

**Note from the Attorney General's Office:**

1975 Op. Att'y Gen. No. 75-062 was overruled in part by  
1997 Op. Att'y Gen. No. 97-010.

**OPINION NO. 75-062****Syllabus:**

1. The materials which comprise a workmen's compensation claim file and any other file pertaining thereto fall within the exception to the definition of a "public record" found in R.C. 149.43 because R.C. 4123.88 specifically prohibits the examination or release of any claim file without the express prior authorization of the claimant, employer, a member of the Industrial Commission, or the Administrator of the Bureau of Workmen's Compensation.
2. The Industrial Commission is required pursuant to R.C. 4121.10 to keep records showing its proceedings, findings, awards, and each member's vote as cast in all claims for compensation presented for its consideration. Such records together with the transcript at its hearings, if any, are a "public record" as defined in R.C. 149.43 and shall be available to the public at all reasonable times for inspection. Such records, transcripts, and evidence, if any, are public even if they are filed within the claim files.
3. Any information contained in a workmen's compensation claim file which was gained through communication or observation by a physician from a claimant who has contacted him for treatment or for diagnosis looking toward treatment would generally be subject to the patient-physician privilege under R.C. 2317.02(A) and may not be released except upon the authorization of the patient-claimant. However, the privilege attached to such information is waived if such information was obtained and placed in the claim file pursuant to a written medical waiver voluntarily signed by the claimant or if the claimant voluntarily testifies or introduces otherwise privileged information at a public hearing. Where the claimant has waived the patient-physician privilege, then pursuant to R.C. 4123.88 a member of the Industrial Commission, the employer or the Administrator of the Bureau of Workmen's Compensation may authorize anyone to examine such medical records which may be contained in the claim file.

**To: Gregory J. Stebbins, Chairman, The Industrial Commission of Ohio,  
Columbus, Ohio**

**By: William J. Brown, Attorney General, September 15, 1975**

I have before me your request for my opinion which reads as follows:

"The Industrial Commission hereby formally requests an opinion from your office concerning what part of a Workmen's Compensation claim file, if any, can be said to constitute a public record. Can a part of the claim file, which relates personally to the injured party, such as medical records, medical reports, x-ray reports, etc., be released without the express authorization of the individual injured claimant?"

I will consider initially the first of your questions: What part of a workmen's compensation claim file is a public record.

R.C. 149.43, which was enacted in 1963, defines a "public record" and creates a public right to inspect such records, in the following terms:

"As used in this section, 'public record' means any record required to be kept by any governmental unit, including, but not limited to, state, county, city, village, township, and school district units, except records pertaining to physical or psychiatric examinations, adoption, probation, and parole proceedings, and records the release of which is prohibited by state or federal law.

"All public records shall be open at all reasonable times for inspection. Upon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time."

Two years later, the General Assembly provided a further definition of "public records" by enacting R.C. 149.40 which provides in pertinent part as follows:

"Any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office, is a record within the meaning of sections 149.31 to 149.44, inclusive, of the Revised Code."

I believe it is clear that a claim file "serves to document the . . . decisions, procedures, operations and other activities" of the Commission.

R.C. 121.21, which requires the preservation of certain records, provides as follows:

"The head of each department, office, institution, board, commission, or other state agency shall cause to be made and preserved only such records as are necessary for the adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and for the protection of the legal and financial rights of the state and persons directly affected by the agency's activities."

It appears that R.C. 121.21 requires the Commission to maintain claim files.

It would therefore seem, upon initial examination, that the contents of a claim file, with the exception of physical and psychiatric reports which are specifically excluded by R.C. 149.43, are public records and would be open to inspection by the public. The issue is not, however, so easily resolved.

