

# PHYSICIAN PATIENT PRIVILEGE IN WORKERS' COMPENSATION CLAIMS

By ARNOLD G. RUBIN

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## I. Introduction

In the workers' compensation setting, one of the more controversial issues confronting the practice involves whether the physician-patient privilege between the injured worker and his/her doctor is viable once a worker seeks workers' compensation benefits. Employers, insurance companies, third-party administrators, rehabilitation nurses, vocational counselors, and attorneys representing employers, generally claim that the physician-patient privilege does not apply in the context of a workers' compensation claim. These groups argue that when an injured worker pursues benefits under the Workers' Compensation Act that the worker waives his/her right to the confidentiality of communications with the medical provider rendering treatment. These groups wish to have unbridled access to the medical professionals through ex-parte communications.

The purpose of this article is to discuss whether the physician/patient privilege is applicable in the workers' compensation setting. The article will first explore the legal basis for the physician-patient privilege. Next, the article will explore a recent Illinois Industrial Commission decision, *Anderson v. Hydraulics, Inc.*<sup>1</sup>, which con-

fronts the issue. It is the author's opinion that the majority decision in this recent case, which determined that the physician-patient privilege was applicable to the workers' compensation setting, was based on sound legal precedent.

## II. Physician-Patient Privilege

The Illinois Supreme Court, in the landmark case, *Best v. Taylor Machine Works*,<sup>2</sup> which overturned the tort legislation of 1995, addressed the issue of the physician-patient privilege. In the *Best* decision, the Illinois Supreme Court referred to the *Petrillo* doctrine, making reference to the First District Illinois Appellate Court decision of *Petrillo v. Syntex Laboratories, Inc.*<sup>3</sup> The Illinois Supreme Court summarized the *Petrillo* doctrine as a doctrine which recognizes a strong public policy in preserving the confidential and fiduciary physician-patient relationship and establishes that such public policy is violated by ex-parte communications between defendants or their counsel and plaintiff's treating physicians. The Illinois Supreme Court determined that there was a foundation under the Illinois Constitution for the preservation of the physician-patient privilege within the right to privacy, con-

tained in Section 6 and Section 12 of the Illinois Constitution.<sup>4</sup>

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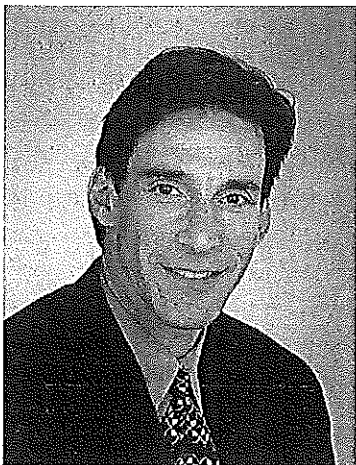
After discussing the constitutional basis for the right to privacy, the Illinois Supreme Court addressed the *Petrillo* doctrine. The Illinois Supreme Court rejected the argument of the defendants which stated that the Illinois Supreme Court had never expressly adopted the *Petrillo* doctrine and therefore the legislature was free to overturn it in the context of the tort legislation. It was emphasized that all five districts of the appellate court have followed the *Petrillo* decision and citing from a law review article, the Illinois Supreme Court stated, "the fundamental holding that ex-parte discussions between defense counsel and plaintiff's treating physician shall be conducted only through authorized methods of discovery has been overwhelmingly approved by subsequent Illinois Appellate Court decisions."<sup>5</sup>

The Illinois Supreme Court stated that the rationale of the *Petrillo* court was sound and that there was a strong public policy against ex-parte conferences between the plaintiff's healthcare practitioners and defendants or their representatives. The Illinois Supreme Court stated that the privacy interest referred to in the "certain remedy" clause of Section 12 provides a constitutional source for the protection of the patient's privacy interest in medical

