

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 LCwccw and LCwcc#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 (LCwcc#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

From: David Lighthall [mailto:dave@carey-law.com]

Sent: Thursday, May 20, 2010 12:16 PM

To: Campbell, Bart

Cc: steve@carey-law.com; mtl@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.

David T. Lighthall

Carey Law Firm, P.C.

From: Norm Newhall [mailto:NNewhall@Inms.net]

Sent: Thursday, May 20, 2010 4:57 PM

To: Campbell, Bart

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.

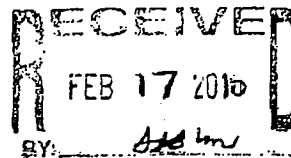
There is no demonstrated need for employers to have access to an injured workers medical records. The statutory framework makes it clear that return to work at the time-of-injury job (or at a modified job) is a **medical** determination to be made by a physician.

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

Linnell, Newhall, Martin & Schulke, P.C.



Work Release/Physical Limitation Request

Worker: [redacted] Employer: Discovery Care
Date of Claim: 4/13/09 Claim #: [redacted]
Diagnosis: Left (anterior) - shoulder Medications: [redacted]
4/13/09

- Disposition: [] Released with no restrictions
[] Patient not to work until (date)
[] Modified work, full shifts until (date)
[] Modified work, reduced shifts at hrs/day maximum until (date)

Restrictions: Check all restrictions below that apply

- Lifting: [] No Lifting
[] Limited Lifting (indicate weight and frequency below)
[] 10 lbs. [] 20 lbs. [] 40 lbs. [] 60 lbs. [] 80 lbs. [] 100 lbs.
[] Frequently [] Occasionally

- Sitting/Standing/Walking: [] No Sitting/Standing/Walking
[] Sitting/Standing/Walking, but limited to: hours.
[] Alternate Sitting/Standing every minutes/hours.

- Repetitive: [] Repetitive grasping/holding/manipulating with right/left/either hand is limited to:

- Motion: [] Climbing, kneeling, bending, squatting, repetitive motion, reaching, overhead reaching, twisting limited to

Other (specific to injury): Could work moderate duty for shoulder continuing
define overall release to Dr. Rosen, no overhead lifting
20 lbs at or below the waist

These restrictions are: [] Permanent [x] Temporary (estimated duration days weeks)

The worker will be re-examined on: 6 wk f/t April 5th 11:57

Maximum medical improvement has been attained: [] Yes [x] No

Date maximum medical improvement was attained:

Additional comments: home exercise program for shoulder

Physician's Signature: [Signature] Date: 2/17/10

Mail completed form to: Liberty Northwest Insurance
700 SW Higgins Ave, Suite 250, Missoula, MT 59803
Fax completed form to: 800-258-9081

cc: Gary Schilde

ATTENDING PHYSICIAN'S
RETURN TO WORK RECOMMENDATIONS RECORD

Company Name

Patient's Name

(Middle Initial)

Date of Injury/Illness

11-2-09

TO BE COMPLETED BY ATTENDING PHYSICIAN - PLEASE CHECK

DIAGNOSIS/CONDITION (Brief Explanation)

Cervical disc herniation
progressive radiculopathy

I saw and treated this patient 3-30-10

Date

and based on the above description of the patient's current medical problem:

1. Recommend his/her return to work with no limitations on _____
2. He/she is totally incapacitated at this time. Patient will be re-evaluated on _____ Date
3. He/She may return to work on Full time duty 3-30-10 Date 40 hrs/wk with the following limitations:

CHECK ONLY AS RELATES TO ABOVE CONDITIONS

- Sedentary Work. Lifting 10 pounds maximum and occasionally lifting and/or carrying such articles as dockets, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required only occasionally and other sedentary criteria are met.
- Light Work. Lifting 20 pounds maximum with frequent lifting and/or carrying objects weighing up to 10 pounds. Even though the weight lifted may be only a negligible amount, a job is in this category when it requires walking or standing to a significant degree or when it involves sitting most of the time with a degree of pushing and pulling of arm and/or leg controls
- Light Medium Work. Lifting 30 pounds maximum with frequent lifting and/or carrying of objects weighing up to 20 pounds.
- Medium Work. Lifting 50 pounds maximum with frequent lifting and/or carrying of objects weighing up to 25 pounds.
- Light Heavy Work. Lifting 75 pounds maximum with frequent lifting and/or carrying of objects weighing up to 40 pounds.
- Heavy Work. Lifting 100 pounds maximum with frequent lifting and/or carrying of objects weighing up to 50 pounds.

1. In an 8-hour work day, patient may:
- a. Stand/Walk
 None 4-6 hours
 1-4 hours 6-8 hours
- b. Sit
 1-3 hours 3-5 hours 5-8 hours
- c. Drive
 1-3 hours 3-5 hours 5-8 hours
2. Patient may use hand(s) for repetitive:
 Single Grasping Pushing & Pulling
 Fine Manipulation Hand only
3. Patient may use foot/feet for repetitive movements as in operating foot controls: Yes No
4. Patient may:
- | | | | |
|----------|-------------------------------------|--------------------------|-------------------------------------|
| | Not at all | Occasionally | Frequently |
| a. Bend | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| b. Twist | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| c. Squat | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| d. Climb | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| e. Reach | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

OTHER INSTRUCTIONS AND/OR LIMITATIONS INCLUDING PRESCRIBED MEDICATIONS

He needs cervical decompression / fusion.