R.C. 149.43 also specifically excludes from the definition of "public records" those records the release of which is prohibited by

state or federal law. R.C. 4123.88 was amended in 1951 to require confidentiality of certain materials relating to claim files in the possession of the Industrial Commission. This statute provides as follows:

"No person shall orally or in writing, directly or indirectly, or through any agent or other person fraudulently hold himself out or represent himself or his partners or associates as authorized by a claimant or employer to take charge of, or represent such claimant or employer in respect of, any claim or matter in connection therewith before the industrial commission, or in or before the department of industrial relations, or any representative thereof. No person shall directly or indirectly solicit authority, or pay or give anything of value to another person to solicit authority, or accept or receive pay or anything of value from another person for soliciting authority, from a claimant or employer to take charge of, or represent such claimant or employer in respect of, any claim which is or may be filed with the commission. No person shall, without prior authority from a member of the commission, the claimant, or the employer, examine or directly or indirectly cause or employ another person to examine any claim file or any other file pertaining thereto. No person shall forge an authorization for the purpose of examining or cause another person to examine any such file. No employee of the commission, notwithstanding the provisions of section 4123.27 of the Revised Code, shall divulge any information in respect of any claim which is or may be filed with the commission to any person other than members of the commission or to the superior of such employee except upon authorization of a member of the commission or upon authorization of the claimant or employer. No person shall solicit or obtain any such information from any such employee without first having obtained an authorization therefor as provided in this section." (Emphasis added.)

I realize that the courts of this state, as well as this office in rendering opinions in the past, have broadly construed the statutes relating to public records in order to facilitate the public's access to a great variety of government records and documents. E.g., State ex rel. White v. City of Cleveland, 34 Ohio St. 2d 37 (1973); 1974 Op. Att'y Gen. No. 74-097; 1973 Op. Att'y Gen. No. 73-034; 1967 Op. Att'y Gen. No. 67-018. It is, however, clear that because the General Assembly has required the prior approval of certain persons to examine claim files, it did not consider claim files and the information contained therein to be "public records." See 1939 Op. Att'y Gen. No. 1971 p. 1531. R.C. 4123.88 places workmen's compensation claim files within the specific exception from the definition of a "public record" set forth in R.C. 149.43 pertaining to records the release of which is prohibited by state or federal law.

However, R.C. 4123.88 also provides that a member of the Commission, the employer, or the claimant may authorize examination of a claim file. In addition to the foregoing individuals, the Administrator of the Bureau of Workmen's Compensation may also authorize the release of these files. This conclusion is based

upon the fact that in 1955 the General Assembly created the Bureau of Workmen's Compensation and defined the powers and duties of the Administrator in R.C. 4121.121, which provides in part:

"The administrator of the bureau of workmen's compensation shall be responsible for the discharge of all administrative duties imposed upon the industrial commission in Chapter 4123. of the Revised Code, and in the discharge thereof:

"(A) The administrator shall do all acts and exercise all authorities and powers, discretionary and otherwise, which are required of or vested in the industrial commission or in any of its employees or subordinates in Chapter 4123. of the Revised Code, except such acts and such exercise of authority and power as is required of and vested in the commission in section 4121.13 of the Revised Code. . . ."  
(Emphasis added.)

It is clear that the foregoing grant of authority empowers the Administrator under R.C. 4123.88 to release a claim file.

The Commission and the Administrator in their jointly promulgated Rules Governing Claims Procedures Before the Bureau of Workmen's Compensation - All Boards Of Review - The Industrial Commission Of Ohio have recognized that the Administrator has the authority to release claim files under R.C. 4123.88. Rule IC/WC-21-22 (D) of these rules provides as follows:

- "(D) The inspection of claim files shall be limited to:
- (1) the parties;
  - (2) person authorized, in writing, by either the employee or the employer;
  - (3) member of the General Assembly when in the course of their duties as such;
  - (4) duly authorized employees of governmental agencies whose official duties require the information contained in the claim files;
  - (5) such other persons as are specifically authorized by a member of the Commission or the Administrator pursuant to the provisions of Section 4123.88, Revised Code."  
(Emphasis added.)

There are other provisions governing the operations of the Industrial Commission which indicate that notwithstanding R.C. 4123.88 some items which may be contained in a claim file are public records. R.C. 4121.10, which requires that all sessions of the Industrial Commission be open to the public, provides as follows:

"The industrial commission shall be in continuous session and open for the transaction of business during all business hours of every day excepting Sundays and legal holidays. The sessions of the commission shall be open to the public and shall stand and be adjourned without further notice thereof on its record. All of the proceedings of the commission shall be shown on its record, which shall be a public record, and all voting shall be had by calling the name of each member of the industrial commission by the secretary, and each member's vote shall be recorded on the record of proceedings as cast. The

commission shall keep a separate record of its proceedings relative to claims coming before it for compensation for injured and the dependents of killed employees, which record shall contain its findings and the award in each such claim for compensation considered by it, and in all such claims the reasons for the allowance or rejection thereof shall be stated in said record." (Emphasis added.)

