Alaska Workers' Compensation Appeals Commission

The Home Depot, Inc. and New Hampshire Insurance Company, Petitioners, vs. James E. Holt, Respondent.	Memorandum Decision on Petition for Review Decision No. 261 May 28, 2019 AWCAC Appeal No. 18-021 AWCB Decision No. 18-0102 AWCB Case No. 201410153

Memorandum Decision on Petition for Review of Alaska Workers' Compensation Board (Board) Interlocutory Decision and Order No. 18-0102, issued at Fairbanks, Alaska, on October 12, 2018, by northern panel members William Soule, Chair, Jacob Howdeshell, Member for Labor, and Sarah Lefebvre, Member for Industry.

Appearances: Stacey C. Stone, Holmes Weddle & Barcott, PC, for petitioners, The Home Depot, Inc. and New Hampshire Insurance Company; Heather M. Brown, Franich Law Office, LLC, for respondent, James E. Holt.

Commission proceedings: Notice of Appeal filed November 14, 2018; *Sua Sponte* Memorandum and Order for petition for review issued November 15, 2018; Petition for Review filed December 5, 2018; Order granting petition for review and requesting additional briefing issued February 5, 2019; briefing completed March 15, 2019; oral argument held April 30, 2019.

Commissioners: James N. Rhodes, Philip E. Ulmer, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

On June 22, 2018, the Alaska Supreme Court (Court) issued *Harrold-Jones v. Drury*, holding that in a civil tort case the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) requires either a voluntary agreement or formal discovery methods before a defendant might have *ex parte* contact with a plaintiff's

physician.[1] James Holt, a workers' compensation claimant, petitioned the Alaska Workers' Compensation Board (Board) to prevent his employer, The Home Depot, Inc., and its insurer, New Hampshire Insurance Company (Home Depot), from having *ex parte* contact with his treating doctors, basing his request on *Harrold-Jones*.[2] At a prehearing conference, the Board designee denied his petition for a protective order and Mr. Holt appealed the decision to the Board.[3] The Board, with one Member dissenting, reversed the Board designee and held that on policy grounds *Harrold-Jones* also applied to workers' compensation matters.[4] The Board granted Mr. Holt the protective order he requested.

Home Depot petitioned the Alaska Workers' Compensation Appeals Commission (Commission) for review, contending the Board erred in its interpretation of *Harrold-Jones,* HIPAA, and the Alaska Workers' Compensation Act (Act). Mr. Holt did not file a brief in opposition. Since this is an "important question of law on which there is substantial ground for difference of opinion, and an immediate review of the decision or order may materially advance the ultimate resolution of the claim," the Commission requested additional briefing to assist the Commission in deciding this dispute.[5] The Commission heard oral argument on April 30, 2019.

The Commission now reverses the Board's decision in part, affirms the decision in part, and remands for further action. The Board did not distinguish between the routine and non-litigious handling of workers' compensation claims and the handling of those claims once a claim becomes litigious. HIPAA does not bar *ex parte* contact in workers' compensation matters. HIPAA allows discovery of medical records without

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[1] *Harrold-Jones v. Drury*, 422 P.3d 568 (Alaska 2018) (*Harrold-Jones*); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of 18, 26, 29, and 42 U.S.C.).

[2] *Holt v. The Home Depot, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 18-0102 at 1-2 (Oct. 12, 2018) (*Holt*).

[3] *Id.* at 2.

[4] *Id.* at 26-27.

[5] *Monzulla v. Voorhees Concrete Cutting*, 254 P.3d 341 (Alaska 2011); AS 23.30.007; AS 23.30.008; AS 23.30.125; AS 23.30.128; 8 AAC 57.073.

consent of the injured worker in some situations, such as for payment of bills/invoices.[6] HIPAA exempts workers' compensation from its restrictions, allowing state law to govern release of information. *Harrold-Jones* pertains to civil litigation, and may have application in workers' compensation once an employer/insurer files a Notice of Controversion and the matter becomes litigious.

