



NEWSLETTER ARTICLE

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Workers' Compensation

Employer/Carrier Contact with Treating Physicians: The Parameters Are Being Defined

Ever since the Court of Appeals' decision in *Salaam v. North Carolina Department of Transportation*, 122 N.C. App. 83, 468 S.E.2d 536 (1996), where the Court of Appeals extended the civil litigation rule prohibiting Defendants from contacting treating physicians into the workers' compensation arena, carriers and employers have struggled with how and when they may contact treating physicians while attempting to adjust workers' compensation claims. The struggle is not surprising given the purported informal nature of the North Carolina Workers' Compensation Act and the statutory right of employers and carriers to direct medical treatment. Recent actions by the Court of Appeals and the state legislature have created more bright lines on such contact with treating physicians. In October, 2005, the legislature enacted amendments to the Workers' Compensation Act, including N.C.G.S. § 97-25.6, to allow employers and insurers to communicate with medical care providers under certain circumstances and to a limited degree set out by the Commission.

This new statute allows employers and insurers to communicate with medical care providers under the following set of circumstances:

1. An employer or insurer paying medical compensation to a provider rendering treatment may obtain records of the treatment without authorization of or notice to the employee;
2. An employer or insurer in a denied claim or a claim that has not yet been accepted or denied may, with written notice to the employee, obtain medical records directly from a medical care provider restricted to a current injury or condition for which the employee is claiming compensation. Authorization of the employee is not necessary, but notice is required;
3. Upon written request from the employer or insurer, the employee or their attorney shall provide medical records or reports in their possession restricted to conditions related to the injury or illness for which the employee is seeking compensation;
4. An employer or insurer paying compensation for an admitted claim or paying compensation without prejudice may communicate with an employee's medical provider in writing limited to questions adopted by the Industrial Commission.

The new statute was enacted to ease the restrictions of carriers and employers in contacting physicians, especially in situations where the claim has been accepted or payments are being made without prejudice. In addition, the statute was designed to allow access to medical records for the employer and carrier. On November 21, 2005, the Industrial Commission adopted a Workers' Compensation Medical Status Questionnaire which may be submitted to the doctor. The form, which may be found at the Industrial Commission web site, allows the doctor to be questioned on nine separate topics, but requires the carrier to specify which of the nine topics must be answered.

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These topics include the diagnosis, the relationship of the injury to the accident, other medical conditions exacerbated by the injury, a reasonable and necessary treatment plan, prescription medications which could impair the ability of the employee to perform certain jobs, whether the employee is able to return to work based on a written job description attached to the questionnaire, the amount of restrictions both in terms of hours and activity, and whether the Plaintiff has reached maximum medical improvement and the amount of disability.

Around the same time the Commission was adopting these questions, the Court of Appeals wrote an important opinion in the case of *Mayfield v. Parker Hannifin*, ___ NC App. ___ (November 15, 2005). In *Mayfield*, the court affirmed the Industrial Commission's exclusion of evidence of a treating physician because of defense counsel's contact with the physician. In *Mayfield*, the attorney wrote the physician prior to a return visit and simultaneously faxed a copy of the questions to Plaintiff's counsel regarding Plaintiff's ability to return to work and whether Plaintiff's inability to return to work was related to his injury or a preexisting condition. In that case, defense counsel argued that, by faxing copies of the questions to Plaintiff's attorney at the same time they were sent to the doctor, this did not constitute an *ex parte* communication.

The court rejected this argument, determining that *Salaam* (and *Crist v. Moffat* in the civil arena) were written to protect the patient's confidentiality and privacy. More importantly, the court went on to rule that the methods by which a Defendant may obtain relevant, substantial information is limited to "statutorily recognized" means. Thus, the ONLY way to obtain substantive information directly from the doctor is through the use of a deposition or other statutorily allowed methods. The court recognized that the legislature had recently enacted N.C.G.S. § 97-25.6 and acknowledged that communications with the doctor by use of the form adopted by the Commission would be a statutorily recognized method for obtaining substantive information. However, the court found that defense counsel's conduct in the *Mayfield* case would have exceeded the parameters allowed by the statute and the medical questionnaire adopted by the Commission because it asked questions beyond those specified in the medical questionnaire. The court found that the legislature's enactment of this new statute providing a means to obtain specific information supported their determination that Defendants' contact with treating physicians was limited to statutorily recognized means (which would include depositions of the physicians).

Thus, after *Salaam*, enactment of N.C.G.S. § 97-25.6, and the Court of Appeal's decision in *Mayfield v. Parker Hannifin*, our Court of Appeals has fairly clearly indicated that the only method for Defendants, and their counsel, contacting Plaintiff's treating physicians is through the use of depositions or by use of the Workers' Compensation Medical Status Questionnaire adopted by the Commission. It should also be noted that this questionnaire is only allowed in situations where the claim has been accepted and is not adopted for situations in which the claim has been denied. The court, in *Mayfield*, did recognize that there would be situations in which the carrier and employer would need to contact the doctor to obtain nonsubstantive information, including obtaining medical records, scheduling appointments and obtaining billing information. In addition, it is to be remembered that this prohibition applies to Defendants and their counsel, but does not apply to vocational rehabilitation specialists who have been assigned to the case and who, by rule, are to be independent of Defendants and whose primary goal should be for the benefit of the employee to whom they have been assigned.

In other important decisions from the Court of Appeals since January 1, 2006, the Court of Appeals has addressed several different topics, including death benefits and requests for additional medical treatment. In *Nicholson v. Edwards Wood Products* (February 7, 2006), the court determined that, where the parties stipulated that a Plaintiff was not a "child" under the Act, that stipulation prohibited the Commission from determining whether an adopted "child" was entitled to presumptive benefits as a dependent. Thus, because the parties had stipulated the main issue to be determined by the court, they were bound by that stipulation.



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In *Ferryra v. Cumberland County* (January 17, 2006), the court upheld the Commission's award of death benefits to a deputy sheriff who suffered a ruptured aneurism while administering CPR. While Plaintiff was certified in CPR, the court relied on the fact that Plaintiff had never been required to perform CPR in eight years on the job in upholding the Industrial Commission's finding of an "accident" within the meaning of the Act. Defendants had contended that performing CPR was a regular job of police officers which is why the officer had been trained to perform CPR.

In *Armstrong v. W. R. Grace & Co.* (January 17, 2006), the court rejected Plaintiff's argument that the Commission should afford the greatest credibility or highest quality of competence to the physician who has the "most advanced specialty" in the field of medicine the disease or injury occurs. Rather, the court stated that its role is limited in determining whether there is any credible evidence to support the Industrial Commission's findings.

The Court of Appeals is somewhat split on the issue of what constitutes timely notice to request additional medical treatment. In *Thompson v. Federal Express* (January 17, 2006), the court stated that a claimant must timely file a request for medical treatment. In that case, Plaintiff, on her own, sought treatment from an osteopath before Defendants filed a Form 60. The Commission ordered payment of treatment up until the date the claim was accepted but not thereafter since Plaintiff did not file a motion requesting approval of this treatment until a year later. Plaintiff's counsel had filed other numerous forms and motions with the Commission without addressing that issue. However, in *Fontenot v. Ammons Springmoor Ass.* (February 21, 2006), the court determined that Plaintiff's filing of a Form 33 five months after Defendant's denied the request for additional medical treatment was a reasonable time within which to request authorization for treatment. The court rejected Defendants' argument that a Form 33 was not a sufficient way for requesting additional medical treatment. Thus, the appropriate time for filing a request to pay for medical treatment appears to be somewhere between five months and one year.

