I. Attorney responsibility to clients regarding medical discovery issues

12:235-3.8 Discovery

…(c) The employer shall be required to furnish or make available for inspection and copying all records of medical treatment, examinations and diagnostic studies authorized by the respondent. The respondent shall have the same right when the worker is treated by his or her own physician. If either party fails to furnish said information within 30 days of receipt of demand of records, it may be responsible to reimburse its adversary for the cost of procuring the same.

12:235-3.5 Other motions

(a) All other motions shall be in the form of a notice of motion, the original of which shall be filed with the district office to which the case is assigned with copies served on petitioner(s), respondent(s), carrier(s), or attorney(s). Every notice of motion shall include the factual and legal basis for the relief requested and a proposed form of order in triplicate.

(b) If the notice of motion or responsive pleading relies on facts not of record, it shall be supported by affidavit made on personal knowledge setting forth facts which are admissible in evidence to which the affiant is competent to testify. The notice of motion shall be considered uncontested unless responsive papers are filed and served within 14 days of the service of the notice of motion.

(c) Motions to dismiss for lack of prosecution pursuant to N.J.S.A. 34:15-54 and motions to suppress defenses shall be listed for hearing. All other motions shall be disposed of on the papers, unless a Judge of Compensation directs oral argument or further proceedings, in which event a hearing shall be scheduled within 30 days from the filing of the last papers contemplated by this section. At the conclusion of any such hearing the Judge of Compensation shall render a decision and enter an appropriate order within 30 days.

PETITIONER ATTORNEY POSITION

In the past several years there has been an attempt by many respondents to greatly expand the type of discovery that is often being requested in their defense of workers' compensation cases. Often times there are no distinction made in the requests that are being made by respondent attorneys between admittedly compensable work related accidents and denied accidents. This effort to greatly expand the extent of discovery being requested by many respondents often includes request for a petitioner's family doctor medical records. Often this request has been made where there has been no allegations made that a petitioner ever received medical treatment from a family doctor for the specific compensable work related injury that the claim involves.

It is the belief and position of many petitioner's attorneys that a petitioner has the right and the attorney representing them, has the responsibility to see that private and personal medical records of a petitioner remain private and personal particularly in relation to family medical physicians who may have treated the petitioner for a variety of medical conditions prior to a work related accident having no relationship to the injuries involved in the pending workers' compensation claim.

Respondent attorneys should be required to offer specific proof to the court justifying their request for an inspection and review of family medical records and a request for this information should not be randomly granted without a specific showing that there may be medical treatment by a petitioner's family medical doctor that directly relates to the injuries alleged in the workers' compensation claim.

RESPONDENT ATTORNEY POSITION

There are two areas the court should be concerned with regarding records of treatment rendered to the Petitioner, other than by the authorized providers. The first is the Abdullah situation. While Respondent is entitled to receive the appropriate credit, proper proofs are required. Hence, the need for medical records. Petitioners should never be able to block access to those records of treatment for related conditions. Whether they are relevant at the end of the day to the issue of permanency is for the court to determine. That determination is best made where a medical expert has had the opportunity to explain whether the records have a bearing on the current condition. Neither expert should be denied that opportunity.

Secondarily, the court is rightly concerned with issues of fraud. Medical records can help the court confirm or deny the happening of a compensable injury or related condition, for example. The medical records are always relevant for purposes of credibility. Credibility of the parties and witnesses is always at issue because the court's findings must be based upon credible evidence. Ours is still a system in which a judge decides compensability. Each party has an equal right to pursue its claims and defenses. The court is obligated to adjudicate those issues.

Returning to the Rule, Respondent has the right to discovery of medical records "when the worker is treated by his or her own physician". There is no qualifier on that phrase. The rule does not limit medical record discovery to treatment related only to the conditions identified in the Claim Petition, although Petitioners may argue that it is implied. That, of course, is the crux of this dispute. No one is arguing that related treatment should not be disclosed. Conditions that have no bearing on the claim at all should be protected. The gray area concerns the treatment that the family physician may have rendered prior to the accident for a slip and fall at home, or for the migraine treatment before the client was hit on the head at work. There is validity to wanting to

know about such things. So it can go beyond treatment for the "specific compensable work related injury" that Jeff refers to.

