

Overstreet – What It Means to Employers

On June 17, 2008 the Supreme Court of Tennessee issued its opinion in the Billy Overstreet v. TRW Commercial Steering Division case (2008 WL 2424349). The Court addressed the covenant of confidentiality that exists between a physician and patient, and narrowed the ability of employers and insurers to communicate with treating physicians in the management of workers' compensation claims and in the investigation of injury causality. It determined that in the absence of an Authorization for the Release of Medical Information, contact between an Employer/Insurer and any treating physician is virtually prohibited.

In Overstreet the Court held that an implied covenant of confidentiality was created by the legislature's efforts to protect privacy in health care and to oversee the disclosure of information under the Workers' Compensation Act. Since a physician treating an injured worker is being paid by the employer, the Court expressed concern regarding the possible influence the employer may have over the treating physician's "independent medical judgment," especially if the employer is allowed to interview the physician outside of the employee's presence.

The Court remarked that although the Workers Compensation statute (T.C.A. §50-6-204(a)(1) and (2)) permits physicians to disclose prognosis reports, medical records and statements of charges, "none of the terms permit *ex parte* communications by the employer with the employee's treating physicians." From this the Court inferred that the General Assembly did not intend for employers, insurers and physicians to communicate at a level beyond that expressly outlined in the statutes without the employee's consent.

What does this mean for employers? Unless an employer has a legally binding Authorization—signed and dated by the employee—specifically granting permission for the employer and/or its insurer to conduct *ex parte* communications with the treating physicians, the employer and insurer cannot communicate with the medical provider(s) about the employee beyond the parameters outlined in the statute.

Bottom Line: Unless you have an Authorization from the employee, do not engage in spoken and/or written communication with a medical provider regarding the employee unless you are only requesting a medical report/update as to the claimed injury.

Be aware that an employee who previously executed a valid Authorization may revoke it at any time. This will most likely occur if the employee retains an attorney. Most attorneys typically send the employer and/or insurer a letter advising that any prior Authorizations executed by his/her client are withdrawn, and that no *ex parte* communications are to be conducted without the express permission of the lawyer and the employee.

Case Management - Tennessee Workers Compensation Law, specifically T.C.A. §§50-6-122 and 50-6-123, provides for case management and utilization review. The Overstreet opinion did not specifically address Case Management aspects of a claim. But since the aforementioned statute does not expressly authorize a nurse case manager to engage in *ex parte* discussions with physicians with respect to the cause of injured employees' symptoms and complaints, we can assume that the Court's same concerns would arise. If the injured worker consents to the nurse case manager engaging in discussion with the physician while present at the appointment, then do so with caution, creating a record of the employee's consent.

Example #1: Communication from Employer/Insurer to medical provider: Please provide an updated medical report regarding John Smith's alleged workers' compensation injury. The report should address the injury's effect upon the employee (including when the employee may return to work and what, if any, physical restrictions apply; the date of maximum medical improvement, if known; permanent partial impairment, if any), the medical treatment prescribed,

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an estimate of the duration of required hospitalization, if any, and an itemized statement of charges for medical services to date.

Result: The medical provider should release the requested information to the employer/insurer, even without an executed Authorization from the employee, as the statute allows this disclosure. We can anticipate that physicians and their staffs will be apprehensive about what information they will release in light of Overstreet. The safest and most efficient course of action would be to obtain an executed Authorization from the employee prior to requesting this documentation and providing it to the medical provider with the request.

Example #2: Communication from Employer/Insurer to medical provider: Dr. House, you are treating employee John Smith for an alleged shoulder injury that Smith says occurred in the course and scope of his employment with our company on April 1, 2008; however, employee Jane Doe says she saw John Smith working out at the gym just prior to and after April 1, 2008, and she's giving us the enclosed videotape that documents him bench pressing an impressive 300 lbs. Please review the video and advise us whether this changes your opinion regarding causation of Mr. Smith's injury. We do not have an executed Authorization from John Smith yet, but we are working on it and anticipate faxing it to you later this afternoon.

Result: This request appears to run contrary to the Overstreet guidance and could subject the employer and insurer to complaint or suit. It is not sufficient that you "anticipate" obtaining an Authorization from the employee. In addition, the Authorization must specifically allow for *ex parte* communication to be valid for this purpose.

What if the employee or attorney refuses to provide a medical Authorization allowing *ex parte* communications? If an employee and/or his attorney refuse to allow the execution of a medical Authorization, the employer and/or insurer should file a Request for Assistance with the Tennessee Department of Labor and Workforce Development so the Department may assist in obtaining the necessary consent from the employee. Because the gathering of relevant medical documentation is vital to the management and defense of a workers compensation claim, it is imperative that this issue be addressed as soon as a problem arises. Consult staff counsel or the claim service center's general counselor if you have any doubt as to what action to take.

The Department will aid the parties in the pre-litigation discovery process; however, remember, the employee has an implied covenant of confidentiality with his/her medical providers and, as outlined in Overstreet, may not have to give either the employer or insurer permission to conduct *ex parte* communications with the providers.

Helpful Links

Billy Overstreet v. TRW Commercial Steering Division, et al. opinion
<http://www.tncourts.gov/OPINIONS/TSC/PDF/082/OverstreetOPN-filecopy.pdf>

Tennessee Department of Labor and Workforce Development
<http://www.tennessee.gov/labor-wfd/>

Tennessee General Assembly, Joint Committee on Workers' Compensation
<http://www.legislature.state.tn.us/>