2. Factual background and proceedings.

The Court issued *Harrold-Jones v. Drury*.[7] On June 27, 2018, the attorney for Mr. Holt wrote to Home Depot's attorney stating, while his client had no objection to "disclosure of existing health records," his client did object to the "common practice of seeking additional information through *ex parte* contact, such as by asking treating physicians to answer questions in the letters that are commonly used in workers' compensation cases."[8] Mr. Holt contends such practices violated HIPAA and are "no longer permissible without the patient's consent."[9] Mr. Holt revoked the previous releases in his case "to the extent that they may be interpreted to authorize *ex parte* communication."[10] Mr. Holt specifically stated Home Depot could continue to use the current releases to obtain medical and related financial records, but he specifically precluded any other *ex parte* communication with medical providers.[11]

On June 28, 2018, Home Depot replied to Mr. Holt's attorney's letter contending HIPAA did not apply to workers' compensation cases and *Harrold-Jones* was distinguishable from his case. Home Depot added it did not support Mr. Holt's interpretation of the law regarding *ex parte* communication with an injured worker's attending physicians.[12]

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6 45 CFR 164.512 in part.

7 Judicial notice.

8 *Holt* at 2, No. 2

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*, No. 3.

On July 3, 2018, Mr. Holt asked for a protective order based on his understanding of the holding in *Harrold-Jones* and its effect on workers' compensation cases. He also contended HIPAA does not completely exempt workers' compensation cases and releases in workers' compensation cases extend only to disclosure of protected health information "that already exists." He further contended HIPAA does not authorize providers to engage in *ex parte* communication with an employer's representatives. Mr. Holt contended, based on *Harrold-Jones,* Home Depot's releases were overbroad.[13]

On July 23, 2018, Home Depot opposed the petition for a protective order and restated its position that HIPAA does not apply to workers' compensation matters. Home Depot also cited an employer's duty to furnish medical treatment for the period which the nature of the injury or the process of recovery requires under applicable statutes. Home Depot further contended, "When an employer contacts an employee's treating physician, the employer is gathering health information from the provider in order to meet with its duty set forth in the Act."[14] Home Depot further noted that, unlike a defendant in a civil personal injury case, employers under the Act are required to continue to provide medical care, and must be able to investigate thoroughly an injured worker's claim in order to verify information, to administer properly claims, to litigate effectively disputed claims, and to detect any fraud. In other words, Home Depot contended discovery is "generally continuous and ongoing."[15] It further asserted this duty requires *ex parte* contact by an employer with an employee's treating physician "to obtain updates regarding an employee's condition and need for ongoing treatment."[16] Home Depot suggested proper claim investigation and administration required the ability to "contact" an employee's medical providers "directly regarding

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13 *Holt* at 2-3, No. 4.

14 *Id.* at 3, No. 5.

15 *Id.*

16 *Id.*

their findings and recommendations." It asked for a ruling denying the requested protective order.[17]

On August 1, 2018, the parties presented their evidence and arguments on the protective order petition to the Board designee at a prehearing conference. The Board designee carefully recorded the parties' respective written and prehearing conference arguments addressing *Harrold-Jones*' applicability or inapplicability to this case. The Board designee cited from HIPAA regulations and from *Harrold-Jones*, and analyzed HIPAA's application to Alaska workers' compensation cases, including the "authorization exception" and the "litigation exception." The Board designee also cited other Alaska Supreme Court decisions as well as decisions from other jurisdictions. Based on these arguments, the evidence presented, and his analysis of Alaska statutes, case law, and decisions from other states, the Board designee found, citing in particular AS 23.30.107(a), that Mr. Holt was not entitled to a protective order based on *Harrold-Jones*. However, the Board designee acknowledged Mr. Holt's concerns regarding *ex parte* communications and found them "well taken." The Board designee noted the Court might apply *Harrold-Jones* to workers' compensation cases given the "cultural shift emphasizing medical privacy." Nevertheless, the Board designee determined any such change should be legislative rather than administrative.[18]

On August 14, 2018, Mr. Holt timely appealed the Board designee's August 1, 2018, discovery order to the Board. Mr. Holt stated:

> Employee appeals the discovery order contained in the 8/13/18 Prehearing Conference Summary on the ground that the designee erred in denying the employee's request for a protective order regarding *ex parte* communication with treating physicians.[19]

Home Depot opposed the appeal for the reasons stated in its July 23, 2018, opposition to the petition for a protective order.[20]

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17 *Holt* at 3, No. 5.

18 *Id.* at 3-4, No. 6.

19 *Id.* at 4, No. 7.

20 *Id.*, No. 8.

