



WORKERS' COMPENSATION COMMENTARY



January 2000

Volume 7 Issue 1

Protection of Confidential Medical Information

By: John C. Martin, Esq.

In 1996, the U.S. Congress passed the Health Insurance Portability and Accountability Act. That Act was in response to a two-pronged problem which employees were encountering relative to their health insurance. The primary problem addressed was the employee's ability to continue healthcare coverage after leaving their employment but problems related to the disclosure of confidential individual health information also received some attention and spurred the passage of medical information protection legislation at all levels of government.

One of the requirements within that Act was that the Secretary of Health and Human Services, after consultation with appropriate groups, develop recommendations on standards to protect the privacy of health information. In June of 1997 a report with recommendations was prepared by the National Committee on Vital and Health Statistics and submitted to the Secretary. The laws recommended by the committee would require creators and users of identifiable health care information to establish a patient's right of access to records, the right to seek amendment of records and be informed about the uses of health information. It was recommended that the law also impose restrictions concerning the disclosure and use of health information, require adequate security and impose sanctions for violations.

In its report, the committee pointed out that such legislation "presents only hard choices and difficult tradeoffs." Well, here in California, we focused on this problem quite early, adding sections to the Health and Safety Code and Insurance Code among others. To establish uniformity in a broader sense, the legislature enacted as part of the Civil Code the "Confidentiality of Medical Information Act" which serves the same purpose as that addressed by the Federal government.

The Confidentiality of Medical Information Act

This legislation, found in Sections 56 to 56.37 of the California Civil Code, is designed to cover the activities of "health care providers" with regard to the disclosure of personal medical information. Do not be lulled by that label, however, because "health care provider" is defined very broadly for the purpose of this Act and this Act covers claims administrators insofar as they deal with such confidential medical information. The general rule imposed is that no provider of health care "shall disclose medical information regarding a patient of the provider without first obtaining an authorization...." There are certain exceptions, however, to this rule.

One exception covers mandatory disclosure under court or administrative agency order, pursuant to a subpoena, pursuant to a search warrant or when otherwise specifically required by law. A second category has to do with circumstances under which that provider might voluntarily disclose medical information. This deals with disclosure required for diagnosis or treatment of a patient, disclosure to an insurer, employer, hospital or health plan or any other entity paying for health care services to the extent necessary to allow responsibility for payment to be determined and payment made. A third exception is provided in circumstances where an intervening agency manages the payments required to be made by the entities covered by the second exception.

Among several other exceptions that are not relevant to this discussion, there are three that are. One exception relates to "a provider of health care for employment related services". That provider could provide to the employer information

(Continued from page 1)

that was relevant in a claim or lawsuit, arbitration or grievance, in which the patient had placed in issue his or her medical history, mental or physical condition, or treatment. It may only be used or disclosed in connection with that proceeding.

The provider might also describe functional limitations of the patient that may entitle that patient to a leave of absence from work for medical reasons or limit the patient's fitness to perform his or her present employment providing that no statement of medical cause was included in the information disclosed.

While, in general, the rules limiting access to such information apply to the workers' compensation and civil liability arenas, a special exception was carved out in Civil Code Section 56.30, providing that certain medical information was not subject to the limitations of the Act. The exceptions relevant to our discussion are contained in Civil Code Section 56.30, subsections (f), (h) and (k). These exceptions relate to industrial accidents. Subsection (f), covers all information and records acquired, maintained or disclosed pursuant to Section 3021 et seq. of the Labor Code, Section 6100 et seq. of the Labor Code and Section 6200 et seq. of the Labor Code. Subsection (h) applies to investigations of employment accidents or illnesses. Subsection (k) deals with medical information or records disclosed to the Insurance Commissioner, Commissioner of Corporations, Division of Industrial Accidents, Workers' Compensation Appeals Board, Department of Insurance or the Department of Corporations.

