Ex-Parte Communications with Georgia Workers' Compensation Physicians: If it Ain't Broke, Don't Fix It

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Last year Macon attorney Jarome E. Gautreaux wrote an article that was published in the Summer/Fall 2009 Edition of the *Workers' Compensation Section Newsletter* arguing that the recent Georgia Supreme Court decision in Moreland v. Austin, 284 Ga. 730 (2008), prevented *ex parte* communications with a treating physician in Georgia workers' compensation cases absent a court order or consent of the claimant. However, Mr. Gautreaux's position is contrary to Georgia law, and goes against the policy considerations that are the foundation for the Georgia Workers' Compensation Act. This article serves as a rebuttal to Mr. Gautreaux's argument.

The Argument

While Mr. Gautreaux acknowledges that HIPPA regulations allow disclosure of protected health information under a particular state's workers' compensation laws, he argues that because there is no express mention in O.C.G.A. § 34-9-207 of *ex parte* meetings with a claimant's treating doctors, the analysis in Moreland should apply and would "permit *ex parte* communications only in cases in which a court issues an order allowing such meetings or the patient/claimant consents to the meeting."[1] Mr. Gautreaux acknowledges that most claimants are unlikely to consent to such meetings which leaves a court order or a deposition as the only avenue an employer/insurer's representative or attorney would have to communicate with a claimant's treating physicians.

Non-Georgia Statutes Are Irrelevant

In evaluating the issue, Mr. Gautreaux indicates that "[u]nder similar statutes, courts held that *ex parte* communications are prohibited." Mr. Gautreaux then goes on to evaluate court decisions from Tennessee, South Carolina, North Carolina, Illinois and Utah to support his position that *ex parte* communications should be prohibited in Georgia workers' compensation claims absent a claimant's consent or a court order. However, because these cases do not interpret the specific language of O.C.G.A. § 34-9-207, which is the controlling law in Georgia, the cases cited by Mr. Gautreaux are irrelevant and are not persuasive.

What Georgia's Statute Says

Unlike other states, the Georgia General Assembly carefully crafted the language of O.C.G.A. § 34-9-207 to allow for a broad range of communications between a claimant's treating physician and an employer or insurer's representative or attorney. In O.C.G.A. § 34-9-207(a), the use of the word "communications" is particularly important. The statute states that when a claimant files a workers' compensation claim in Georgia, she waives "any privilege or confidentiality concerning any communications related to the claim or history or treatment of injury..." This indicates that not only is it permissible for a claimant's medical providers to disclose the contents of the claimant's medical records; it is also permissible for an employer/insurer's representative or attorney to have other types of communications with the physician such as written correspondence or verbal communications. O.C.G.A. § 34-9-207(b) goes on to state that a claimant "shall provide the employer with a signed release for medical records and information related to the claim or history or treatment of injury..." The use of the broad term "information" shows the General Assembly's clear intent to permit an employer/insurer's

[1] Jarome E. Gautreaux, *Ex-Parte Communications with Treating Physicians After Moreland v. Austin*, Workers' Compensation Law (Section Newsletter Summer/Fall 2009).

representative or attorney to obtain more than mere medical records which can best be accomplished by the very communication which Mr. Gautreaux's interpretation of the statute would prevent.

Ex Parte Communications is a Misnomer

Black's Law Dictionary defines *ex parte* communications as communications "done or made at the instance and for the benefit of one party only, and without notice to or argument by, any person adversely interested."[2] *Ex parte* communication is generally used in the context of one lawyer or party talking with a judge about a case without the other party being present. This is a violation of the Code of Judicial Conduct, Section 3B(7), and Board Rule 102(A)(2), which prohibits either party from having *ex parte* communications about a case with the judge.[3] Since clearly a claimant can and should communicate with her own doctor without an employer/insurer's representative being present, the term "*ex parte*" really does not apply to communications with a treating physician in a workers' compensation case.