The Board's decision noted that injured workers routinely complain about their employer's representatives having private conversations with the injured workers' attending physicians. The decision further remarked that many injured workers are convinced there is a "conspiracy" of sorts among insurance adjusters, defense attorneys, and others in the workers' compensation community designed to deprive them of their benefits. The decision opined these beliefs cause considerable unnecessary litigation.[21] The decision further asserted employers and insurers do not routinely allow injured workers to have *ex parte* conferences or communications with the employer's medical evaluators without noting the injured worker attends an Employer's Medical Evaluation (EME) without the employer being present and sometimes with the worker's own witness or counsel being present. The employee thereby has *ex parte* communication with the EME evaluator (and the SIME evaluator).[22] The Board decided, based on public policy grounds with one member dissenting, to grant the protective order to Mr. Holt and denied Home Depot any *ex parte* contact with Mr. Holt's treating physicians.[23] Home Depot timely filed a petition for review.[24]

Mr. Holt did not oppose the petition for review.[25] The Commission requested and received additional briefing from both parties. Mr. Holt agreed that in certain circumstances HIPAA does not preclude *ex parte* contact, such as for billing/invoice questions and prior to a Notice of Controversion. He asserts, however, that *Harrold-Jones* mandates either a specific release from the injured worker or a Board order prior to any *ex parte* contact by the employer/insurer once the claim becomes litigious.[26]

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21 *Holt* at 5, No. 17.

22 *Id.*, No. 18.

23 *Id.* at 26.

24 Record at the Commission.

25 *Id.*

26 Holt Briefing on Employer's Petition for Review at 4.

Home Depot asserts that HIPAA allows for *ex parte* contact both before and after a Notice of Controversion. Home Depot contends that *ex parte* communication with a treating physician is often essential in providing benefits to injured workers. Home Depot notes that workers' compensation is a voluntary scheme in which both employees and employers have given up certain rights in exchange for a system that is quick, efficient, and fair without being an undue burden on the employer.[27] Therefore, an employer must have the right to collect medical information, including medical records and oral communications, and *ex parte* contact with a treating physician, with or without an employee's prior consent, is often necessary in order to administer promptly and efficiently the benefits required by an injured worker.

The Commission observes that Mr. Holt and the Board primarily looked at *ex parte* contacts under the Act once litigation has commenced, and the Board did not address the vast majority of injuries that proceed without litigation. The Board further observed that Home Depot did not make a distinction between procuring medical information prior to any litigation and obtaining medical information after litigation has commenced. The Board relied on *Harrold-Jones* and its reversal of *Langdon v. Champion* in concluding that employers should have no *ex parte* contact with an injured worker's treating doctor. However, the Court, in both *Langdon* and *Harrold-Jones*, addressed *ex parte* contact only in the civil litigation situation.

3. Standard of review.

The standard of review for a petition for review from an interlocutory decision and order of the Board is set forth in 8 AAC 57.073. A petition will be granted if one or more of the following requirements are met:

> (1) postponement of review will result in an injustice due to an impairment of a legal right or due to unnecessary delay, expense, hardship, or other factors;
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> (2) the interlocutory order involves an important question of law on which there is substantial ground for difference of opinion and immediate review will advance the ultimate resolution of the case;

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[27] *Wright v. Action Vending Co.*, 544 P.2d 82, 84-85 (Alaska 1975).

(3) the Board has deviated from the accepted course of proceedings; or

(4) the issue is one which might otherwise evade review.[28]

4. Discussion.

The issue before the Commission is a legal issue requiring interpretation of a Court decision in *Harrold-Jones v. Drury*, the Act, and federal law (HIPAA), and any application of HIPAA to the Act. The petition for review meets both the first and second criteria above: the petition involves an important question of law and delay of review might impair a legal right. The Commission exercises its independent judgment when the issue before it requires interpretation of the law.[29]

The Board, with a dissenting opinion, ordered that Mr. Holt was entitled to a protective order restricting *ex parte* contacts with his treating physicians. The Board based this order on the idea of a "'cultural shift' toward increased patient privacy even in litigation" and, therefore, found that public policy now favors restricting *ex parte* contacts with treating physicians in workers' compensation cases, and relied on the Court's decision in *Harrold-Jones*. A close reading of the Board's order seems to support the idea that the order is limited to cases in litigation, but it does not say so explicitly. The Court's decisions in *Langdon* and *Harrold-Jones*, upon which the Board based its order, dealt with matters in civil litigation.[30]

There are several statutes, both state and federal, that must be considered in analyzing whether *ex parte* contact by an employer with an injured worker's treating physician is permissible. AS 23.30.107 provides for the release of medical information to the employer or its insurer:

> a) Upon written request, an employee shall provide written authority to the employer, carrier, rehabilitation specialist, or reemployment benefits administrator to obtain medical and rehabilitation information relative to the employee's injury. The request must include notice of the employee's

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[28] 8 AAC 57.073(b).