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## ABOUT THE AUTHOR

ARNOLD G. RUBIN, Law Offices of Arnold G. Rubin, Ltd., concentrates his practice in the area of workers' compensation law. Mr. Rubin has served as Chairman of the Industrial Commission Committee of the Chicago Bar Association (1989 to 1990). He is a member of the Board of Managers of the Illinois Trial Lawyers Association. He is past President of the Workers' Compensation Lawyers Association (1993) and presently serves on the Board of Directors for that organization. He has authored various articles for the Illinois Bar Journal and Illinois Trial Lawyers Journal. Mr. Rubin is a graduate of Northwestern University (1975), and received his law degree from IIT-Chicago Kent College of Law (1978). He has lectured for the Chicago Bar Association, Illinois Institute for Continuing Legal Education, Illinois Trial Lawyers Association and Illinois State Bar Association on various topics involving workers' compensation.



information and records that are not related to the subject matter of the plaintiff's lawsuit. The court concluded that patients in Illinois have a privacy interest in confidential medical information and that the *Petrillo* court properly recognized a strong public policy in the patient's fiduciary and confidential relationship with his/her physicians.<sup>6</sup>

The court summarized the separate indicia of public policy that the *Petrillo* court stated was the basis for preserving the confidentiality of physician-patient communications.<sup>7</sup> The first indicia of public policy invaded by ex-parte conferences were summarized in the medical profession's code of ethics. This was supported by the Hippocratic Oath, the American Medical Association's Principle of Medical Ethics and current opinions of the Judicial Council of the AMA.<sup>8</sup> Within the context of the medical professional code of ethics, it was pointed out by the supreme court that the *Petrillo* court stated that the plaintiff-patient does not, by the simple act of filing suit, consent to ex-parte discussions between his/her treating doctor and defense counsel, nor does he/she consent to disclosure of confidential information unrelated to the subject matter of the lawsuit. The physician's compliance with the ethical obligations of confidentiality and barring ex-parte conferences is a necessary adjunct to preserve that right.

The second indicia of public policy against ex-parte conferences from the *Petrillo* court decision were the fiduciary quality of the physician-patient relationship. The *Petrillo* court emphasized that at the heart of a fiduciary relationship is trust, loyalty and faith and the discretion of the fiduciary. The supreme court concluded that ex-parte conversations with defense counsel constituted a serious breach of that trust.<sup>9</sup>

Thus, there is a sound legal basis under Illinois law for the preservation of the physician-patient privilege and the bar to ex-parte communications. The issue whether the preservation of the physician-patient privilege and the bar to ex-parte communications extends to workers' compensation claims was recently addressed by the Illinois Industrial Commission in the case of *Anderson v. Hydraulics, Inc.*<sup>10</sup>

### III. *Anderson v. Hydraulics, Inc.*

The Illinois Industrial Commission, in a two to one majority decision, recently held in *Anderson v. Hydraulics, Inc.*, that the *Petrillo* doctrine was applicable to workers' compensation claims. The Commissioners who ruled that *Petrillo* applied to workers' compensation claims were Commissioners Diane Dickett-Smart and Robert E. Falcioni. Commissioner Douglas Stevenson issued a dissenting opinion in which he stated that *Petrillo* should not apply to workers' compensation claims.

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In *Anderson*, a factory worker sustained a fracture injury to her left wrist, caused by repetitive lifting activities. The claimant eventually came under the medical care of a hand specialist, Dr. Ruder. She was sent to Dr. Ruder through a chain of referrals initiated by the employer. Dr. Ruder initially set forth in his operative report that the work-related injury was an aggravation of an underlying condition and the proximate cause of the wrist fracture.