AB 435

In the last session of the legislature, AB 435 was signed into law. This bill limits information to be provided to the employer as mandated by the "Employers Bill of Rights" as well as information relating to HIV infection. With regard to the Employer's Bill of Rights, a restriction has been implemented by adding additional provisions to Labor Code Section 3762. That language is very straightforward and should not create substantial problems regarding compliance. The amendment deals with "medical information" as defined in Section 56.05 of the Civil Code that has two elements: First, It is individually identifiable, that is, from the information supplied, the patient

may be identified. Such information includes name, social security number, address, position etc. The second criterion is that it deals with medical history, medical condition, treatment, prognosis, etc.

Within this legislation, there are two existing exceptions: 1) If the premium to be assessed an employer is affected by a diagnosis, then that diagnosis may be relayed to the employer; 2) Such information as is necessary for the employer to determine whether or not a disability may be accommodated can also be imparted to the employer.

In the vast majority of cases, a diagnosis will not affect premiums but when it does, it is easily recognized. Likewise, a competent Rehabilitation professional, while preparing a JA for Rehabilitation purposes or a Job Description for ADA purposes will impart to the employer only the limitations which must be accommodated. This disclosure stricture is virtually the same as that imposed by the ADA, which has not proven particularly troublesome.

The nettlesome problem that arises with this issue is that of its effects on the copying of medical information, reports, records and summaries to an employer who uses a third party administrator. Since it is the employer or a Joint Powers insuring association who engages the T.P.A. to act as its claims department, we believe that the Joint Powers administrator and/or a specific designee at the city should be considered an integral part of the claims process and, therefore, should be permitted to receive such information. Those individuals, however, should recognize their legal constraints and avoid sharing medical information except as exempted with anyone else in the city, i.e., city manager or administrator, council members, etc.

In addition to this restriction respecting the disclosure of general medical information, there still remain a number of other specific code sections dealing with the disclosure of AIDS or AIDS related information under certain circumstances. The Confidentiality of Medical Information Act, which is really the "keystone" of the health records privacy legislation, did not originally deal specifically with the dissemination of health related information pertaining to AIDS or the human immunodeficiency virus (HIV) specifically as related to workers' compensation claims.

Pursuant to the provisions of AB 435, the exemption of a claim for workers' compensation under the Confidentiality of Medical Information Act was removed "with respect to the disclosure or use of medi-

(Continued on page 3)

(Continued from page 2)

cal information regarding the human immunodeficiency virus (HIV) without a patient's prior authorization...." (AB 435) This rule now governs unless the case involves an applicant claiming infection or exposure to the virus through an exposure incident arising out of and in the course of the employment.

In this newly added section within the Civil Code, the prohibition is very explicit: "Nothing in subdivision (f) of Section 56.30 shall permit the disclosure or use of medical information regarding whether a patient is infected with or exposed to the human immunodeficiency virus without the prior authorization of the patient; unless the patient is an injured worker claiming to be infected with or exposed to the human immunodeficiency virus through an exposure incident arising out of and in the course of the employment."

Violation of the Confidentiality of Medical Information Act, including this newly enacted section carries with it a liability for economic loss or personal injury for which the injured party may obtain compensatory damages, punitive damages, and attorneys' fees subject to certain limitations along with the cost of litigation. Additionally, any violation that does result in such economic loss or personal injury is punishable as a misdemeanor. Because of the civil and criminal penalties which may be imposed, professionals in the workers' compensation field who are the recipients of, or custodians of, records, reports or other documents that contain references to AIDS or HIV must become familiar with, and takes steps to comply with, this law.

Recommendations Regarding Compliance

Fortunately, most cases with which claims professionals will be dealing can be handled in a relatively simple fashion. It is recommended that claims handling entities adopt a similar protocol to that being utilized at the Workers' Compensation Appeals Board and avoid the expense of "reinventing the wheel."

The most prevalent type of case with which a claims professional will deal is a case involving an injured worker who, as a result of exposure to bodily fluids through a needle stick, a laceration, etc., is sent for testing to establish whether or not that individual has contracted the HIV. If

the result is positive, that propels the file at that time into the next category that we will discuss. But if the testing is negative, it is recommended that reports discussing such testing be placed in an envelope, which will then be sealed and placed in the back of the claims file. A note should be affixed to the front of the envelope with language to this effect: "This envelope contains confidential medical information that may not be disclosed without authorization of the injured worker or pursuant to an order of the Workers' Compensation Appeals Board or a court."