[29] AS 23.30.128(b).

[30] *Langdon v. Champion*, 745 P.2d 1371 (Alaska 1987) (*Langdon*); *Harrold-Jones*, 422 P. 3d 568.

> right to file a petition for a protective order with the division and must be served by certified mail to the employee's address on the notice of injury or by hand delivery to the employee. This subsection may not be construed to authorize an employer, carrier, rehabilitation specialist, or reemployment benefits administrator to request medical or other information that is not applicable to the employee's injury.
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> (b) Medical or rehabilitation records . . . in an employee's file maintained by the division or held by the board are not public records subject to public inspection and copying under AS 40.25 . . . . This subsection does not prohibit
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> (1) the reemployment benefits administrator, the division, the board . . . or the department from releasing medical or rehabilitation records in an employee's file, without the employee's consent, to a physician providing medical services under AS 23.30.095(k) or 23.30.110(g), a party to a claim filed by the employee, or a governmental agency; or
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> (2) the quoting or discussing of medical or rehabilitation records contained in an employee's file during a hearing on a claim for compensation or in a decision or order of the board.

This statute makes the provision of a release of medical information mandatory in order for an injured worker to receive worker's compensation benefits. The statute does not explicitly forbid *ex parte* communications with a worker's treating doctor. However, the Act provides that an injured worker may seek a protective order if the injured worker objects to the release of information.

> If an employee objects to a request for written authority under AS 23.30.107, the employee must file a petition with the board seeking a protective order within 14 days after service of the request. If the employee fails to file a petition and fails to deliver the written authority as required by AS 23.30.107 within 14 days after service of the request, the employee's rights to benefits under this chapter are suspended until the written authority is delivered.[31]

The Act also provides that the Board "is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearings in

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[31] AS 23.30.108(a).

the manner by which it may best ascertain the rights of the parties."[32] The Act allows the Board to provide by regulation "for procedural, discovery, or stipulated matters to be heard and decided . . . ."[33] Further "[p]rocess and procedure under this chapter shall be as summary and simple as possible."[34] By regulation, evidence may be presented through deposition testimony.[35] There are no other formal means of discovery in the Act except for interrogatories allowed following a Second Independent Medical Evaluation (SIME).[36]

HIPAA explicitly contains an exemption for workers' compensation acts and expressly allows for medical providers to provide records and information in a workers' compensation claim in certain situations to the employer or insurer without the injured worker's consent.

> A covered entity may use or disclose protected health information without the written authorization of the individual, as described in § 164.508, or the opportunity for the individual to agree or object as described in § 164.510, in the situations covered by this section, subject to the applicable requirements of this section. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.
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> **(l)***Standard: Disclosures for workers' compensation*. 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.[37]

The Alaska Act requires an injured worker to provide a release of medical information in order to obtain workers' compensation benefits. *Harrold-Jones* addressed release of information in civil litigation, and stated "[t]he litigation exception . . . allows for

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32 AS 23.30.135(a).

33 AS 23.30.005(h).

34 *Id.*

35 8 AAC 45.120 (a).

36 8 AAC 45.092(j).

37 45 CFR 164.512 in part.

permissive disclosure even against the subject's wishes."[38] Moreover, employers have a limited timeframe in which to pay for an injured worker's medical treatment. Pursuant to AS 23.30.097(d), an employer must pay medical bills within 30 days after receipt of the medical bill or medical report in support, whichever is received later.