Before the case proceeded to trial on the basis of an immediate hearing, under Section 19(b) of the Illinois Workers' Compensation Act, for payment of temporary total disability benefits, two pre-trial hearings occurred. The events that transpired between the two pre-trial hearings constitutes the claimant's basis for violation of the physician-patient privilege. The first pre-trial occurred on February 3, 1998. The attorney representing the employer requested a continuance. On March 3, 1998, the attorney for the employee advised that the continuance from the previous hearing date of February 3, 1998 was requested by the employer to take the deposition of Dr. Ruder. The attorney repre-

sented the employer stated that the reason for the continuance from February was due to having just filed the Appearance as substitute counsel for the employer.

The facts elicited at the hearing determined that the rehabilitation nurse hired by the employer had sent a letter directly to Dr. Ruder on February 19, 1998, requesting that he clarify his opinion regarding causal relationship. In the letter, the doctor was informed of certain facts based on the rehabilitation nurse's interpretation of the records of treatment and her understanding of certain facts relative to the injured worker's activities. A job description was included in the letter and a videotape depicting those job duties was also included. In addition, causal relationship questions were included in the correspondence which requested the doctor's opinion on that issue. The doctor issued a letter on February 26, 1998 stating that he did not believe that repetitive motion itself would have been sufficient to cause the left wrist fracture. The implication from the summary of the facts as contained in the decision, is that the employer used the time between pre-trials to have an ex-parte communication with the treating doctor.

At the hearing before the Arbitrator, the following exhibits were offered into evidence by the employer: Claimant's job description, the videotape depicting the jobs, the February 26, 1998 report of Dr. Ruder and testimony from the rehabilitation nurse. The attorney for the employee objected to the admission of this evidence. The Arbitrator agreed with the position of the claimant's attorney and rejected the employer's tender of all of the above exhibits into evidence citing the *Petrillo* doctrine.

The majority of the Industrial Commission, after reviewing the record, vacated and remanded the Arbitrator's decision. The Arbitrator had, in his decision, awarded claimant temporary total disability benefits of 17-1/7 weeks and medical expenses of \$11,276.32. Penalties under Sections 19(k) and 19(1) were awarded, together with attorney's fees under Section 16. With respect to the evidentiary issues, the majority determined that the rehabilitation nurse's letter to Dr. Ruder violated the *Petrillo* doctrine of physician-patient confidentiality. Therefore, the doctor's report was determined to be inadmissible. However, the majority held that

the job description and videotape were improperly excluded under *Petrillo*. Furthermore, the rehabilitation nurse, according to the decision, should have been allowed to testify to non-*Petrillo* related issues.

As explanation for its decision relating to the exclusion of the letter solicited from Dr. Ruder, the majority relied upon the fact that the employer had failed to exhaust all possible avenues of procedure available to the employer prior to the ex-parte communication with Dr. Ruder. There was no evidence in the record indicating that the employer had requested the evidence deposition of Dr. Ruder prior to the finding of the letter directed to the doctor by the rehabilitation nurse. The majority pointed out that the employer had one month between pre-trial hearings in which to file a *dedimus potestatem* to provide for the deposition.<sup>11</sup> The majority additionally pointed out that the employer had failed to issue a subpoena requiring the appearance of Dr. Ruder for the Industrial Commission proceeding.

The Industrial Commission majority specifically held that the ex-parte communications between the rehabilitation nurse and Dr. Ruder was a violation of the *Petrillo* doctrine. The Industrial Commission also cited the Illinois Supreme Court case of *Best v. Taylor Machine Works*,<sup>12</sup> in its decision. The majority emphasized the strong public policy against ex-parte communications between Plaintiff/Petitioner's treating physicians and the Defendant/Respondent and its representatives, since such communication could irreparably breach the confidential and fiduciary relationship between a physician and his/her patient.