4. These restrictions are in effect until Surgery Date or until patient is reevaluated on _____ Date

5. Referred to: None Private Physician _____ Doctor

Return Here _____ Date & Time A Consultant _____ Doctor, Date & Time

Physician's Signature

Date

3-30-10

AUTHORIZATION TO RELEASE RECORDS

I hereby authorize my attending physician and/or hospital to release any information or copies thereof acquired in the course of my examination or treatment for the injury identified above to my employer or his representative.

Patient's Name

Date

DISTRIBUTION OF FORM:

WHITE - Employer

CANARY - Doctor

PINK - Employee

09/23/2009 - MSF



D.S. Chance Gulch
P.O. Box 4759
Helena, MT 59604-4759
Phone: 406-444-6500
Fax: 406-444-5963
www.montanastatefund.com

WORK CAPACITY

Name of Physician: _____

Date of Exam: _____

PATIENT MUST COMPLETE THIS SECTION OF THE FORM

Patient's Name (Please Print) _____ Birthdate _____
Social Security Number _____ Claim Number _____

"I understand the health care information relevant to my workers' compensation or occupational disease claim may be released to Montana State Fund or an agent of Montana State Fund, as provided in 39-71-604 and 50-16-527, MCA."

Employee Signature: _____ Date _____

PROVIDER MUST COMPLETE THIS SECTION OF THE FORM

Is the worker medically stationary (MM)? Yes No Date 9/23/09 Impairment Rating: Yes No Rating: 2/0
Anticipated Date of MMI: _____ Anticipated Impairment: _____

DISPOSITION Release with no restrictions (date) 9/23/09
 Patient may not work until (date) _____ or Cleared by consulting physician
 Restricted duty until (date) _____ or Cleared by Consulting physician

PROVIDER MUST COMPLETE SECTION BELOW WHEN RESTRICTED DUTY IS CHECKED ABOVE

Restrictions: The worker is released to return to work in the following range for lifting, carrying, pushing/pulling (mark X where applies)

Pounds	Never			Occasionally			Repetitively		
	0-10 lbs	10-25 lbs	25-50 lbs	>50 lbs	0-10 lbs	10-25 lbs	25-50 lbs	>50 lbs	
Bend									
Squat									
Climb									
Crawl									

(Please circle the appropriate restrictions)

STANDING: No Standing
Standing permitted, but limited to 2 Hours 4 Hours 6 Hours

SITTING: No Sitting
Sitting permitted, but limited to 2 Hours 4 Hours 6 Hours
Alternate Sitting/Standing: For _____ minutes every _____ hours

REPETITIVE: Repetitive grasping/holding/manipulating with right/left/either hand limited to: _____

MOTION: Repetitive reaching above shoulder height with right/left/either arm limited to: _____

Comments: _____

Follow-Up: Surgery _____ Date: _____
Referred to _____ Date: _____

Next scheduled appointment date: _____

Provider's Signature Michael R... Date: 9/23/09

Please Fax this Form to (406) 444-5963 or Mail to P.O. Box 4759 - Helena, MT 59604-4759

MSF-WORKCAP (01/2005)

RECEIVED TIME SEP. 23. 10:46AM

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Michael Woods, M.D. Spine Surgery Total Joint Replacement Sports Medicine

Joan Bond-Deschamps, PA-C

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Louis Westenfelder, PA-C

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Missoula Bone & Joint Surgery Center 2360 Mullan Road, Suite B Missoula, Montana 59808 Phone: (406) 542-9695 Fax: (406) 542-9703

WORK STATUS REPORT

Patient Name: [Redacted] DOB: [Redacted] Claim #: [Redacted]

Date of Office Visit: 11/23/09 Next Appt.: 6 Weeks Days Weeks Months

Diagnosis: _____

Released to work: WITHOUT RESTRICTIONS Medically Stationary NO WORK until next evaluation Anticipated Return to Work Date: _____ Anticipated MMI Date: _____

Released to work WITH THE FOLLOWING RESTRICTIONS:

- Limit work to _____ hours per day. No pushing, pulling, or lifting in excess of 10 20 30 40 50 pounds. No twisting, climbing, or stooping. No work with the left arm / right arm / above or at shoulder level. No work requiring repeated motion of the head. No repetitive movements or gripping with the left / right wrist / hand. Move around or sit when necessary for comfort. No walking on rough or uneven ground. No working at unprotected heights. The patient needs walking aids (e.g. crutches, splints, other). Must wear splint or brace when working. Keep wound clean and dry. Sedentary work with ability to change positions. No kneeling, crawling or squatting.

Other Sit down, light duty, no lifting, no bending, no twisting.

The patient has been referred to: _____ Physical Therapy _____ Occupational Therapy _____ Other Facility: _____

MD Signature: [Signature]