Interpretive Bulletins

Director's interpretations of issues impacting the Colorado workers' compensation system

In an effort to provide guidance on the practical applications of the Colorado Workers' Compensation Act, we will be publishing Director's interpretations of statutes and other factors affecting the system, in the form of *Interpretive Bulletins*. The purpose is to provide greater levels of consistency and predictability as to how the Colorado system is intended to operate. While the opinions do not have the force and effect of rule, they are afforded as navigational tools to clarify and simplify processes, create efficiencies, and to reduce litigation.

If you have questions regarding this information or issues you would like to see addressed in future bulletins, please direct your inquiries to Paul Tauriello, Director of the Division of Workers' Compensation, at 633 17th St., Suite 400, Denver, CO 80202, FAX 303.318.8632, or e-mail at paul.tauriello@state.co.us

RELEASE OF MEDICAL INFORMATION

Release Date: 5/22/02
Revision Date:

This interpretive bulletin addresses issues concerning the privacy of medical information in relation to the required exchange of medical reports in workers' compensation matters. In particular, this bulletin will note the distinction between a medical *report* and a medical record within the workers' compensation system, and address the issue of what records need to be submitted by a medical provider for payment, versus what records may be released by the insurer.

Privacy of Medical Information

Regulations required by the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") are soon to be implemented, and concerns exist regarding the privacy mandates of this statute and the possible impact on the exchange of medical information within the Colorado workers' compensation system.

The federal Department of Health and Human Services ("HHS") presently requires compliance on April 14, 2003, of the Standards for Privacy of Individually Identifiable Health Information (the "Privacy Rule"). The Privacy Rule, as it is currently adopted, creates a comprehensive federal system designed to assure the confidentiality of medical records through a regulatory scheme that applies to doctors and other medical professionals, as well as "health plans," all of which are considered "covered entities" under the rule. Covered entities generally must safeguard "protected health information" ("PHI") -- an individual's medical records that include basic health and disability status

and health history -- and they may use and disclose PHI only as prescribed by the Privacy Rule.

The Privacy Rule as it currently stands, may be interpreted in a manner which impacts workers' compensation by restricting medical providers and other covered entities from disclosing medical information which may be pertinent to workers' compensation cases. Workers' compensation insurers, self-insured employers, firms that provide services to workers' compensation insurers and self-insurers ("workers' compensation payers"), and workers' compensation adjudicative agencies, are not covered entities under HIPAA and the Privacy Rule. The Privacy Rule allows them to use and disclose information to downstream entities pursuant to state law and practice. However, they *receive* information from medical providers who are covered entities. The Privacy Rule states that covered entities can only disclose the "minimum amount of PHI necessary" in response to a request for medical information.

There is an exception under the Privacy Rule, however, that allows covered entities to disclose PHI to the extent necessary to comply with state workers' compensation laws.[1] Therefore, under the Privacy Rule, the release of health information within the workers' compensation system by covered entities should be determined according to state law.

Section 8-47-203(1), C.R.S., provides that filing a claim for workers' compensation is deemed to be a limited waiver of the doctor-patient privilege to persons who are necessary to resolve the case. The limited waiver applies to the injury or disease that is the subject of the case. The medical treatment and resulting medical *reports* are limited to the work-related injury or disease, and therefore, are subject to the disclosure and exchange requirements mandated by Rule XI (B), of the Division of Workers' Compensation Rules of Procedure. In addition to the statutory limited waiver, in many instances, the claimant signs a release of medical information at the request of the carrier, or at the medical provider's office at the time of the initial visit. At some point, however, the releases of medical information may become more specific and restrictive than those currently used. Therefore, the statutory limited waiver, and the scope of any specific release, define subsequent exchanges of health information within the Colorado workers' compensation system beyond the mandates of the Privacy Rule.

Medical Report vs. Medical Record

Section 8-43-404, C.R.S., and Rule XI, of the Division's Rules of Procedure, reference the term medical "*report*." It is helpful to note the distinction between the terms medical *report* and medical record within the workers' compensation system. A medical *report* is a medical record, but a medical record is not necessarily a medical *report*. A medical *report* is generated either after examination of the claimant, or based on a document review. A medical *report* in the workers' compensation context refers to information regarding the work-related injury or disease at issue. Medical record is a broader term, and can include information not directly related to the injury or disease at issue.

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[1] *See*, Section 164.512 (l), 45 CFR, Part 164, *Standards for Privacy of Individually Identifiable Health Information: Final Rule.*

Release of Medical Records by Provider for Payment

A medical provider must forward the medical information generated from an examination of the claimant to the insurer, third party administrator, or self-insured employer ("payer") in order to be paid. At the time of the initial visit, as well as some follow-up visits, the scope of a medical examination goes beyond the specific injury or disease that is the subject of the workers' compensation case. As a result, protected health information, such as previous medical history or an underlying disability, may be included in the resulting medical records. There are many occasions when this other information is necessary in determining payment to the medical provider. If there is a written release in place, it will allow the exchange of this medical information from the provider to the payer. In the absence of a written release, it is the Director's position that the exchange of medical records under these circumstances is generally covered by the statutory limited waiver and workers' compensation case law.

Release of Medical Records by Payer

In certain instances, medical information received by the payer from the medical provider should not be released to other parties in a workers' compensation case. For example, a payer might receive medical records from the medical provider that contain protected health information **not** related to the workers' compensation injury or disease. In such cases, it may be that this information should not be forwarded to anyone else unless a specific release is obtained. Medical information received by the payer should be evaluated for relevance to the injury or disease. While the employer is entitled to receive medical *reports* and medical records to the extent necessary to resolve the case, and to be involved in the administration of a case, there may be circumstances when personal medical information not directly related to the injury or disease at issue should not be forwarded to the employer, or anyone else.[2]

It is the Director's position that a medical record containing protected health information not related to the injury or disease at issue should not be presumed to be a medical *report* as contemplated by the statutes and rules. Therefore, the medical records at issue may not be subject to the mandates of Section 8-43-404, C.R.S., and Rule XI, of the Division's Rules of Procedure, which require the exchange of medical *reports* between the parties. The parties to a workers' compensation case should carefully assess at each stage of the case what medical records are being forwarded to other parties, in order to safeguard protected health information.

Applying these guidelines to a specific situation may be difficult and will depend on the individual facts presented. Under the Colorado workers' compensation system, medical information relied upon in taking a position on a workers' compensation case, other than medical information not related to the workers' compensation injury, should be provided to the other parties. Parties must also remember that any documents to be introduced at hearing, pursuant to Section 8-43-210, C.R.S., must be exchanged prior to hearing,

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[2] When the employer is self-insured, the employer should consult state and federal laws regarding privacy and confidentiality protections in order to safeguard protected health information received from a provider.

pursuant to Rule VIII of the Division's Rules of Procedure. The issue in many instances will be what information is related to the injury or disease in question, and what information is necessary to resolve the workers' compensation case. It is not always clear what records are directly related, and disputes over the release of medical information should be presented to an Administrative Law Judge for resolution.