Significantly, the majority acknowledged that *Petrillo* and *Best* were nonworkers compensation cases where discovery was available. The majority pointed out that in the workers' compensation field, there is no formal discovery. However, it was emphasized that Section 8(a) of the Act specifically provides for the release of medical reports to the employer.<sup>13</sup> The majority explained that the employee did not refuse to turn over medical records at the onset of the injury. The majority pointed out that had that been the case, the injured worker would not be entitled to benefits. The majority succinctly stated the facts before the Commission concerned a rehabilitation nurse for the employer having an ex-parte

communication with the employee's treating physician regarding his opinion on causality. The Commission correctly interpreted that the goal of the rehabilitation nurse was to "seemingly attempt to change the outcome of that opinion." The majority clearly stated that a workers' compensation claimant does not waive his/her physician-patient privilege by filing an Application for Adjustment of Claim with the Industrial Commission.<sup>14</sup>

The majority also addressed the issue of Dr. Ruder's status as a treating physician. Although the claimant was originally referred to Dr. Ruder by a company doctor, the majority held that it did not appear that he was the company doctor throughout his rendering of treatment to the injured worker. The majority pointed out that Dr. Ruder had effectively become the injured worker's treating physician.

Commissioner Stevenson issued a strong dissenting opinion in which he stated that application of the *Petrillo* doctrine to workers' compensation claims would cripple the workers' compensation system. He reasoned that there was no basis to apply *Petrillo* to a workers' compensation claim, because *Petrillo* was based upon a personal injury claim.

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It is the author's position that Commissioner Stevenson's concerns are misplaced. Employers have a direct means to obtain treating doctors' records. Section 8(a) and Section 16 provide for the obtaining of medical records.<sup>15</sup> In addition, if the medical opinion of the doctor is questioned, rather than relying on a rehabilitation nurse or insurance adjustor to contact the treating doctor in an attempt to change the doctor's opinion, a deposition of the doctor can be arranged, or a Section 12 independent medical evaluation can be scheduled.<sup>16</sup>

#### IV. Precedent for the Majority Position in *Anderson*

The *Anderson* case was not the first claim in which the *Petrillo* doctrine was applied to a workers' compensation claim. The application of the *Petrillo* standards to workers' compensation cases was established in *Mitchell v. Illinois Bell Telephone Company*.<sup>17</sup> In *Mitchell*, the employer's attorney admitted that a pre-deposition ex-parte conference occurred between himself and one of the claimant's treating physicians. The deposition was subsequently admitted into evidence and the Arbitrator relied upon this deposition to find that the claimant's condition of ill-being was not causally related to the work accident. The Commission, on Review, reversed the Arbitrator's decision and ruled that the deposition of the treating doctor was inadmissible. The Commission, citing to *Petrillo*, stated that "while the Supreme Court's rules governing discovery do not apply in workers' compensation cases, Section 8(a) and Section 16 of the Workers' Compensation Act do provide an appropriate means of obtaining and introducing medical information without violating the sacrosanct physician-patient privilege and fiduciary relationship that has long been upheld by statute, code of ethics and case law. No reason or rationale is strong enough to overcome the stated public policy against such ex-parte communications."

In addition, the Illinois Appellate Court has addressed the issue of *Petrillo* in the case of *Jones v. Industrial Commission*.<sup>18</sup> In that case, the appellate court, *in dicta*, stated that the *Petrillo* doctrine would be applicable to workers' compensation claims. In *Jones*, the employer introduced medical records of a treating physician, which were obtained through use of an improper subpoena. The Arbitrator refused to admit those records into evidence and awarded the claimant benefits. On Review, the Commission acknowledged that the subpoena was altered, violating the Commission rules. Nevertheless, the Commission considered the records and reversed the Arbitrator's decision.

After an initial review to the circuit court, the case was remanded to the Commission to allow the claimant the opportunity to rebut the records. On remand, the claimant did not offer any rebuttal evidence and the Commission reis-

sued its original opinion. On further review, the circuit court ruled that the records were obtained in violation of the physician-patient privilege and reversed the Commission's decision.