Now, if the records should be subpoenaed, our recommendation is that the documents contained within this envelope not be submitted for photocopying but that the photocopy service be advised that there is certain confidential medical information contained in the file which will not be voluntarily provided for copying. The sealed envelope may be turned over to the Workers' Compensation Appeals Board and a determination made there as to whether or not such disclosure should be made.

This scenario should also pertain to circumstances where there is speculation as to HIV infection or the presence of AIDS even if there has been no determination in that regard.

Where an individual is claiming to be infected (whether factually established at the time or not) and whether or not that individual requests that the records be treated confidentially, there is the need in those circumstances to provide greater safeguards because of the more substantial volume of correspondence, medical reports and records which may be anticipated. Under those circumstances, the establishment of an "anonymous" file is probably the best choice to maintain confidentiality. The Appeals Board's system goes so far as to establish not only a "fictitious" name for the individual file e.g. John or Jane Doe, but also imposes a unique numbering system as well.

Obviously, with all of our clients having distinct filing protocols, I would not presume to suggest anything specific but what I will do is just outline the general requirements:

(Continued on page 4)

(Continued from page 3)

1. The files should remain out of the general filing shelves and be placed in some area where they can be safeguarded and only provided to those individuals who have a need to access the file.
2. The file should, even under those circumstances, not be filed under the true name of the injured employee but should be given a fictitious name or a number which will, of course, have to be keyed to the true name of the individual so that mail may be matched to the appropriate file.

The object is to ensure that the information in the file is not disseminated outside of the office or to individuals who have no need to access the information. Obviously, mail handlers, file clerks and claims executives themselves will, by necessity, have access. The file, once created, should bear the same sticker on the outside. If a subpoena is issued for that file or if information is requested therefrom by any other means (excluding an authorization from the applicant) then the requesting party should be advised that the file is protected from disclosure pursuant to California law and that the file may only be accessed upon receipt of an order from the WCAB or another court.

Under these circumstances, when a subpoena is received, the copy company should be contacted and advised that the file will be taken to the presiding workers' compensation judge at the appropriate board on a date of mutual convenience. At this time the judge will make a determination as to whether or not the contents should be copied.

Although the file is "anonymous" for the purposes of most individuals in the office and insofar as the general public is concerned, certain documents must be prepared and issued in the name of the applicant. Within this classification are orders of the Workers' Compensation Appeals Board, Findings and Awards, and Compromise & Releases, all of which must identify the individual by name and provide an accurate Social Security number. In those circumstances, the documentation containing the accurate name of the applicant should be placed in a sealed envelope within the fictitious name file that would not be subject to disclosure except by an order from the WCAB or another court.

It is obvious that these rules will not cover 100% of all situations that will be faced by claims professionals. They should, however, cover the vast majority of all circumstances and we certainly invite any inquiries when other circumstances pertain. We, in fact, would be most appreciative for any such inquiry since they will certainly broaden our personal experience as to situations that can develop and allow exploration of broader guidelines. We would be delighted to share such information, in a general sense, with our other clients.

The presence of these laws displays a strong intention on the part of the State of California to protect our confidential medical information and most particularly to enact rules that limit the potential for discrimination on the basis of HIV or AIDS infection. It would appear that this policy can be carried into effect without any major disruptions in the claims handling field.

We certainly wish you well in implementation of appropriate rules.

Next Month: Surveillance

It's still O.K., if you do it right!

We wish all of our clients a Happy and Prosperous New Year!

This newsletter contains only personal opinions and suggestions by the writer which may be of general application in the subject area being discussed. This letter is not intended as specific legal advice as applied to any factual situation and it is recommended that if legal advice is desired concerning the application of any of the information contained herein to a particular factual situation that direct contact with an attorney be sought.