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Privilege Issues In Workers' Compensation Cases

Your Protections

Generally speaking there is very little that is not discoverable by a party to a litigated California Workers' Compensation case. The theory is that open discovery with "all cards on the table" for both sides will promote more agreements and less litigation. Open discovery is felt to promote fairness and equity in the management of litigation for everyone. However, there are certain things which a party may be prevented from seeing or obtaining, and most of these fall into what attorneys call privileged communications or documents.

Most privileges are granted by statute and most are codified in the Code of Civil Procedure and or the Evidence Code. Some, however, flow from special statutory provisions such as the tax code. The question of how a privilege is to be interpreted and how it applies in a California Workers' Compensation case has been the subject much interesting litigation. We are very often presented with questions involving whether applicant's counsel or an insured employer may obtain defense witness statements, investigation reports, copies of claim notes and other file documentation. This article, by no means

comprehensive on all such questions, attempts to address some of the more common issues.

Communication With Counsel

When a case is litigated and a party chooses to be represented by counsel, communications (written and oral) between client and attorney are privileged and may not be discoverable. However, it is the client (the employer or the adjusting agency on the defense side) that holds the privilege and it may be waived, either deliberately or inadvertently. Once an otherwise privileged communication between defendant and counsel is revealed to an opponent or a third party, the horse is out of the barn and potentially all such communications in the case may be open to discovery.

In one recent case, *William Lamouree v. WCAB, Hyspan Precision Products, Inc., California Casualty Insurance Company, Liberty Mutual Insurance Company, Respondents* (2005), 70 CCC 640, disclosure of such a communication may have almost proved disastrous in a Labor Code 132a case. At the request of Defendant's attorney, defendant's president prepared a summary that included information concerning

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applicant's employment, as well as some personal information regarding the applicant. The defendant sent the summary to its attorney, who reviewed it and then returned it to the defendant. The attorney also sent a copy of the summary to California Casualty, the carrier. California Casualty later sent various documents concerning the applicant's claim, including the summary, to its adjusting agency, GAB Robins. Subsequently, Liberty Mutual subpoenaed documents related to the Applicant's case from GAB Robins, and the summary was provided to Liberty Mutual with the other documents. A copy of those documents, including the summary, was also served on the applicant's counsel. Happily for the defendant, on a technicality, it was determined that the privilege had not been waived.

Inclusion of otherwise privileged communications in subpoenaed records is not unusual, but it is unfortunate. We recommend that when a subpoena issues to a defendant, defense counsel should be provided the documents first for examination and redaction of privileged documents.

Claims Examiner's Notes

This may surprise you, but claims notes are fully discoverable except to the extent that they contain verbatim copies or notes of discussions with defense counsel. It has been held that the WCAB properly upheld a judge's order compelling the defendant to produce records and found that defendant's claims examiners' notes were not within the attorney-client privilege, although defendant might use the notes in attorney consultations in the future. *Winchells Donut Houses, Petitioner v. WCAB* (Saldana) (1997) 62 CCC 1185.

The Claims File

Again, subject to withholding privileged documents (in which case your counsel should prepare and serve a "privilege log" enumerating by date and generic identification what was withheld), your claims file is subject to discovery by subpoena or Notice to Produce. In one case involving SCIF, where the WCJ ordered the defendant to appear in deposition with the claims file and where defense counsel instructed the defendant not to answer 18 questions and to withhold documents, sanctions were issued. *Willie T. Cabanilla, v. WCAB, California Youth Authority/State of California, State Compensation Insurance Fund, State Contract Services*, (Rivera) (2003) 68 CCC 1375.