Furthermore, the U.S. Department of Health & Human Services provides the following information regarding "disclosures for workers' compensation purposes:"

> The HIPAA Privacy Rule does not apply to entities that are either workers' compensation insurers, workers' compensation administrative agencies, or employers, except to the extent they may otherwise be covered entities. However, these entities need access to the health information of individuals who are injured on the job or who have a work-related illness to process or adjudicate claims, or to coordinate care under workers' compensation systems. Generally, this health information is obtained from health care providers who treat these individuals and who may be covered by the Privacy Rule. The Privacy Rule recognizes the legitimate need of insurers and other entities involved in the workers' compensation systems to have access to individuals' health information as authorized by State or other law. Due to the significant variability among such laws, the Privacy Rule permits disclosures of health information for workers' compensation purposes in a number of different ways.
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> **How the Rule Works**
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> **Disclosures Without Individual Authorization.** The Privacy Rule permits covered entities to disclose protected health information to workers' compensation insurers, State administrators, employers, and other persons or entities involved in workers' compensation systems, without the individual's authorization:
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> - As authorized by and to the extent necessary to comply with laws relating to workers' compensation or similar programs established by law that provide benefits for work-related injuries or illness without regard to fault. This includes programs established by the Black Lung Benefits Act, the Federal Employees' Compensation Act, the Longshore and Harbor Workers' Compensation Act, and the Energy Employees' Occupational Illness Compensation Program Act. See 45 CFR 164.512(l).

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[38] *Harrold-Jones*, 422 P. 3d at 573.

- To the extent the disclosure is required by State or other law. The disclosure must comply with and be limited to what the law requires. See 45 CFR 164.512(a).[39]

45 CFR 164.502 provides:

> (a) *Standard.* A covered entity or business associate may not use or disclose protected health information, except as permitted or required by this subpart or by subpart C of part 160 of this subchapter.
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> (1) *Covered entities: Permitted uses and disclosures.* A covered entity is permitted to use or disclose protected health information as follows:
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> (i) To the individual;
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> (ii) For treatment, payment, or health care operations, as permitted by and in compliance with § 164.506 . . . .[40]

The Board reviewed its prior decision from 1988, when it determined that *ex parte* contact by an employer was permissible for a variety of reasons under the Act.[41] First, the Board noted that there is no language in AS 23.30.107 that limits a release of medical information to written documents. The Board, in *Baker*, stated that employers need full access to medical information in order to investigate properly claims, and an employee's right to privacy is protected by the exclusion from the record of irrelevant information. The Board, in *Baker*, also stated that full access to medical information enhances the goal in workers' compensation to provide a fast and efficient remedy. The Board did not mention at that time the need for benefits to be provided at a reasonable cost to employers, per AS 23.30.001. These are still pertinent concerns and remedies. The Board's reliance on *Langdon* formed only a small portion of its reasoning and the fact that this civil litigation case has been reversed does not negate the other sound reasons under the Act for allowing *ex parte* contact with the treating physician.[42]

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[39] U.S. Department of Health & Human Services, Health Information Privacy, Disclosures for Workers' Compensation Purposes, www.hhs.gov/hipaa/for-professionals/privacy/guidance/disclosures-workers-compensation.

[40] 45 CFR 164.502.

[41] *Baker v. Anglo Alaska Constr., Inc.*, Alaska Workers' Comp. Bd. Dec. No. 88-0013 (Jan. 29, 1988).

[42] *Langdon*, 745 P.2d 1371 (Alaska 1987).

The Board also relied, in part, on a 1992 New Mexico court of appeals decision which predated the enactment of HIPAA and was based in part on releases in tort litigation.[43] This case is of limited value because HIPAA specifically exempts workers' compensation matters from its privacy regulations because of the nature of workers' compensation as a no fault and quick system. Several cases cited by Mr. Holt from other jurisdictions discussing HIPAA are likewise not very instructive because they involve civil litigation. For example, *Sorensen v. Barbuto* involved an automobile accident and not a workers' compensation injury.[44] *Morris v. Consolidation Coal Company*,[45] like *Church's*, was prior to the enactment of HIPAA.

In one case involving a workers' compensation matter, *Arby's Restaurant Group, Inc. v. McRae*, the Georgia Supreme Court held that Georgia law permitted *ex parte* contact and HIPAA did not preclude *ex parte* contact between a treating doctor and an employer in a workers' compensation claim "as long as such communication is appropriately related to the compensable injury."[46] The Georgia Court further stated Georgia law did not "expressly prohibit ex parte communications and HIPAA's privacy provisions [did] not preempt Georgia law on the subject of ex parte communications because HIPAA exempts from its requirements disclosures made in accordance with state workers' compensation laws."[47] The Georgia Court also stated, "[w]e believe a complete prohibition on all ex parte communications would be inconsistent with the policy favoring full disclosure in workers' compensation cases, as well as the goal of our workers' compensation statute of providing equal access to relevant information within an efficient and streamlined proceeding so as not to delay the payment of benefits to

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[43] *Church's Fried Chicken No. 1040 v. Hanson*, 845 P.2d 824 (N.M. Ct. App., 1992) (*Church's*).

