[J-68-2025] [MO: Mundy, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

GEORGE B. THOMAS,	:	No. 66 EAP 2024
	:	
Appellant	:	Appeal from the Order of the
	:	Commonwealth Court at No. 899
	:	CD 2022 entered on April 26,
v.	:	2024, affirming the Decision of the
	:	Workers' Compensation Appeal
	:	Board at No. A21-0790 entered on
SYSCO FOODS (WORKERS'	:	July 21, 2022.
COMPENSATION APPEAL BOARD),	:	
	:	ARGUED: November 20, 2025
Appellee	:	

DISSENTING OPINION

JUSTICE WECHT **DECIDED: November 17, 2026**

While working as a forklift operator for Sysco Foods in 2016, George B. Thomas suffered a traumatic injury that resulted in an at-the-knee amputation. Sysco accepted liability for Thomas' injury, describing it as "a lower left leg amputation and an adjustment disorder with mixed anxiety and depressed mood."[1] Thomas was awarded specific loss benefits for the amputation. He also received total disability benefits because his psychiatric conditions prevented him from returning to work.

In 2020, Sysco filed a termination petition alleging that Thomas had fully recovered from his psychological injuries and could return to work as of February 10, 2020, the date of his most recent independent medical examination ("IME") with forensic psychiatrist

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1 *Thomas v. Sysco Foods*, 2024 WL 1827305, at *1 (Pa. Cmwlth. 2024).

Gladys Fenichel M.D.[2] Thomas' attorney objected to Sysco using Dr. Fenichel's 2020 IME report, asserting that he was never informed that the 2020 IME had been scheduled. Counsel stated that he learned the IME had occurred only when he received a copy of Dr. Fenichel's report.[3] Under the Special Rules of Administrative Practice and Procedure Before Workers' Compensation Judges, any written correspondence sent to a workers' compensation claimant must also be sent to the claimant's counsel.[4] Sysco's failure to comply with that regulation notwithstanding, the WCJ refused to exclude the 2020 IME report. Ultimately, the WCJ granted Sysco's termination petition based on the strength of that report.

The Commonwealth Court affirmed the WCJ. Because Special Rule 131.11 does not impose explicit consequences for a party's failure to copy opposing counsel on required communications, the panel below analogized this case to those in which an employer fails to provide a claimant's attorney with "prompt written notice" of the claimant's ability to return to work.[5] In that context, the Commonwealth Court has held that a notice of ability to return to work will not be considered void unless the claimant

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[2] Thomas attended two IMEs with Dr. Fenichel prior to the February 10, 2020 examination at issue here, one in 2019 and one in 2018. Dr. Fenichel's opinion was consistent in all three of her IME reports. She believed that, from a psychiatric perspective, Thomas could return to work.

[3] Thomas' counsel received notice prior to the 2018 and 2019 IMEs.

[4] 34 PA. CODE § 131.11 ("Any notice or other written communication required to be served upon or furnished to a party shall also be served upon or furnished to the party's attorney in the same manner as it is served upon the party.").

[5] *Thomas*, 2024 WL 1827305 at *7 ("[A]lbeit in a different context, we required a claimant to demonstrate actual prejudice or adverse impact when the claimant's counsel did not receive a copy of a notice of ability to return to work." (citing *Hale v. W.C.A.B. (Fleming Cos.)*, 2012 WL 8693120, at *12 (Pa. Cmwlth. 2012) (unpublished)); *see* 77 P.S. § 512(3) (stating that, "[i]f the insurer receives medical evidence that the claimant is able to return to work in any capacity, then the insurer must provide prompt written notice" informing the claimant of certain rights and responsibilities).

suffers "actual prejudice or adverse impact as a result of Employer's failure to provide his counsel with a copy of the notice."[6] Applying that same standard here, the panel below concluded that Thomas cannot "establish any actual prejudice or adverse impact from the lack of notice to [counsel] under *Hale*, particularly given this was [his] third IME with Dr. Fenichel."[7]

