Compilation of Comments received on HIPAA bill drafts as of 1:30 p.m. Friday 5/21

From: David Lighthall [mailto:dave@carey-law.com]
Sent: Thursday, May 20, 2010 12:16 PM
To: Campbell, Bart
Cc: steve@carey-law.com; mtla@mt.net
Subject: Legislative Proposals re: HIPPA releases

Mr. Campbell –

We have been provided the three proposals concerning HIPPA releases in the Workers' Compensation Act. Please note it is our firm's position that the proposals are either unnecessary (the new proposals), or improperly revisit a statute that has been deemed unconstitutional by the Workers' Compensation Court and will likely be held unconstitutional by the Montana Supreme Court once reviewed anew (revisions to § 39-71-604, MCA).

The proposed new sections simply permit an employer to obtain information from the insurer they already obtain in the absence of a contrary statute. An employer's knowledge of an employee's work restrictions, anticipated date of MMI, and RTW status is not the subject of significant controversy. However, how an employer obtains that information is an issue, and the employer should not be able to communicate directly with a health care provider to obtain that information. That is the claim adjuster's job, and there are already too many cooks in the kitchen with the adjuster, NCM, and voc rehab counselor all in the mix as it is.

The employee's constitutional right to privacy in his or her medical records should also be assured, and it is clear the Montana courts share this view. The constitutionally offensive language in § 39-71-604, MCA, should be scrapped. The amendments to the statute mirroring those in the proposed new sections are futile as noted above and should be abandoned accordingly.

Thank you for your time.

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From: Norm Newhall [mailto:NNewhall@lnms.net]
Sent: Thursday, May 20, 2010 4:57 PM
To: Campbell, Bart
Cc: al smith; Dick Martin; Kim Schulke; Stacy StJohn
Subject: Draft HIPAA/wk comp release proposals

Mr Campbell--

This firm agrees with comments of the Carey Law Firm. These proposals represent a solution in search of a problem. There is no demonstrated need for employers to have access to an injured workers medical

records. The statutory framework makes it clear that return to work at the time-of-injury job (or at a modified job) is a ***medical*** determination to be made by a physician. The employers only involvement is to provide information to a qualified vocational consultant regarding the employee's job duties or the duties involved in a modified job. Obviously this does not require that the employer know anything about the employee's medical condition. Clearly the employer is not qualified to make a medical determination whether an employee can return to work. Even assuming there is some purpose for providing an employer with medical information, the invasion of privacy; the potential for misuse of the information; and the added complication of yet another player meddling in the medical care of the injured worker, far outweigh any perceived benefit that these proposed statutes are intended to address. Norm Newhall

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Bart - I am responding to Pat Murdo's email inviting comments on the three proposals for release of medical information to employers.
Thank You,
Al Smith
Montana Trial Lawyers
443-3124

Objection To Statutory Claim Submission Release (versions LCwcwc and LCwc#3)
The question of whether the current release in Section 39-71-604(3) violates a claimant's right to privacy under Article II, Section 10 of our Montana Constitution has not been settled. The Workers' Compensation Court (WCC) found the statute to be unconstitutional in the *Thompson* case *(2005 MTWCC 53)*, the Supreme Court reversed that decision solely on jurisdictional grounds and did not even address the constitutional privacy issue. The WCC is now a 'court of record" curing the jurisdictional problem. The WCC found in *Thompson* that there was no compelling state interest that would justify the infringement of a claimant's constitutional right to privacy. In perhaps the most poignant passage, the WCC stated it 'would be hard pressed to find that administrative expediency of a workers' compensation claim is an interest 'of the highest order' justifying the infringement of a fundamental constitutional right. This is particularly so when there are other, less intrusive means available."

The proposed language of LCwc leaves open the possibility of copies of the claimant's medical records that has the requested information, but also includes other private medical information, being sent to an employer. To allow employers to have access to medical records is a high risk of inappropriate disclosure/ leaking of personal and private information. Medical records typically contain information far beyond the medical issue involved. The "employer" could be a manager, or a secretary, or a co-worker or the janitor. There is no safeguard of confidentiality if the employer gets the record. The claimant should not have to sacrifice privacy to keep her job during the healing period.

A responsible employer will respect a claimant's privacy, while at the same time assisting in a safe return to work. However, we do not need legislation for those types of employers, we need it for those who invade privacy, overstep boundaries and destroy privacy. This language enables those types of employers to do just that.

The only need employers have is for the information contained on the physical restrictions form that they are already getting - there is no reason to allow direct contact between health care

providers and employers (LCwc#2). This proposal is a solution in search of a problem. Given the high value Montanans place on individual privacy, the questionable constitutionality of the current statutory release, the absence of a compelling state interest in this new release provision, the certainty of litigation and the existence of other less intrusive means to ensure that employers receive the necessary information, it makes no sense to enact this proposed release.

If a statute is necessary to accomplish what is already being done, we suggest the following, which protects an employee's private medical information and provides the insurer and employer with the information they need.

MTLA Suggestion

NEW SECTION. **Section 1. Release for disclosure of certain information to injured employee's employer.** (1) A workers' compensation insurer, as defined in 39-71-116, the agent of the workers' compensation insurer, or a health care provider may request an injured employee to sign a release authorizing the disclosure of information set out in subsection (3).

(2) If the employee signs the release provided for in subsection (1), an injured worker's health care provider may provide the workers' compensation insurer, as defined in 39-71-116, or the agent of the workers' compensation insurer, the information set out in subsection (3).

(3) If the employee signs the release provided for in subsection (1), the workers' compensation insurer, as defined in 39-71-116, or the agent of the workers' compensation insurer, may disclose to the injured employee's employer the following information that pertains to the injured worker's return to work:

(a) the employee's restrictions related to the employee's claim;

(b) the date or anticipated date the employee is released to return to work;

(c) the approval or disapproval of job descriptions for the employee; and

(d) the date or anticipated date of maximum medical improvement.

END