

THAT'S AN INVASION OF PRIVACY! HIPAA AND RELATED ISSUES IN DISCOVERY

Panel Members: WCJ W. Kearsce McGill, W. Lynne Brown, Esq., Thomas A. Richard, Esq. (Oakland), Barry S. Pearlman, Esq. (Los Angeles)

Disclaimer

- The comments made during this presentation are the personal opinions of the panelists only, and any statements made cannot be construed as legal advice, or policy of the Workers' Compensation Appeals Board, the Department of Industrial Relations, or the State of California.

That's An Invasion of Privacy! HIPAA and Related Issues in Discovery

- Discovery and Its Scope Generally
 - Labor Code section 5307 gives to the WCAB the power to set “reasonable and proper rules of practice and procedure.”
 - Labor Code section 5708 states that the WCAB is “not bound by the common law or statutory rules of evidence and procedure ... but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions [of the workers’ compensation laws].”
 - Labor Code section 5709 states that “No order, decision, or award, or rule shall be invalidated because of submission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure.”
 - From these statutes, the policy of the WCAB is that “liberal pre-trial discovery is desirable and beneficial” (*Hardesty v. McCord & Holdren, Inc.* (1976) 41 CCC 111 (panel decision)).

That's An Invasion of Privacy! HIPAA and Related Issues in Discovery

- Additional Considerations Regarding Scope of Discovery Issues
 - Waiver:
 - Did applicant sign a release?
 - Revocation
 - Motion to Compel Signature
 - Did the applicant volunteer the medical information to the employer?
 - Ex parte communications
 - Records of Third Parties
 - Spouses: *City of Santa Ana v. WCAB (Wadsworth)* (2000) 65 CCC 289 (*writ denied*)
 - Co-employees: *Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 56; *California Water Service Company v. WCAB (Price)* (2004) 69 CCC 382

That's An Invasion of Privacy! HIPAA and Related Issues in Discovery

- Procedural Steps for Records Discovery
 - Subpoena (Labor Code section 130 and 8 CCR section 10530)
 - Motion to Quash
 - Order Quashing Subpoena with Self-Executing Order
 - Conference and Hearing
 - In Camera Review by WCJ or Special Master
 - Petition for Removal
 - Failure to Comply with Subpoena

That's An Invasion of Privacy! HIPAA and Related Issues in Discovery

- Special Procedures for Discovery
 - Labor Code section 3208.4 (sexual conduct discovery)
 - Sealing Records under 8 CCR 10754
 - Special Handling for Cases Involving HIV

That's An Invasion of Privacy! HIPAA and Related Issues in Discovery

- The legal foundation for the privacy privilege in California is the **California Constitution**.
 - Article I, section 1: “All people are by nature free and independent and have inalienable rights. Among those are enjoying and defending life and liberty, acquiring, possession, and protecting property, and pursuing and obtaining safety, happiness and **privacy**.”
 - What does “privacy” mean? The right “to be let alone” (see *Robbins v. Superior Court* (1985) 38 Cal. 3d 199).
 - California’s right to privacy is broader than the federal right to privacy (*Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128).

That's An Invasion of Privacy! HIPAA and Related Issues in Discovery

- ▶ “The basic test as to whether there has been an unconstitutional invasion of privacy is whether the person has exhibited a **subjective expectation** of privacy which is **objectively reasonable** and, if so, whether that expectation has been violated by an **unreasonable** governmental intrusion” (see *Katz v. United States* (1967) 389 U.S. 347; see also *Jacobs v. Superior Court* (1973) 36 Cal.App.3d 489, and *People v Bradley* (1969) 1 Cal.3d 80).
- ▶ *Britt v. Superior Court* (1978) 20 Cal.3d 844: **The right to privacy is not absolute**. The government bears the burden of demonstrating a **compelling state purpose** justifying the disclosure of private matters.
 - ▶ Even highly relevant, non-privileged information may be shielded from discovery if its disclosure would impair a person’s inalienable right of privacy.
 - ▶ There is a limited waiver regarding medical history. Applicants may not withhold information relating to any physical or mental disorder which they have put in issue.
- ▶ Tort for breach of invasion of privacy recognized in California.