Witness Statements

Where good cause has been shown, each party to a Workers' Compensation proceeding must make available to the other party for inspection all non-privileged statements of witnesses which are in his possession, or which might come into his possession before the time of trial, since the denial of discovery of non-privileged statement would unfairly prejudice the opposing party in preparing his case and would unduly expose him to the danger of surprise at trial. [See generally Hanna, California Law of Employee Injuries and Workmen's Compensation, Vol. 1, §§ 15.03[2], 17.01[8].] *Patricia Ann Hardesty et al., (John D. Hardesty, Jr., deceased), v. McCord & Holdren, Inc. and Industrial Indemnity Company* (1976) 41 CCC 111.

Attorneys are potentially afforded extra protection from discovery of their impressions and thought processes while preparing a case and interviewing potential witnesses for trial. This protection is in the form of the so-called "work product" privilege. It applies to attorneys only, not their clients. It probably does not apply to

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non-attorney hearing representatives (although we have not seen any cases on this point).

The Attorney Work Product statute (CCP 2018.010 et. seq.) recognizes two tiers of work product privilege: absolute and qualified. Absolute privilege--that which renders material non-discoverable under any circumstance--applies to work product that "reflects an attorney's impressions, conclusions, opinions, or legal research or theories." CCP 2018.030(a).

With respect to other types of work product, a qualified privilege exists which can be overcome by a court determination "that denial of discovery will unfairly prejudice the party seeking discovery in preparing *that party's claim or defense or will result in an injustice* CCP 2018.030(b). Article: *Ethically Speaking: Coito v. Superior Court And Discoverability Of Witness Statements* by Lisa Glasser & Alastair Gamble, 52 Orange County Lawyer (September 2010)

In *Nacht & Lewis Architects, Inc., et al, v. The Superior Court Of Sacramento County*, 47 Cal. App 4th 214 (1996), the Third Appellate District Court of Appeal held in a published decision "Any notes or recorded statements of witnesses taken by defendants' counsel would be protected by the absolute work product privilege because they would reveal counsel's "impressions, conclusions, opinions, or legal research or theories" within the meaning of Code Civ. Proc., § 2018, subd. (c). However, a list of potential witnesses who submitted to counsel their independently prepared statements would not constitute qualified work product. Further, defendants could not shield independently prepared witness statements by having their employees submit such statements to defendants' attorney during his interviews with the employees."

The authors of the O.C. Bar Journal Article cited above correctly stated that "The recent California Court of Appeal decision in *Coito v. Superior Court*, 182 Cal.App.4th 758 (5th App.Dist. March 4, 2010) (requiring disclosure of witness interviews taken by agents of the Attorney General), review granted 110 Cal.Rptr.3d 462 (June 9, 2010), makes clear that it is not always safe to assume that witness statements taken by your attorney will be shielded from discovery. In *Coito*, the mother of a deceased child sued the State after her son drowned in the Tuolumne River. The Attorney General sent special agents from the California Department of Justice, Bureau of Investigation, to take recorded interviews of four children who witnessed the incident. During the litigation, the plaintiff sought discovery of the witness statements. Relying primarily upon *Nacht*, the trial court held that the statements were absolutely privileged as statements taken by agents of the State's attorney. By a 2-1 majority, the Court of Appeal reversed and held that the witness statements did not fall under either of California's two tiers of work product protection. The *Coito* majority held that *Nacht* was a "cursory" opinion containing "no analysis to support" its conclusion. The decision is currently pending further appeals.

Coito notwithstanding, the Courts have previously held that the attorney-client privilege protects witness statements from disclosure when the sole purpose for obtaining the statements was in preparation for litigation. The issue can be more appropriately phrased as whether an employer can make the unprivileged statement of an independent witness privileged when that statement is taken in anticipation of litigation, i.e., are witness statements made in the process of evaluating a case for litigation made in the "ordinary course of business."

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When an employee's only connection is as an independent witness, not as a co-defendant or as the natural person to speak for the employer, such statements do not become privileged just because they are given for transmittal to the employer's attorney in preparation for litigation. When an employee is no more than a witness to an accident, his or her statement is not privileged even if it was taken in preparation for litigation as an employer should not be allowed to silence witnesses when a natural person could not.