Who has the burden of proof with regard to non-authorized medical records? Both parties. The standard should be that where the respondent makes a reasonable records request based upon any evidence in the claim or before the court, the burden should shift to the Petitioner to establish that the requested records are not relevant for the parties' or courts' consideration. How may that argument be made without reviewing the records? A rational jurist can surely impose penalties (apportionment of counsel fees, reimbursement for added costs in obtaining records or supplemental IME reports, etc.) where the parties' actions are inappropriate. When the court imposes this rule consistently and fairly, the parties will act ethically, professionally and with candor before the court. In the end, the judicial determination of whether an award or settlement is fair and just can only be made where all the relevant evidence is before the court.

JUDGE'S RESPONSIBILITY

1). Insure that the rights of all parties are maintained.
2). Render a decision promptly
3). Give all parties an opportunity to address the issue.
4). Require the release of records that only pertain to the parts of the body alleged. This may require that petitioner attorney as on officer of the court review the records and forward only that information which is applicable.

II. Going and Coming Rule

The original 1911 Workers' Compensation Act did not contain a definition of employment but simply provided for compensation when employees were injured or killed in accidents, "arising out of and in the course of employment." Therefore it devolved upon the courts to develop principles capable of distinguishing between those accidental injuries which may fairly be said to have some work connection and those which may be fairly said to be unrelated to the employment. To make that distinction the "going and coming rule," sometimes referred to as the "premises rule," evolved. The going and coming rule precludes an award of compensation benefits for injuries sustained during routine travel to and from an employee's regular place of work. This doctrine rests on the assumption that an employee's ordinary, routine, day to day journey to and from work, at the beginning and at the end of the day, neither yields a special benefit to the employer, nor exposes the employee to risks that are peculiar to the industrial experience. However, the basic going and coming rule became diluted over the years by a series of exceptions that all but "swallowed the rule." Therefore one of the purposes of the 1979 amendments to the

Workers' Compensation Act was to "establish relief from the far-reaching effect of the "Going and Coming Rule" decisions by defining and limiting the scope of employment." *Senate Labor, Industry and Professions Committee Joint Statement to Senate* No. 802 SCS and Assembly No. 840 ACS, November 13, 1979. To accomplish this purpose the legislature included a definition of employment.

Two exceptions to the going and coming rule are the *special-mission* and *paid travel time*.

The "special-mission" exception allows compensation at any time for employees

1. required to be away from the conventional place of employment, and
2. if actually engaged in the direct performance of employment duties.

The "travel time" exception allows portal-to-portal coverage for employees

1. paid for travel time to and from a distant job site, or
2. using an employer authorized vehicle for travel to and from a distant job site and on business authorized by the employer, or
3. travel in a ridesharing or van pool arrangement specifically covered by *N.J.S.A.* 34: 15-36.

Scott v. Foodarama Supermarkets, **398 N.J. Super. 441 (App. Div. 2008).** Reversing the decision of the workers' compensation judge, the Appellate Division held that the "travel-time" exception to the going-and-coming rule does not apply where a salaried employee is reimbursed for gas, tolls, and wear and tear on his vehicle, but is not paid wages for the time of his commute to and from work.

Brower v. ICT Group**, 164 *N.J.* 367 (2000).** The mere fact that the workers' compensation claimant punched out on the time clock did not preclude compensability for an accident that occurred in a multi-tenant office building on a stairway leading to the street. Under N.J.S.A. 34:15-36, the depositive factors were the site of the accident and the employer's control of that location. Here, the employer exercised sufficient control over the site and knew or should have know that employees used the stairways for egress and for smoking breaks, none of the employer's customers or clients visited the premises, and the physical layout of the stairway prevented it from being considered as a common area with other tenants. The accident was held to be

compensable because of the employer's right of control; it is not necessary to establish that the employer actually exercised that right.