[44] *Sorensen v. Barbuto*, 177 P.3d 614 (Utah, 2008).

[45] *Morris v. Consolidation Coal Company*, 446 S.E.2d 648 (W.V. 1994).

[46] *Arby's Restaurant Group, Inc. v. McRae*, 292 Ga. 243, 246, 734 S.E.2d 55, 57 (Georgia 2012) (*Arby's*).

[47] *Id.*, 292 Ga. at 245-246, 734 S.E. 2d at 57.

an injured employee."[48] The Georgia Court urged the board to set "parameters consistent with privacy protections" and reminded treating physicians that under Georgia law they did not have to agree to be interviewed by employers without their own counsel or the employee being present.[49] This case from Georgia provides sound reasoning about the need for quick access to information from treating doctors.

Mr. Holt agrees the Act "is designed to be self-administering, with the employer reviewing medical records and making decisions about continuing coverage."[50] "The employer and employee are in a more-or-less cooperative relationship."[51] Mr. Holt does suggest that, while the Act does not have a regulation regarding *ex parte* contacts, it would be helpful to injured workers if notice were given of *ex parte* contacts by employers to treating physicians so the worker could authorize the contact or file an objection.

Alaska workers' compensation cases are generally non-adversarial in nature because it is a no-fault system by which the injured worker is entitled to benefits the injury necessitates, including medical treatment, without regard to fault. The system works without litigation most of the time because in approximately 90% of the injuries filed, a worker is injured, gets treatment, receives time loss, gets better, gets retraining, or is converted to permanent total disability status.

Nonetheless, in these cases there are many times when the employer/ insurer/adjuster needs quick unfettered access to the treating doctor. Questions often arise about the date of medical stability, the ability of the worker to return to work with or without restrictions, if with restrictions what are the restrictions, billing questions arise (and bills must be paid within 30 days of receipt of the bill and medical record), travel restrictions may be imposed, clarification may be needed regarding palliative care, *inter alia*. This is true in spite of the computer generated medical reports which

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48 *Arby's*, 292 Ga. at 246-247, 734 S.E. 2d at 58.

49 *Id.*

50 Holt Supplemental Briefing on Employer's Petition for Review at 4.

51 *Id.*

may be more legible than the previous hand written notes, but still are often not the models of clarity they should be. In order for the adjuster to act quickly, fairly, and efficiently, an *ex parte* telephone call or letter is needed to resolve efficiently the question the adjuster has. Once the question is answered, the injured worker's medical treatment or other benefits proceed unimpeded by a delay in order to get a board order for permission to contact the treating physician.

If the Board wishes to limit *ex parte* conferences between the employer or its representative and the treating physician, this could be done through a new regulation. However, a blanket rule against all *ex parte* contact, particularly in non-litigious cases, would only impede the "quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers . . . ."[52]

However, in a small percentage of cases, the injured worker's case becomes litigious. When this occurs, after a controversion of benefits has been filed, one or both parties usually ends up with an attorney. The posture of the claim is now different. The case is now adversarial and different rules may be needed. At this point, at a minimum if *ex parte* contact with a treating doctor is sought, it should be with notice to the employee. The treating doctor always has the right to refuse the *ex parte* contact, with or without specific permission of the employee.

A total ban on *ex parte* contact in workers' compensation matters undercuts the basic premise of workers' compensation schemes, *i.e.*, the compact forming the basis of workers' compensation whereby employees and employers each gave up something to insure injured workers receive timely medical care and benefits. A total ban would also increase costs for employers in the payment of additional benefits not owed and increasing litigation expenses by requiring Board orders to challenge bills/invoices and for clarifying physician's reports regarding return to work, physical restrictions, and medical stability, among other needs.

Moreover, Mr. Holt does not argue for a limit on *ex parte* contact in workers' compensation cases prior to an employer controverting some or all of the injured

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[52] AS 23.30.005(1).

worker's benefits. Rather, he contends that when a case is controverted the situation changes and the right to access to the worker's medical records and information should be more restrictive by requiring prior approval for *ex parte* contact.