Thus, pursuant to R.C. 4123.10, the Industrial Commission is required to keep, and any member of the public is permitted to inspect, records of its proceedings relative to claims for compensation presented for the Commission's consideration. Accordingly, the Commission's findings, awards and each member's vote as cast in all such claims are public records. Moreover, because all proceedings of the Commission are open to the public, transcripts and evidence introduced, if any, at such public hearings are also public records.

R.C. 4123.10 also requires the Commission to state in its public record the reasons for the allowance or rejection in all such claims for compensation. However, the interpretation of this portion of the statute is presently being litigated in several court actions. Because it is the policy of this office not to render opinions on issues pending in court, this opinion will not discuss whether the Commission statements of its reasons for allowance or rejection of claims are a public record.

The second question presented by your request reads as follows:

"Can a part of the claim file, which relates personally to the injured party, such as medical records, medical reports, x-ray reports, etc., be released without the express authorization of the individual injured claimant?"

Clearly all reports which relate to a claimant, such as medical records and reports, may be released if the claimant pursuant to R.C. 4123.88 personally authorizes examination of the entire claim file or specified medical records contained in the file.

However, in order to determine if such medical records may be released when someone other than the claimant pursuant to R.C. 4123.88, authorizes inspection of the file, it is necessary to examine the law relating to privileged communications and the waiver thereof. Since your question relates to the confidentiality of medical records and reports, only the physician-patient privilege will be discussed. Only where the physician-patient privilege exists does the question arise of under which conditions someone other than the claimant-patient may authorize release of privileged medical records.

R.C. 2317.02(A) provides in part as follows:

"The following persons shall not testify in certain respects:

"(A) [A] physician, concerning a communication made to him by his patient in that relation, or his advice to his patient, but the . . . physician may testify by express consent of the . . . patient, or if the . . . patient be deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of such deceased . . . patient; and if the . . . patient voluntarily testi-

fies, the . . . physician may be compelled to testify on the same subject; . . ."

The provisions of this statute are clear that a physician shall not testify concerning a communication made to him by a person in the status of a patient, except by express consent of the patient.

There is no common-law rule of physician-patient privilege in Ohio. Mariner v. Great Lakes Dredge & Dock Co., 20 Ohio Ops. 2d 341 (1962). Since R.C. 2317.02(A) is in derogation of the common-law and as such must be strictly construed, it has been interpreted to afford protection only to those relationships specifically named in the statute. Weis v. Weis, 147 Ohio St. 416 (1947).

As a general rule, the physician-patient relationship exists when treatment is rendered or an examination or diagnosis looking toward treatment has been made. It has been held that it is not requisite, in order to create the relationship, that the physician should actually treat the patient. If he makes an examination, with the patient's knowledge and consent, the patient believing that it is being made for the purpose of treating him, the relationship is created by implication. Russel v. Penn Mutual Life Ins. Co. 70 Ohio App. 113, 24 Ohio Ops. 440 (1941).

However, unless treatment or advice is rendered or the patient believes it is to be rendered, a privileged relationship will not be created. For example, an examination by a physician of a client at the instance of attorneys for the purpose of ascertaining conditions determinative of facts solely for a lawsuit does not create a privileged relationship. McMillen v. Industrial Comm. 34 Ohio Law Abs. 435 (1941). Similarly, the relationship of physician and patient is not created by an examination of an employee by physicians engaged by the employer where such examination does not include treatment or advice and clearly is not for the purpose of alleviating the employee's pain or curing his malady. Suetta v. Carnegie-Illinois Steel Corp. 75 Ohio Law Abs. 487 (1955). A medical examination for the purpose of determining the eligibility of applicants for admission to an institution for the blind maintained by the state not for the purpose of treatment but wholly for the purpose of education does not establish a privileged relationship. Bowers v. Industrial Comm. 30 Ohio Law Abs. 353 (1939).

The physician-patient privilege has also been held not to extend to hospital records. Perry v. Industrial Comm., 160 Ohio St. 520 (1954). However, this is subject to the limitation that where hospital records include communications between the patient and his physician, such portions of the records are, in the absence of waiver of the privilege, inadmissible in evidence. Weis, supra; Mariner, supra.