Goal of Georgia's Workers' Compensation Act

The ultimate goal of the Georgia Workers' Compensation Act is to "effect a cure, give relief, or restore the employee to suitable employment." Actions which frustrate these goals should be avoided. Keeping a treating physician in the dark regarding the claimant's medical history, pre-existing conditions, light duty job opportunities, post work accident injuries, claimant's activities which are inconsistent with work restrictions and many others would clearly be impediments to the above stated goals. In order to make sure treating physicians in the workers' compensation arena are fully informed, the Workers' Compensation Act recognized and incorporated within its provisions the need for more interaction and communication with a claimant's treating physician.

Ex Parte Communications Keep Litigation Costs Down

Another goal of the Workers' Compensation Act in Georgia is to minimize litigation and promote cooperation between the parties. Limiting communications between a treating physician and the employer/insurer would hamper this process. Permitting the claimant and her attorney to communicate with the treating physician would leave the physician with only one side of the story, thereby frustrating the goal of providing a cure and returning the claimant to suitable employment. It would also drive up litigation costs by requiring formal depositions and court orders before adjusters and attorneys representing the employer/insurer could obtain answers to simple questions, such as a clarification of a medical restriction needed in order to create a light duty job. Eliminating these impediments to successfully returning the injured employee to suitable employment, should be a mutual goal of all in the workers' compensation system.

Issue Resolved

As noted above, the case of Moreland v. Austin involved a medical malpractice action where the Court held that under HIPPA, *ex parte* communications with treating physicians are only permissible if the patient gives consent or if the court has issued an order specifically allowing the *ex parte* communications.[4] A subsequent decision involving a medical malpractice case reached a similar conclusion as Moreland, but went a step further in confirming that any court order should limit the *ex parte* inquiry to matters relevant to the plaintiff's medical conditions which are at issue.[5]

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[2] *Black's Law Dictionary* (Bryan A. Garner ed., 8th ed., West 2004).

[3] There are extraordinary circumstances under the law where *ex parte* communications are permitted such as under O.C.G.A. § 9-11-65(b), which allows a party to obtain a temporary restraining order without written or oral notice to the adverse party under special circumstances.

[4] Moreland v. Austin, 284 Ga. 730 (2008).

[5] Baker v. Wellstar Health Systems, Inc., 2010 Ga. LEXIS 413, (June 1, 2010).

Atlanta defense attorney Andy Hamilton recently obtained clarification regarding this issue from the Appellate Division of the State Board of Workers' Compensation in the decision of Arby's Restaurant Group, Inc. Specialty Risk Services v. McRae.[6] Citing both Moreland and Baker, the claimant argued that her executed form WC-207 did not authorize *ex parte* communications, so any *ex parte* contact would be in violation of HIPPA. The Appellate Division confirmed that there is an express exemption under HIPPA for disclosure of protected health information as authorized by and to the extent necessary to comply with the Georgia Workers' Compensation Act and that Board Form WC-207 is designed to be HIPAA compliant. Accordingly, the Appellate Division rejected the claimant's argument and indicated that there was no support under HIPPA or applicable Georgia law for a contention that an employer/insurer's representative or attorney cannot meet privately with a claimant's physician when the claimant has executed a WC-207. Additionally, the Appellate Division confirmed that the Administrative Law Judge did not err in removing the case from the hearing calendar until claimant expressly authorized the employer/insurer to engage in *ex parte* communications with the claimant's physician.[7]

Bottom Line

The Moreland decision, which limited communications with physicians in medical malpractice cases, is clearly inapplicable to Georgia workers' compensation cases. Both claimant's and their lawyers as well as employer/insurers and their lawyers can communicate with treating physicians without the other being present.

[6] Arby's Restaurant Group, Inc. Specialty Risk Services v. Laura S. McRae, Claim Number: 2006-008851 (August 10, 2010).
[7] Id.