[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 BROBSON **DECIDED: November 17, 2026**

The Workers' Compensation Act (Act)[1] authorizes the Department of Labor and Industry (Department) to establish and promulgate regulations to explain and enforce the Act. 77 P.S. § 991(a)(v). In accordance with this grant of authority, the Department promulgated the Special Rules of Administrative Practice and Procedure Before Workers' Compensation Judges (Special Rules)[2] "to promote, consistent with fairness and due process, the orderly and expeditious determination of proceedings before judges under the [A]ct . . . to implement the remedial intent of the [A]ct." 34 Pa. Code § 131.1. Relevant to the instant matter, Special Rule 131.11(c) provides that "[a]ny notice or other written communication required to be served upon or furnished to a party shall also be served

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§ 1-1041.4, 2501-2710.

[2] 34 Pa. Code §§ 131.1 to .204.

upon or furnished to the party's attorney in the same manner as it is served upon the party." 34 Pa. Code § 131.11(c).

There is no dispute among the parties in this matter that Employer Sysco Foods (Employer) violated Special Rule 131.11 by failing to provide Geroge B. Thomas's (Claimant) attorney with notice of the independent medical examination (IME) conducted by Dr. Gladys Fenichel (Dr. Fenichel) on February 10, 2020. Rather, the issue before this Court is whether an employer found to be in violation of Special Rule 131.11 must be barred from relying upon information obtained as a result of that violation—at least in the context of an IME. Below, the Commonwealth Court relied upon two related workers' compensation cases to conclude, essentially, that preclusion of an IME obtained without notice to a claimant's counsel is necessary only where a claimant can "establish any actual prejudice or adverse impact from the lack of notice." *Thomas v. Sysco Foods (Workers' Comp. Appeal Bd.)* (Pa. Cmwlth., No. 899 C.D. 2022, filed Apr. 26, 2024), slip op. at 16 (citing *Maranc v. Workmen's Comp. Appeal Bd. (Bienenfeld)*, 628 A.2d 522 (Pa. Cmwlth. 1993), and *Hale v. Workers' Comp. Appeal Bd. (Fleming Cos.)* (Pa. Cmwlth., No. 1803 C.D. 2011, filed June 4, 2012)).

In his dissenting opinion, Justice Wecht reaches a similar conclusion; he "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." (Dissenting Op. at 7 (Wecht, J.).) The Majority, however, reverses the Commonwealth Court's order, concluding "that a lack of notice of an IME to workers' compensation counsel must be presumed to have been prejudicial." (Majority Op. at 21-22.) Consequently, the Majority holds that the only appropriate remedy for a violation of Special Rule 131.11, in the context of an IME, is to preclude the employer from utilizing the IME. (*See id.* at 23.)

I take a much simpler approach than my learned colleagues. To begin, I must emphasize that Special Rule 131.11 is not a rule applicable only to IMEs. Instead, Special Rule 131.11 is a general rule that applies to all matters and circumstances before a workers' compensation judge (WCJ). In promulgating this Special Rule, it is inarguable that the Department chose not to fashion a specific remedy for an employer's failure to provide a claimant's counsel with the required notice. I do not believe that we can assume that the Department's silence in this regard was anything less than intentional. Instead, I believe that the Department's silence acted as a grant of discretion to WCJs, given the general nature of the Special Rules and the broad range of circumstances to which the Special Rules apply. A contrary interpretation risks usurpation of the Department's choice in crafting its own procedural regulation in favor of this Court's preferred consequence.

That being said, I recognize the policy concerns forwarded by the Majority relative to harms that could potentially result from a claimant undergoing an IME without having first been advised by his/her counsel. I agree with Justice Wecht, however, that "[t]here is no sign of the Majority's hypothetical harms occurring here." (Dissenting Op. at 6 (Wecht, J.).) As the Commonwealth Court explained, the WCJ in this matter carefully reviewed the circumstances present and recognized a violation of Special Rule 131.11. To remedy this violation, the WCJ "postponed proceedings for several months to allow Claimant's . . . counsel ample time to confer with his client," provided Claimant's counsel with "the opportunity to participate in Dr. Fenichel's subsequently scheduled deposition and cross-examine her to challenge Dr. Fenichel's findings from the IME," and "provided Claimant time to have [his treating physician] review Dr. Fenichel's report and deposition and provide his own report and testimony." *Thomas*, slip op. at 16. The WCJ's remedy was a measured response to the specific circumstances of the present case and, therefore, I "cannot conclude the WCJ committed an error of law or abused her discretion"

by allowing the matter to proceed in accordance with her ruling. *Id.* As the Commonwealth Court reached this same conclusion, I would affirm its order, albeit on alternative grounds.