A communication between the patient and his physician includes both words and exhibition of the body or any part thereof to the physician for his opinion, examination or diagnosis to determine the character of his disease; and this type of communication is clearly within the statute. Baker v. Industrial Comm. 135 Ohio St. 491 (1939); In re Roberto, 106 Ohio App. 303 (1938).

Thus, any information contained in a workmen's compensation claim file gained through communication or observation by a physician from his patient who contacted him for treatment or for diagnosis looking toward treatment would generally be privileged information and absent a waiver only the patient-claimant could authorize the release of such information.

A patient may, of course, voluntarily waive his privilege. R.C. 2317.02 provides that the physician may testify by express consent of the patient or if the patient voluntarily testifies, the physician may be compelled to testify on the same subject.

Under the first exception in R.C. 2317.02(A), express consent of the patient may be given by a waiver in writing and may be given in advance of the time for testimony. New York Life Ins. Co. v. Snyder, 116 Ohio St. 693 (1927). Although such written waivers most commonly appear in insurance policies, they appear, in one form or another, in all applications for workmen's compensation as well. For example, both the C-1 and C-57 applications for compensation contain the following waiver:

"By signing this application I expressly waive, on behalf of myself and of any person who shall have any interest in this claim, all provisions of law forbidding any physician or other person who has heretofore attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which they thereby acquired."

With respect to the foregoing waiver, it has been held that an employee who, following an alleged industrial injury and treatment therefore, voluntarily signs as part of an application for adjustment of claim a waiver of physician-patient privilege is chargeable with knowledge of the contents thereof. Therefore, pursuant to the provisions of R.C. 2317.02, the physician who treated such employee-claimant may testify about relevant matters which came to his knowledge by reason of such treatment. Ronald v. Young, Admr. Bureau of Workmen's Compensation, 117 Ohio App. 362 (1963).

Under a second exception in R.C. 2317.02(A), when the patient voluntarily testifies, the physician may be required to testify on the same subject. In Re Roberto, supra; Bowers v. Industrial Comm., supra. A patient who voluntarily testifies, in effect, gives an express waiver as to that physician. Ausdenmoore v. Holzback, 89 Ohio St. 381 (1914). The privilege is the privilege of the patient and not of the physician. Therefore, the purpose of the privilege fails when the patient makes his physical condition an issue and voluntarily testifies concerning his physician-patient relationship. In Re Lowenthal's Petition, 101 Ohio App. 355 (1956).

Thus, if a claimant voluntarily submits medical records or reports containing privileged information during a hearing open to the public, then any privilege which may have existed has been waived.

In specific answer to your question, it is my opinion and you are so advised that:

- 1) The materials which comprise a workmen's compensation claim file and any other file pertaining thereto fall within the exception to the definition of a "public record" found in R.C. 149.43 because R.C. 4123.88 specifically prohibits the examination or release of any claim file without the express prior authorization of the claimant, employer, a member of the Industrial Commission, or the Administrator of the Bureau of Workmen's Compensation.
- 2) The Industrial Commission is required pursuant to R.C. 4121.10 to keep records showing its proceedings, findings,



awards, and each member's vote as cast in all claims for compensation presented for its consideration. Such records together with the transcript at its hearings, if any, are a "public record" as defined in R.C. 149.43 and shall be available to the public at all reasonable times for inspection. Such records, transcripts, and evidence, if any, are public even if they are filed within the claim files.

- 3) Any information contained in a workmen's compensation claim file which was gained through communication or observation by a physician from a claimant who has contacted him for treatment or for diagnosis looking toward treatment would generally be subject to the patient-physician privilege under R.C. 2317.02(A) and may not be released except upon the authorization of the patient-claimant. However, the privilege attached to such information is waived if such information was obtained and placed in the claim file pursuant to a written medical waiver voluntarily signed by the claimant or if the claimant voluntarily testifies or introduces otherwise privileged information at a public hearing. Where the claimant has waived the patient-physician privilege, then pursuant to R.C. 4123.88 a member of the Industrial Commission, the employer or the Administrator of the Bureau of Workmen's Compensation may authorize anyone to examine such medical records which may be contained in the claim file.