On appeal to the appellate court, it was held that a technical violation of the Commission's subpoena rule falls short of the conduct condemned in *Petrillo*. However, the court went on to state that the Commission is the proper body to determine whether sanctions should be imposed for violation of its rules and that although, the conduct of the parties is open to substantial criticism, the Commission did not abuse its discretion in refusing to impose sanctions. The appellate court explained that the technical violation of the subpoena rule fell short of the substantive conduct condemned in *Petrillo*.

The appellate court emphasized that "ex-parte communications between a litigant's physician and opposing counsel violate the physician-patient privilege." These communications permit revelation of confidences which have developed between the patient and physician without prior consent of the patient. The appellate court reversed the circuit court and reinstated the decision of the Commission.

Although the Commission refused to impose sanctions under the circumstances set forth in *Jones*, the appellate court, *in dicta*, emphasized that a more obvious violation of physician-patient privilege would result in different sanctions in the workers' compensation setting. Clearly that occurred in the *Anderson* case, which is summarized in detail above. However, it is quite clear that the *Anderson* case does, for the first time, address the *Petrillo* doctrine in light of the aggressive, partisan nature, of certain rehabilitation nurses who operate within the present workers' compensation system. The majority decision sends a strong message to those rehabilitation nurses, whose primary motivation is to act as an advocate for the employer to limit workers' compensation liability or exposure for the employer.

## V. Conclusion

The Illinois Industrial Commission, in its majority opinion in *Anderson v. Hydraulics, Inc.*, has made a strong statement regarding the application of the *Petrillo* doctrine to workers' compensation

claims. Public policy clearly supports the preservation of the physician-patient privilege. The Industrial Commission majority correctly determined that it was irrelevant that the *Petrillo* standard was originally applied in a personal injury claim where formal discovery was available. The Commission correctly pointed out that there is a means for the employer to obtain medical documentation regarding treatment received by an injured worker without violating the physician-patient privilege. Section 8(a) clearly demands that the injured worker's medical providers supply the employer with records of treatment. Section 16 also provides for the issuing of subpoenas to obtain relevant medical records where they are not easily obtained through Section 8(a).

The majority correctly addressed an increasing problem in workers' compensation claims today which involves the partisan involvement of rehabilitation nurses who attempt to limit the liability of the employer in work-related injury cases. The rehabilitation nurse becomes involved in the case through the subterfuge that the nurse is actually attempting to assist the employee. Rather, and practitioners who are involved in the handling of workers' compensation claims clearly recognize this, the rehabilitation nurse actually attempts to defeat the injured worker's case at the Industrial Commission. The author acknowledges that there are some rehabilitation nurses practicing in the field today who have as their primary motive the treatment and recovery of the injured worker. Currently, there are no guidelines that exist at the Industrial Commission regarding the involvement of rehabilitation nurses. Perhaps the time has come for the Industrial Commission to issue specific rules, in line with the *Anderson* case, to prevent this continuing and unbridled conduct in the future.

<sup>1</sup> 99 IIC 93. This is an official decision of the Illinois Industrial Commission which was issued pursuant to Section 19(e) of the Illinois Workers' Compensation Act. Under that section of the law, the Industrial Commission is to set forth in writing, the reasons for its decision including findings of fact and conclusions of law. According to Section 19(e), the conclusions of law set out in the decisions of the Industrial Commission shall be regarded as precedent for Arbitrators for the purpose of achieving a more uniform administration of the Act.

<sup>2</sup> 179 Ill.2d 367, 689 N.E.2d 1057 (1997)

<sup>3</sup> 148 Ill.App.3d 581, 499 N.E.2d 952 (1986). The author acknowledges that the *Petrillo* decision involved a products liability case. The *Petrillo* case was decided in the context of

the discovery rules in a personal injury case.

<sup>4</sup> 179 Ill.2d at 452, 689 N.E.2d at 1097.

<sup>5</sup> *Id.* at 1098. The article referred to was L. Bonagure and M. Jochner, *The Petrillo Doctrine; A Review and Update*, 83 Ill.B.J. 16 (1995).