Thomas now argues that, if the Commonwealth Court's decision stands, employers will be incentivized to schedule IMEs without affording the claimant's counsel notice of the examination, as is required by the Special Rules. More specifically, Thomas' theory seems to be that Employers will violate Special Rule 131.11 in an effort to prevent claimants from consulting with their attorneys prior to the IME.[8] Today's Majority echoes similar fears, opining that "permitting such gamesmanship undermines the humanitarian and remedial purposes of the Act."[9]

The potential for employer mischief here is being greatly overstated. For one thing, the Commonwealth Court's analysis suggests that, had this been Thomas' first IME—or even just his first IME with Dr. Fenichel—the court likely would have found an adverse impact and excluded the report.[10] Thomas' argument therefore should be that the Commonwealth Court's decision incentivizes employers to withhold required notice of any

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6 *Hale*, 2012 WL 8693120 at *12.

7 *Thomas*, 2024 WL 1827305 at *7.

8 Brief for Thomas at 34 ("If this Court does not address the remedy of preclusion of the report and testimony of Dr. Fenichel, then employers, insurance companies and IME agencies will be free to proceed in a fashion similar to that here, injured workers and their counsel will be left with no recourse, and injured workers will be left without the benefit of counsel whose advice can be critical.").

9 Majority Opinion at 21.

10 *Thomas*, 2024 WL 1827305, at *7 (holding that Thomas "did not establish any actual prejudice or adverse impact from the lack of notice to [counsel] under *Hale*, *particularly given this was Thomas' third IME with Dr. Fenichel*." (emphasis added)).

second or subsequent IMEs. But I question even this alleged negative incentive. Workers' compensation claimants who receive IME-scheduling letters will, in the vast majority of cases, contact their attorneys to discuss the letter, which naturally limits the potential for employer gamesmanship.[11] Indeed, there is no evidence that Sysco withheld the notice here as some sort of scheme to induce Thomas to attend the examination without the benefit of consulting with counsel. (And why would Sysco assume that such a scheme would even succeed?)

The Majority seemingly rejects the Commonwealth Court's prejudice-or-adverse-impact standard, holding that an employer's failure to copy claimant's counsel on the IME scheduling notice renders the IME inadmissible. The Majority claims that allowing an employer to use an IME that was conducted without proper notice would undermine the remedial goals underlying the Workers' Compensation Act.[12] It is worth emphasizing, however, that the notice requirement comes not from the Act itself but from a regulation.[13] While I do not disagree that the statute's humanitarian purpose can in some circumstances help guide our interpretation of regulations promulgated under the Act, the inquiry is slightly more complicated than the Majority lets on. It is the purpose behind the Special Rules—not the purpose behind the overall Workers' Compensation Act—that should inform our understanding of the regulatory notice requirement. And while the

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[11] This case is the exception rather than the rule, because Thomas was apparently not speaking to his attorney when he received the IME scheduling notice and attended the examination. Brief for Thomas at 10 ("Claimant was severely depressed and avoidant of his counsel of record and others, but attended the examination without benefit of counsel.").

[12] Majority Opinion at 21-22 ("To hold otherwise would turn Section 131.11(c) into a loophole that would enable employers to avoid the requirements of the Special Rules and their consequences and would undermine the remedial nature of the Act, which is intended to benefit the worker." (cleaned up)).

[13] *Contra id.* at 12 (stating that "[t]he issue on appeal involves interpretation of the Act").

Special Rules do seek to implement the law's overall remedial purpose, they also exist to promote "the orderly and expeditious determination of proceedings."[14]

The Majority suggests that today's rule is necessary because prejudice arising from an employer's failure to give claimant's counsel notice of an IME is "nearly impossible to prove."[15] But it is not hard to imagine situations in which it can be shown that the lack of notice to counsel had no impact on the IME physician's conclusions.[16] If, for example, Thomas had called his attorney after receiving the scheduling notice and informed him of the upcoming IME, what sense would it make to presume prejudice from Sysco's error when we know there was none? Although the facts before us are not quite so blatant, the same lack of prejudice exists here, where there is no reasonable probability that Sysco's failure to provide proper notice affected Dr. Fenichel's conclusions.