Mr. Holt agrees that often an employer needs quick information from the treating doctor in order to continue to provide proper benefits to the injured worker. He objects primarily to the potential use of *ex parte* communications with the treating doctor as a means to manufacture medical evidence. While the potential may exist, Mr. Holt did not suggest it had occurred in his case and the Board's supposition that injured workers often suspect the worse of their employers does not seem to be a valid argument for increasing the cost of workers' compensation cases by increasing the likely overpayment of benefits, the delay in processing medical bills, and the increase in litigation expenses by constantly having to seek Board orders to obtain information that possibly should be included in medical reports but often is not. The prospect of unseemly *ex parte* contact could certainly be minimized by the Board adopting a regulation requiring an injured worker be notified of any *ex parte* contact so the worker could participate or discuss the matter with the treating doctor. Moreover, the release for medical information could contain a phrase reminding treating doctors of their right not to participate in *ex parte* contact with a representative of the employer.

The Commission finds that *ex parte* contact or communication with a treating physician prior to a controversion in a workers' compensation case should remain unimpaired, although it would be prudent to notify an employee of such contact. HIPAA does not require the same degree of privacy protections in workers' compensation cases by expressly exempting workers' compensation matters from those protections. The Act does not define "information" to exclude *ex parte* contacts, except for the SIME process, nor does it include it. Since it is silent on *ex parte* contacts, statutory constructions principles would indicate it is allowed. Neither HIPAA nor the Act preclude *ex parte* contacts between the employer and the treating doctor. A change in the policy underlying the Act should be left to the Legislature.

The Commission agrees with the Board that once a controversion is filed, the matter becomes litigious and, thus, more like civil litigation with the protections

afforded under HIPAA. *Harrold-Jones* detailed discovery in civil litigation. The reasoning there is applicable to worker's compensation matters that become litigious. Therefore, prior notice should be given to an injured worker of the intent to have *ex parte* contact with the treating doctor, once the employer has controverted the claim. Prior notice will give the injured worker time to object and for a Board order to be obtained. Because the Board's decision seems to preclude *ex parte* contact prior to a controversion, the Commission reverses that part of the Board's decision. To the extent the Board's decision pertains only to controverted claims, the Board is affirmed. The matter is remanded to the Board for clarification regarding uncontroverted claims.

5. Conclusion and order.

The Board's decision is AFFIRMED in part and REVERSED in part and is REMANDED for clarification. The Board is AFFIRMED as to the need for a specific release or board order for *ex parte* contact once a notice of controversion has been filed. The Board is REVERSED as to permission for *ex parte* contact with a treating physician and as allowed by HIPAA for contact regarding billings or invoices.

It is, therefore, ORDERED that the matter is affirmed in part, reversed in part, and REMANDED for clarification.

Date: *28 May 2019* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Deirdre D. Ford, Chair

This is a not a final Commission decision or order on the merits of an appeal from a final Board decision or order on a claim. This is a non-final order of the Commission on the merits of a petition for review of a non-final Board decision. The effect of this order is to allow the Board to proceed toward a hearing on the merits of the employee's workers' compensation claim. The petitioner may still appeal a final Board decision when it is reached on the claim.

This order becomes effective when distributed (mailed) unless proceedings to seek supreme court review are instituted (started). For the date of distribution, see the box below.

RECONSIDERATION

The Alaska Supreme Court ruled in *Warnke-Green vs. Pro West Contractors, LLC*, Slip Op. No. 7356, ___ P.3d ___ (Alaska, April 26, 2019), that "AS 23.30.128(f) does not prohibit the Commission from reconsidering orders other than the final decisions described in AS 23.30.128(e) because the authority to reconsider is necessarily incident to the Commission's express authority to 'issue other orders as appropriate.'"

A party may ask the Commission to reconsider this order by filing a motion for reconsideration no later than 10 days after the date shown in the notice of distribution (the box below). If a request for reconsideration of this order is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties.

PETITION FOR REVIEW

A party may file a petition for review of this order with the Alaska Supreme Court as provided by the Alaska Rules of Appellate Procedure (Appellate Rules). *See* AS 23.30.129(a) and Appellate Rules 401 – 403. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date of this order's distribution.

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition for review to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Memorandum Decision No. 261, issued in the matter of *The Home Depot, Inc. and New Hampshire Insurance Company vs. James E. Holt*, AWCAC Appeal No. 18-021, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on May 28, 2019.

Date: *May 30, 2019*

Signed
K. Morrison, Appeals Commission Clerk