

son not taken the standard error of measurement and the Flynn effect into account, he would have found Mr. Burgess to have an IQ score of 76. The standard error of measurement becomes particularly important in cases of mild intellectual disability. In general, the accepted degree of measurement error is five points (Gresham F: Interpretation of Intelligence Test. . . . *Appl Neuropsychol* 16:91–7, 2009). Thus, a recorded IQ score of 74 may reflect a true IQ anywhere between 69 and 79. Another psychometric factor is the Flynn effect, which is based on the observation that average IQ scores for a given test increase as the test ages. An individual's true IQ score does not change; rather, only the norms change. As a result of the Flynn effect, fewer persons may be classified as having an intellectual disability. Therefore, it is critical for mental health experts to consider psychometric properties when interpreting IQ test scores given the considerable impact it may have on determining whether a defendant is intellectually impaired and thereby prohibited from receiving the death penalty under *Atkins*.

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## Oral Ex Parte Communication With Claimant's Treating Physician in a Workers' Compensation Case

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### Workers' Compensation Board May Require an Employee to Authorize a Treating Physician to Communicate With an Employer Without the Employee Present

In *Arby's Restaurant Group, Inc. v. McRae*, 734 S.E.2d 55 (Ga. 2012) the Georgia Supreme Court considered whether the Georgia Court of Appeals erred in holding that Ga. Code Ann. § 34-9-207

(2012) does not require an employee who files a workers' compensation claim under the Georgia Workers' compensation Act, Ga. Code Ann. § 34-9-1 *et seq.* (2012), to authorize her treating physician to engage in *ex parte* communication with her employer or her employer's representative. The Georgia Supreme Court reversed, holding that the lower court erred in construing the statutory language and that "information" meant not only "tangible documentation" but also informal oral communication.

#### Facts of the Case

Laura McRae sustained a work-related injury in February 2006, for which she filed a workers' compensation claim. Arby's Restaurant Group, Inc. (Arby's), her employer, accepted the claim as compensable and commenced income benefits in March 2006. Ms. McRae signed a form authorizing release of medical information as a part of her claim for benefits. Her treating physician then issued a report stating that Ms. McRae had reached maximum medical improvement and qualified for permanent partial disability. After receiving this report, counsel for Arby's attempted to arrange an *ex parte* meeting with her treating physician; however, the physician refused such a meeting without the presence of Ms. McRae or her counsel.

Arby's filed a motion with the Georgia Workers' Compensation Board either to dismiss Ms. McRae's hearing request or to request an order authorizing her treating physician to communicate with an Arby's representative. The board issued an order directing Ms. McRae to sign a medical release allowing her treating physician to meet privately with a representative of her employer and to provide medical information regarding Ms. McRae's claim. Ms. McRae refused to sign such a release, and her hearing request was subsequently removed from the hearing calendar. The appellate division of the State Board of Workers' Compensation and the superior court upheld the board's order. In December 2011, the Georgia Court of Appeals reversed and in a 4-to-3 majority opinion held that Ga. Code Ann. § 34-9-1 (2012) does not compel an employee to authorize her treating physician to participate in *ex parte* communication in exchange for receiving benefits for a compensable injury (*McRae v. Arby's Restaurant Group*, 721 S.E.2d 602 (Ga. Ct. App. 2011)).

*Ruling and Reasoning*

The Georgia Supreme Court reversed the lower court's ruling and held that an employer may informally seek relevant protected health information through oral *ex parte* communication with the claimant's treating physician without the presence of the claimant or claimant's counsel. The Supreme Court first examined the court of appeals' interpretation of the language in Ga. Code Ann. § 34-9-207. Under Georgia law, an employer in a workers' compensation case is entitled to seek "all information and records related to the examination, treatment, testing, or consultation concerning the employee" (Ga. Code Ann. § 34-9-207(a)). Furthermore, the statute states that the employee waives privilege or confidentiality in protected medical records and information once the employee submits a claim for workers' compensation benefits or the employer has paid medical expenses.

The court of appeals erred in construing "all information and records" to mean nothing other than "tangible documentation." The supreme court noted that when interpreting a statute, words must be given their "ordinary signification." In using the term's generally accepted meaning, information includes both the tangible and intangible; therefore, it also includes oral communication between a treating physician and an employer or employer's representative.

Although Ms. McRae argued that *ex parte* communication violates the substantive right to privacy under Georgia law, the Georgia Supreme Court recognized that she had waived this right under Ga. Code Ann. § 34-9-207 once the claim was filed and benefits commenced. Moreover, the supreme court also acknowledged that such disclosures do not violate the Health Insurance Portability and Accountability Act's (HIPAA) privacy provisions, because HIPAA specifically exempts disclosures made in accordance with state workers' compensation benefits. While the court recognized the risk that *ex parte* communication might exceed the bounds of privilege waived (i.e., exceeding that information which is directly related to the compensable injury), it argued that a complete prohibition on all *ex parte* communication would be inconsistent with the state policy of favoring full disclosure to provide an efficient proceeding and to prevent delay of workers' compensation benefits to an employee.

Finally, the court noted that the workers' compensation law does not demand that a treating physician agree to be interviewed *ex parte*. The physician may agree to be interviewed only under particular conditions. For example, the treating physician may agree to be interviewed only on the condition that the employee or his counsel or both are present, may request the interview be video or audio recorded, and may choose to share the contents of the interview with the employee and his counsel.

*Discussion*

In their holding, the Georgia Supreme Court reaffirmed the role and authority of the State Board of Workers' Compensation in ensuring that information communicated among relevant parties in workers' compensation cases adheres to the privacy protections afforded under state and federal law. Of special interest to the field of forensic psychiatry and medical practice is the treating physician's role in the workers' compensation proceedings and disclosure of privileged information. As the Georgia Supreme Court noted, the treating physician is not compelled to agree to be interviewed *ex parte*, and it outlined several conditions under which the physician may agree to participate in an *ex parte* interview. However, the court stopped short of offering the necessary conditions under which these disclosures should take place. If the court's aim is to ensure the integrity of the proceedings such that the proceedings remain within the bounds of state and federal confidentiality, then a formal proceeding such as a deposition (in which testifying parties are under oath and a court reporter records the proceedings) would ensure that those goals are met. This protocol would, of course, affect the expediency of resolving claims. In California, for example, the use of depositions in workers' compensation cases delays a given case by approximately one month from the time of scheduling to the final transcription of the proceedings. Thus, the importance of maintaining the integrity of the proceedings must be weighed against the efficiency of conducting those proceedings and the subsequent impact on an employee's receipt of compensable benefits.

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