As the Majority admits, the role of claimants' counsel in the IME process is extremely limited, meaning that there is only so much that Thomas' attorney could have done had he received the required notice. Because counsel has no right to attend the examination, his main role is to advise the claimant and to object to any second or subsequent IMEs taking place.[17] I concede that the lack of notice here (when combined with Thomas' avoidant behavior) technically prevented Thomas' counsel from objecting

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[14] 34 PA. CODE § 131.1(a) ("The purpose of this chapter is to promote, consistent with fairness and due process, the orderly and expeditious determination of proceedings before judges under the act and the Disease Law to implement the remedial intent of the act and the Disease Law.").

[15] Majority Opinion at 21.

[16] Although the Commonwealth Court put the burden on claimants to show that the employer's lack of notice caused either prejudice or adverse impact, this Court could easily place the burden on employers to demonstrate that the lack of notice to counsel had no effect on the IME.

[17] The Majority adds that counsel could "as[k] for a different date due to scheduling conflicts," Majority Opinion at 20, but my focus here is on actions that counsel could have taken which might have altered Dr. Fenichel's conclusion.

to the 2020 IME. But such an objection almost certainly would have failed anyway. That's because an employer need only show that a serial IME is reasonable under the circumstances.[18] And when a prior IME is at least six months old, such staleness generally constitutes sufficient reasonable grounds for requesting a new examination.[19] Indeed, the WCJ here suggested that she would have overruled any objection to the 2020 IME given that roughly a year had passed since Dr. Fenichel's prior examination.[20] Similarly, while an employer's failure to comply with Special Rule 131.11 *could* prevent counsel from preparing the claimant for an IME, and while this lack of advice *could* potentially impact the IME physician's ultimate conclusion, there is not even a hint of that occurring here. Again, this was Thomas' third IME with Dr. Fenichel, counsel received proper notice of the first two IMEs, and Dr. Fenichel's conclusion that Thomas had fully recovered from his psychiatric conditions remained consistent in all three of her IME reports. Although the Majority hypothesizes potential harms that could result from a claimant undergoing an IME without being advised by counsel, Thomas presumably *was* advised by counsel before the first two IMEs, and there is no evidence that Thomas did or said anything during the 2018 and 2019 IMEs. There is no sign of the Majority's hypothetical harms occurring here. There is no reason to suspect, for example, that Thomas lied, minimized his injuries, or revealed

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[18] DAVID B. TORREY, ANDREW E. GREENBERG, & LEE FIEDERER, PENNSYLVANIA WORKERS' COMPENSATION LAW & PRACTICE § 13:80 (4th Ed. 2021) ("[T]he mere passage of time *can* constitute grounds to compel a claimant to submit to an examination." (emphasis in original)).

[19] *Davis v. W.C.A.B. (Woolworth Corp.)*, 928 A.2d 429, 432 n.4 (Pa. Cmwlth. 2007) ("[C]ustom and practice have established six months as a reasonable period of time for a new examination where a claimant continues to receive benefits.").

[20] Notes of Testimony, 5/14/2020, at 25 ("[H]ad you objected to it, more than likely I would have overruled your objection and permitted the IME to go forward anyhow.").

privileged information.[21] To the contrary, Thomas: (1) complained to Dr. Fenichel at the 2020 IME of severe depression, anxiety, and sadness; (2) told her that he had neither accepted nor adjusted to his work injury; and (3) stated that he had cut himself off from his friends, family, and acquaintances.[22]

Although I would not adopt the *Hale* approach outright, I would hold that an employer who fails to give a claimant's counsel notice of an IME under Special Rule 131.11 can use the resulting IME only if there is no reasonable probability that the lack of notice affected the IME. I would place the burden of proof for this showing on the employer who failed to provide proper notice. The Majority's contrary presumption of prejudice is excessively punitive, is unsupported by the text of Special Rule 131.11, and goes well beyond what the Act's remedial purpose demands.