***Ramos v. M & F Fashions*, 154 *N.J.* 583 (1998).** Petitioner's employer was found to have control of a building's freight elevator under "premises rule," because the employer used and operated that elevator to conduct its business. Hence, petitioner's injuries were compensable when he was hurt as the result of a fall into the shaft of that freight elevator on his way up to the fourth floor to begin work.

***Kristiansen v. Morgan*, 153 *N.J.* 298 (1998), *modified*, 158 *N.J.* 681 (1999).** Under "premises rule," fatal injuries were compensable when suffered by a bridge employee who was struck by a car while crossing four-lane roadway on the bridge when trying to get into his car and go home. The Supreme Court also found that the Division of Workers' Compensation has primary jurisdiction to decide compensability issues before pursuing a negligence action thus voiding a jury verdict of $1,811,000. in a Superior Court action.

***Zelasko v. Refrigerated Food Express*, 128 *N.J.* 329 (1992).** Truck driver, who owned his own tractor-trailer but worked only for respondent, was injured while fixing loose pallets in the trailer after he left the respondent's terminal and was on his way to park the trailer. Accident was held not compensable under the "going and coming" rule where neither the "special mission" nor the "employer-authorized vehicle" exception applied to the facts presented here.

***Livingstone v. Abraham & Straus, Inc.*, 111 *N.J.* 89 (1988).** Employee injured while walking in a mall parking lot from area where she was directed to park by employer was injured at employer's place of employment. Application of the going and coming rule is "fact sensitive." *Note*: *This case outlines the history of the going and coming rule and the 1979 amendment.*

Bradley v. State; Plumeri v. State, 344 N.J. Super. 568 (App. Div. 2001). Following judicial unification, former county employees were transferred to State employment in the unified judicial system. Employees injured at their designated parking location or enroute to or from the work sites are entitled to workers' compensation benefits from the State despite the location's non-State ownership. The State provided the employee's parking and instructed them where to go. *Note: This decision reviews prior holdings in detail.*

Cannusco v. Claridge Hotel and Casino, 319 N.J. Super. 342 (App. Div. 1999). Claimant was assaulted after picking up her paycheck from her employer's administrative building. However, evidence showed that the claimant was found after the assault in a chair outside another place of business, which was several feet away from her

employer's building. Based on these facts, the assault was found not to have occurred on or in front of employer's premises and the claim was denied.

N.G. v. State, Div. of Youth and Family Services, 300 N.J. Super. 594 (App. Div. 1997). Petitioner, returning from a call and while on 24 hour call as child abuse investigator, raped in her apartment by one who saw her return to her apartment, did suffer injuries arising out of and in the course of her employment.

Perry v. State Dept. of Law & Public Safety, Div. of State Police, 296 N.J. Super. 158 (App. Div. 1996). State trooper, although required to use an employer-authorized vehicle, a police car, on her daily commute to work was held as not on business authorized by her employer when injured shoveling to get the car out of her driveway. Therefore there is nothing to support a finding of "special mission". The Supreme Court affirmed this holding in *Perry v. State Dept. of Law & Public Safety*, 153 *N.J.* 249 (1998) and remanded (1) for consideration of whether the State is authorized to pay benefits not required under the Workers Compensation Act to workers injured while commuting in state owned vehicles, and (2) for consideration of a defense it wished to raise that petitioner, in this case, was outside the parameters of such authorized voluntary payments since she was shoveling snow preparatory to driving her state owned vehicle.

Brown v. American Red Cross, 272 N.J. Super. 173 (App. Div. 1994). Petitioner who has no "conventional" place of employment, but travels from home to various blood donor sites in her own vehicle and is paid travel time, qualifies for the "travel time" exception to the going and coming rule.

Manzo v. Amalgamated Ind., 241 N.J. Super. 604 (App. Div.), certif. denied, 122 N.J. 372 (1990). Maintaining business records at home and sometimes conducting business at home does not make home a job site so that accident that occurred during travel from home to office was not during the course of employment.