That's An Invasion of Privacy! HIPAA and Related Issues in Discovery

- Allison v. WCAB (1999) 72 Cal.4th 654: This case answers two questions: (1) What is the appropriate scope of medical discovery in workers' compensation proceedings, and (2) Who decides the appropriate scope when the parties cannot agree?
 - Regarding the appropriate scope, while the physician-patient confidential communication privilege is waived for the medical, emotional, and mental conditions placed by an applicant in issue in a case, all medical privacy is not waived. Even though information may be "relevant" to the substantive issues of litigation, the scope of inquiry permitted depends upon the nature of the injuries which the applicant has brought before the court.

- The defendant bears the responsibility for framing questions narrowly, which do not improperly impinge on privileged information.
- An applicant attorney claiming a privilege for a client does not have the right unilaterally to determine the validity of the privilege claim and it is incumbent on the attorney claiming a privilege to advise opposing counsel.
- Pursuant to Labor Code section 5310 and 8 CCR 10348, WCJs have the authority to use their discretion to decide discovery disputes.

Privileges Recognized in WCAB Proceedings

- Physician and Psychotherapist/ Patient
- Sexual Assault or Domestic Assault Victim/ Counselor
- Attorney/ Client
- Attorney work product
- Clergy/ Penitent
- Spousal
- Self-incrimination
- California Confidentiality of Medical Information Act
- Constitutional Right to Privacy
- Tax Return

That's An Invasion of Privacy! HIPAA and Related Issues in Discovery

- Statutory Protections for Medical Privacy
 - Federal :Health Insurance Portability and Accountability Act (HIPAA) - 42 USC section 1320d, *et seq.*
 - Effective in 2003, its purpose is “to improve the efficiency and effectiveness of the health information system through the establishment of standards and requirements for the electronic transmission of certain health information” (*Webb v. Smart Document Solutions, LLC* (1999) 499 F. Supp. 1078).
 - California: Confidentiality of Medical Information Act (CMIA) – Civil Code section 56, *et seq.*
 - Much like the federal law, its purpose is “to protect the confidentiality of individually identifiable medical information obtained from a patient by a health care provider ... setting forth limited circumstances [where the release of medical] information to specified entities or individuals is permissible” (*Loder v. City of Glendale* (1997) 14 Cal.4th 846).

That's An Invasion of Privacy! HIPAA and Related Issues in Discovery

- Under both statutory schemes the concerns generally are two:
 - Who can request an applicant's medical information from a medical provider?
 - Upon a party's receipt of an applicant's medical information, what is that party's obligation to the applicant regarding applicant's rights of privacy?

That's An Invasion of Privacy! HIPAA and Related Issues in Discovery

- Who can request an applicant's medical information from a medical provider?
 - Applicant;
 - Another party who possesses a [valid] authorization and release from the applicant; or
 - For all others, both statutory schemes **generally prohibit** the release of applicant's medical information by a "covered entity," unless the requesting party fits within one of the statutory schemes' exceptions:
 - HIPAA - 45 CFR section 164.512
 - CMIA – Civil Code section 56

That's An Invasion of Privacy! HIPAA and Related Issues in Discovery

- HIPAA exceptions:
 - 45 CFR section 164.512 (l) – "a covered entity may disclose protected health information ... necessary to comply with laws in relation to workers' compensation ... programs..."
 - 45 CFR section 164.512(a) – disclosure "required by law"
 - Labor Code 4603.2(a)
 - 45 CFR section 164.512(e) – disclosure "in the course of any judicial or administrative proceeding ... in response to an order of a court or administrative tribunal..."
 - By court order – (e)(i)
 - By subpoena – (e)(ii)
 - Caveat: While the exceptions clearly allow a medical provider to disclose medical information under federal law in relation to workers' compensation cases, 45 CFR section 164.502(b) requires that "a covered entity must make reasonable efforts to limit protected health information to the **minimum necessary** to accomplish the intended purpose..."