<sup>6</sup> *Id.* at 1100.

<sup>7</sup> *Id.* at 1099.

<sup>8</sup> *Id.* In the supreme court opinion, the supreme court summarized the Hippocratic Oath and compared it to the AMA principles of medical ethics and opinions of the Judicial Council of the AMA. The supreme court summarized the physicians duties of honesty and confidentiality to the patient and preservation of the patients confidential information.

<sup>9</sup> *Id.* at 1100.

<sup>10</sup> 99 IIC 93.

<sup>11</sup> The provision for filing a *dedimus potestatem* to have a deposition ordered by the Industrial Commission is provided for under Section 16 of the Illinois Workers' Compensation Act. In addition, the rules of the Illinois Industrial Commission similarly provide a basis for having depositions taken. Section 7030.60 of the Industrial Commission Rules specifically discusses the procedure for taking depositions. Under Section (a), it states that depositions may be taken upon stipulation of the parties or upon order, called a *dedimus potestatem* in Section 16 of the Act, which would be issued by the Arbitrator or Commissioner to whom the case has been assigned. The employer in *Anderson* had failed to request an evidence deposition pursuant to a *dedimus potestatem*.

<sup>12</sup> 179 Ill.2d 367, 689 N.E.2d 1057 (1997).

<sup>13</sup> Under Section 8(a) of the Illinois Workers' Compensation Act, it is clearly provided for that every hospital, physician, surgeon or other person rendering treatment or services shall, upon written request, furnish full and complete reports and permit their records to be copied by the employer, or the employee and any other party to the proceeding for compensation before the Commission or their attorneys. Although not specifically mentioned in the Commission decision, it is clear that an additional method of obtaining medical records is to have a subpoena issued pursuant to Section 16 of the Act. This section of the Act provides that the Commission or any Arbitrator designated by the Commission shall have the power to issue subpoenas requiring the production of books, papers, records and documents which may be evidence of any matter under inquiry as they relate the question in dispute. Certainly, the nature and extent of a workers' injury is an issue in dispute. The custom and practice has been for medical providers to respond to subpoenas by turning over medical records. The custom and practice has been for the records to be turned over prior to the hearing at the Industrial Commission. It therefore constitutes an additional method in which an employer may be able to obtain the relevant medical records prior to the beginning of a hearing.

<sup>14</sup> In commenting upon the fact that a workers' compensation claimant does not waive his/her physician-patient privilege by filing an Application for Adjustment of Claim, the Commission echoed the language of the Supreme Court of the Illinois Supreme Court in the *Best* decision. The Court in *Best* summarized the arguments of the defense attorney in *Petrillo*. The attorney in *Petrillo* had raised several arguments which were collectively referred to as the waiver challenges. It was the position of the defense attorney in *Petrillo* that a Plaintiff, by filing suit, placed his/her mental and physical condition at issue thereby waiving the physician-patient privilege. This argument was rejected by the *Petrillo* court, 148 Ill.App.3d at 584, referred to in the *Best* decision at 689 N.E.2d at 1100.

<sup>15</sup> See text of endnote #13.

<sup>16</sup> Section 12 of the Act is that section which allows the employer to schedule an independent medical evaluation of the injured worker.

<sup>17</sup> 91 IIC 199. The Industrial Commission has also issued a number of subsequent decisions in which it has held the *Petrillo* doctrine applicable to workers' compensation claims: *Koley v. Swift Eckrich*, 92 IIC 96; *Finnegan v. Hayes Bioler*, 92 IIC 170; *Lammy v. Ralph Korte's Construction Company*, 92 IIC 644; *Smith v. Methodist Medical Center*, 92 IIC 1095; *Domain v. Chicago Park District*, 95 IIC 1482; and, *Gill v. Harrisburg Medical Center*, 96 IIC 1224.

<sup>18</sup> 227 Ill.App.3d 161, 591 N.E.2d 33 (2nd Dist. 1992).