The determination of whether the dominant purpose of a report was preparation for litigation rests with the trial court. (See e.g., *Holm v. Superior Court*, *supra*, 42 Cal.2d 500, 507 *Travelers Companies v. Superior Court* (1983) 143 Cal.App.3d 436, 447-452 [191 Cal. Rptr. 871].) Similarly, we conclude the determination of whether a particular employee statement was that of an independent witness, i.e., not related to the scope of the employee's duties, should also rest with the WCJ.

Communicating With a Doctor

Communications with doctors are not privileged and must be disclosed. An undated, unsigned confidential note from a physician to an insurance claims adjuster which amplified and explained the doctor's opinions and conclusions was considered a "medical report" which must be filed with the workers' compensation appeals board. *Carmelita Payne, v. Mattel, Inc.*, and *Zenith National Insurance Corp* (1980) 45 CCC 745. Moral: When it comes to medical communications, when in doubt, serve it out.

The Employer's Report of Injury

The Employers Report of Occupational Injury or Illness is absolutely privileged by Labor Code 6412 and is undiscoverable and may not be used in Workers' Compensation proceedings even

though it must be transmitted to third parties (OSHA). They should never be included in materials turned over to a copy service pursuant to a subpoena for your records.

Getting Information from Lien Claimants

Ameri-Medical Corporation et. al v. WCAB, California Ranchwear, Inc., et. al., (1996) 42 Cal. App. 4th 1260 held that discovery pursuant to Labor Code Section 4628, subdivision (d), is limited to the categories of information that constitute the types of permissible charges enumerated in the statute. This information is relevant to the issue of whether non-reimbursable fees and costs were included in the total amount of the lien claimant's lien/bill, and the credibility and reliability of the medical-legal report. Respondents are entitled to relevant and unprivileged information that will assist them in determining (1) the medical services performed by the physician signing the report, (2) the amount of direct charges for that physician's professional services, and (3) the amount of the reasonable costs for lab exams, diagnostic studies, medical tests, and clerical expense related to producing the report. The issue of what discovery can be included within these categories and whether respondents' requests should be permitted are best addressed by the Board, which is in a better position to define the scope of discovery.

Can You Get the Employee's Tax Returns?

These might be useful where a claim of earnings exceeds the level officially reported by the employer (such as a claim of extra income from tips in the service industry). Generally, tax returns are not discoverable. (*Schnabel v. Superior Court* (1993) 5 Cal. 4th 704, 718-721 [21 Cal. Rptr. 2d 200, 854 P.2d 1117. Although, by its language, Rev. & Tax. Code, § 19282 (prohibition against disclosure of tax returns),

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appears to be directed only toward administrative officers, it establishes an implied privilege against forced disclosure in civil discovery proceedings. The purpose of the statute is to facilitate tax enforcement by encouraging a taxpayer to make full and truthful declarations in his or her return, without fear that any statements will be revealed or used against him or her for other purposes. If the information could be secured by forcing the taxpayer to produce a copy of a return, the primary legislative purpose of the secrecy provisions would be defeated. The effect of the statutory prohibition is to render the returns privileged, and the privilege should not be nullified by permitting third parties to obtain the information by adopting the indirect procedure of demanding copies of the tax returns. This applies equally to federal and state tax returns. Further, this privilege applies to bank and corporate tax information required by Rev. & Tax. Code, § 26451, and to quarterly payroll tax returns required by Unemp. Ins. Code § 1094.

Need Assistance with Training?

McDermott & Clawson, LLP is happy to assist with the training needs of your organization. Our education committee has extensive experience in providing seminars and discussions on Workers' Compensation topics of concern to adjusters and employers. We have worked with numerous carriers, third party administrators, and brokers to provide educational assistance, and would be happy to discuss your needs. Call or email [Howard Stevens](#) at (714) 288- 1700 or feel free to speak with any of our attorneys for further information.

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