That's An Invasion of Privacy! HIPAA and Related Issues in Discovery

- CMIA exceptions:
 - Civil Code section 56.10(b) – **mandatory** exceptions, or when a medical provider **must** disclose applicant's medical information:
 - (1) Court order;
 - (2) Administrative tribunal (WCAB);
 - (3) Pursuant to a subpoena issued by a court or the WCAB;
or
 - (7) By the applicant or applicant's representative;

That's An Invasion of Privacy! HIPAA and Related Issues in Discovery

- CMIA exceptions:
 - Civil Code section 56.10(c) – **discretionary** exceptions, or when a medical provider **may** disclose applicant's medical information:
 - (1) To another medical provider for purposes of treatment;
 - (2) To an entity responsible for payment of a health care services rendered to the applicant, to the extent necessary for responsibility of payment to be made;
 - (3) To an entity that provides billing, claims management, or other administrative services for a health care provider;
 - (8)(a) To the employer that is relevant to a legal proceeding in which the employer and employee are parties and in which the employee has placed his or her medical history, condition, or treatment at issue, to be used or disclosed only in connection with that proceeding;
 - (8)(b) To the employer describing functional limitations of the employee that may entitle the patient to leave work for medical reasons or limit the employee's fitness to perform his or her present employment, provided that no statement of medical cause is included in the information disclosed.
 - *Pettus v. Cole* (1996) 49 Cal.App.4th 402

That's An Invasion of Privacy! HIPAA and Related Issues in Discovery

- Other CMIA exceptions:
 - Civil Code section 56.16 – Provides, unless there is a specific written request by a patient to not release medical information, a general acute care hospital may release at its discretion:
 - The patient's name, address, sex, and age;
 - A general description of the reason for treatment;
 - A general description of the injury or condition;
 - The general condition of the patient; and
 - Any information that is not medical information
 - See *Garrett v. Young* (2003) 68 CCC 1346
 - Civil Code section 56.30 – Provides general exemptions in the following areas:
 - (f) In relation to industrial accident claims;
 - However, see Civil Code section 56.31 regarding HIV requirement of non-disclosure (*Francis v. Kapla* (2005) 70 CCC 412.
 - (h) California OHSAs investigations; and
 - (k) Records disclosed to the WCAB

That's An Invasion of Privacy! HIPAA and Related Issues in Discovery

- Remedies
 - HIPAA
 - No private cause of action by applicant.
 - File a complaint with the US Department of Health and Human Services
 - Administrative penalties and fines
 - Referral to the Department of Justice for criminal action
 - CMIA
 - Civil Code section 56.35 – Private cause of action with compensatory damages, punitive damages not to exceed \$3,000, attorney's fees not to exceed \$1,000, and costs.
 - Civil Code section 56.36 – Administrative and civil penalties, and also possibility of misdemeanor charges.

That's An Invasion of Privacy! HIPAA and Related Issues in Discovery

- Upon a party's receipt of an applicant's medical information, what is that party's obligation to the applicant regarding applicant's rights of privacy?
 - Under the CMIA, Civil Code section 56.20(a) an employer is required to set up procedures to ensure that medical information remains confidential and is protected from unauthorized use and disclosure.
 - Best procedures for employees (or agents) who had these records to be instructed on the need for confidentiality and medical records should be stored under lock and key, and, if stored on a computer, protected by a strong access code.

That's An Invasion of Privacy! HIPAA and Related Issues in Discovery

- Additionally, Labor Code section 3762 ("The Employer's Bill of Rights") provides limitations on an insurer, a third party administrator for a self-insured employer, and their employees and agents which affect the type of medical information which can be disclosed to the employer.
 - Labor Code section 3762(c) generally prohibits the disclosure of medical information in a workers' compensation claim to an employer, except where:
 - (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; or
 - (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.