Chen v. Federated Dep't. Stores, 199 N.J. Super. 336 (App. Div. 1985). Department store employee, injured while shopping during lunch hour, suffered an accident held as arising out of and in the course of employment because that accident occurred while the employee was shopping during lunchtime and such on-premises activity is both convenient to the employee and beneficial to the employer. *But see Zahner v. Pathmark Stores, Inc.*, 321 *N.J. Super.* 471 (App. Div. 1999).

Cressey v. Campus Chefs, Div. of CVI Services, Inc., 204 N.J. Super. 337 (App. Div. 1985). Employee injured on loading dock not exclusively under the control of employer and while traversing a hazardous route of egress, is within the course of employment. (Premises rule)

Nemchick v. Thatcher Glass Mfg. Co., 203 N.J. Super. 137 (App. Div. 1985). Trip home after completion of an employment-assigned, off-premises task, was in the course of employment.

Nebesne v. Crocetti, 194 N.J. Super. 278 (App. Div 1984). Payment of travel expenses not sufficient to bring travel within the course of employment.

Hope v Eberle unpublished App. Div. 2010(on Division of Workers' Compensation website) cites relevant cases on premises rule. In this case issue was accident in parking lot at Ft. Dix after signing out.

III. Payments of medical treatment by health insurance

A. Payments for unauthorized medical treatment.

Where medical benefits have been provided by a private health care carrier beneficiary and said treatment was the result of a work related condition, the carrier is entitled to be reimbursed either by the workers' compensation insurance carrier and/or the injured worker. Since most private health plans have an exception for work related injuries it is important that attorneys advise the client s that it is health care fraud to not indicate to the provider or the carrier that the condition is work related.

B. Common language regarding private healthcare carrier work related exclusions.

Work related injuries or disease. This includes the following.

Injuries arising out of or in the course of work, wage or profit.

Disease caused by reason of its relation to workers' compensation law, occupational laws or similar laws.

Work related tests, examinations of any kind required by work.

Work related injuries will not be eligible for benefits under a private health plan before or after the workers' compensation carrier has settled or closed your case.

C. If there have been benefits from a health plan for medical services that are work related, the plan has the right to recovery those payments. This means that if the medical expenses are reimbursed through a settlement, satisfied by a Judgment, or other means, you are required to return any benefits paid for illness or injury to the plan. This provision is binding whether the payment

received from the third party is the result of a legal Judgment, a compromised settlement, or any other arrangement, whether or not the third party has admitted liability for the payment.

he reimbursement rights apply to any recoveries made by the member or the spouse of a member as a result of a work related or occupational claim.

D. Responsibility of Petitioner's Attorney.

Respond to status inquiries and request for information from the private healthcare carrier or ERISA plan.

It should be made clear to the healthcare carrier that you will present their expenses for payment to the other parties involved in the workers' compensation litigation; however, it should be made completely clear to the private healthcare carrier that you are not representing them regarding their open bills. The private healthcare carrier should be advised in writing that you do not represent their interests and that the private healthcare carrier has the right to intervene and become a party to the ongoing workers' compensation claim.

It is a clear conflict of interest for a petitioner's attorney to ever accept an assignment to represent the private healthcare carrier in court. This represents a clear conflict of interest.

E. Negotiating with the Health Insurance Carrier.

Determine if the healthcare plan involved in your case, is an ERISA self-funded plan or an insured plan.

An ERISA self-funded plan is a plan that is provided as an employee benefit that bares its own risk for the payment of benefits through the general assets of the employer or through a trust funded by employer and employee contributions. ERISA self-funded plans, contrast with insured plans, which is a plan that buys an insurance policy to cover any risk of loss/payment payout of benefits.

Request a copy of the carrier's policy. If there is no right of reimbursement clause to a workers' compensation settlement recovery, or if the exclusion clause does not exclude injuries arising out of and in the course of employment, advise that their claim may not be enforceable. This can be used as a bargaining tool in negotiating a resolution of the lien.