In an attempt to rebut the concerns that I have raised in this dissent, the Majority creates an exception to the presumption it announces today. Despite holding that the remedial purpose of the Act demands that prejudice be presumed as a consequence for an employer's violation of Special Rule 131.11, the Majority nevertheless suspends that presumption of prejudice in cases where "counsel essentially receive[s] actual notice" of the upcoming IME through some other means and therefore has "a meaningful

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[21] *See* Majority Opinion at 20 (stating that "a claimant would likely benefit from the admonitions of counsel to: (1) be truthful; (2) not disclose trial strategy; (3) not disclose attorney-client communications; (4) neither minimize injuries, nor hyperbolize recovery, and vice versa; and (5) answer only the questions asked by the medical professional—hired by the Employer—conducting the IME.").

[22] *Thomas*, 2024 WL 1827305 at *3 ("[Thomas] appeared for an examination before Dr. Fenichel at which he complained of severe depression, anxiety, and feeling downtrodden, sad, and unhappy. [Thomas] told Dr. Fenichel he has neither adjusted to the injury nor accepted he had been injured. . . . [Thomas] told Dr. Fenichel 'he cut himself off from friends and family,' as well as his attorneys, resulting in his mother intervening." (citations omitted)).

opportunity to advise the claimant before the IME."[23] The Majority does not explain why it believes that the presumption of prejudice should yield in such circumstances, but the explanation seems rather obvious to me. Indeed, it is the core thesis of my dissent: It makes no sense to presume prejudice in cases where we know there was none. The Majority, in other words, is on the cusp of an epiphany. Just as prejudice should not be presumed when counsel learns of the upcoming IME despite the employer's failure to give notice, prejudice should also not be presumed where the employer can show that there is no reasonable probability that the lack of Rule 131.11 notice affected the IME physician's report. Although I commend the Majority for taking steps to narrow today's flawed decision, the Court should take one more logical step forward and adopt my position in toto.[24] I respectfully dissent.

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[23] Majority Opinion at 22 n. 17.

[24] The Majority is reluctant to admit that the exception it creates in response to my analysis is an exception at all. Instead, the Majority claims that "under the rule announced by this Court today," the presumption would never apply in circumstances where counsel: (1) receives "actual notice" of the upcoming IME notwithstanding employer's lapse; and (2) has "a meaningful opportunity" to advise the claimant prior to the examination. *Id*. But how could that be true? The sole justification that the Majority gives for creating today's presumption is that, unless we presume prejudice, employers would be free to violate Special Rule 131.11, which in turn would undermine the Workers' Compensation Act's humanitarian purpose. *Id.* at 21 ("[A] lack of notice of an IME to workers' compensation counsel must be presumed to have been prejudicial. To hold otherwise would turn Section 131.11(c) into a loophole that would enable employers to avoid the requirements of the Special Rules and their consequences and would undermine the remedial nature of the Act, which is intended to benefit the *worker*." (emphasis in original; cleaned up; citation and footnote omitted)).

Because the logic underlying today's presumption applies regardless of whether counsel finds out about the IME from someone other than the employer, the Majority's refusal to presume prejudice in cases where counsel obtains "actual notice" should be seen for what it is: a hasty policy-driven carve-out designed to sand off just some of the roughest edges of today's flawed rule. *Contrast id.* at 22 n. 17 (admitting that an employer still "violate[s] the mandate of Section 131.11(c)" even if counsel acquires actual notice of the IME from another source), *with id.* at 19 ("Because WC Counsel did not receive notice of Dr. Fenichel's third IME, Employer clearly failed to comply with the mandate of (continued…)

Section 131.11(c). We must now address what, if any, consequences Employer faces in light of its violation."), *and id.* at 21 ("[A] lack of notice of an IME to workers' compensation counsel must be presumed to have been prejudicial."), *and id.* at 22 (stating that Dr. Fenichel's "IME should never have been admitted," not because counsel lacked actual notice of the examination, but rather due to: "Employer's complete violation of the mandates of Section 131.11(c)").