Explain to the carrier's representative that you are dealing with, the specific difficulties in your claim. Explain to the carrier the reasons why your client used their private health policy for coverage and explain the reasons for any denial of the workers' compensation claim. If requested, send them defense IME exams and any denial of treatment letters that you have received from respondent's attorney.

This information can help substantiate your argument that you may not be able to meet your burdens of proof if your claim is litigated which could result in a dismissal of the workers' compensation claim and a complete dismissal of the private healthcare carrier's rights to reimbursement.

The ultimate goal of these discussions is to successfully negotiate a reduction in the private healthcare carrier lien with the payment coming out of the settlement proceeds of the resolution of your compensation case.

You should always request and obtain from the private healthcare carrier an itemized expense sheet so that a determination can be made as to exactly what treatment was covered and paid for by the private healthcare carrier. If there are any charges being raised by the healthcare carrier that covered treatment not directly related to your pending workers' compensation claim, this should be explained, a request should be made that these particular medical charges be dropped from the overall lien amount.

In cases where there is a unusually large private healthcare carrier lien and or in cases where there appears to be a significantly large payment for certain types of medical treatment, you may wish to have the respondent's attorney ask the workers' compensation carrier to audit the carrier's itemized expenses to try and arrive at what would be a more reasonable and necessary reimbursement. This audit should be provided to the private healthcare carrier in an effort to convince the private healthcare carrier to significantly reduce their lien.

University of Massachusetts v. Chriscodolulou <u>180 N.J. 334 (2004)</u>

The decedent's father filed an workers' compensation on behalf of his son's estate and a dependency claim petition on behalf of himself and his wife, alleging that the accident that killed his son occurred in the course of his son's employment. The hospital was listed as a medical provider on the employee claim petition. The law division ruled that the medical providers were not bound by a settlement entered into by the parents. The appellate court held that the medical providers were required to pursue an administrative remedy by either filing a petition to seek reimbursement or moving to intervene in the parents' compensation action and that the medical providers could not seek relief on a contract action in the trial court. However, the medical providers

relied on the repeated representations of the parents' attorney that the bills for the medical providers' services would be presented to the compensation court. In light of those representations, the supreme court reversed, holding that the medical providers were not bound by the settlement and that they did not act unreasonably in failing to intervene or in failing to file their own petition.

Hunt v. Hospital Service Plan of New Jersey 33 N.J. 98 (1960)

The wife of plaintiff insured was injured at work and received extensive medical care as a result. Because her employer had not authorized the treatment, the employer was not responsible for payment of the medical or hospital expenses under the workmen's compensation law despite the fact that the injury arose out of her employment. Defendant insurers denied coverage based upon exclusionary clauses stating that they were not liable for services compensable under any workmen's compensation laws. The trial court ruled in favor of defendants. In reversing the judgment and remanding the matter to the trial court, the court held that the word "compensable" was not used in defendants' contracts in a sense which would work a forfeiture of the purchased security of payment of medical and hospital bills. Rather, it was used to signify an exclusion of payment in the event that the bills qualified for payment under the workmen's compensation law and were in fact paid through that source.

Hospital Service Plan of New Jersey v. Phillips 126 N.J. Super 246(1973)

Plaintiff insurers, brought an action against defendant to recover an amount paid on their behalf. Plaintiffs had made medical payments for defendant, which they later asserted were within the workmen's compensation exclusions of their contracts. Thereupon, plaintiffs moved for summary judgment. The court found upon review that the workmen's compensation exclusions contained in the contract were clear and unambiguous. Since the record indicated that the medical services rendered to defendant resulted from an injury for which workmen's compensation was available, plaintiffs were entitled to judgment as a matter of law since there was no genuine issue of material fact.

Mid Atlantic Surgical Associates v. Robert Dent, decided by the Appellate Division November 4, 2010

US Airways, Inc. in its capacity as Fiduciary and Plan Administrator of the US Airways, Ins. Employee Benefits Plan v. James E. McCutchen, Rosen, Loulk and Perry.