[J-68-2025]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, McCAFFERY, JJ.

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, 2024,
v.	:	affirming the Decision of the
	:	Workers' Compensation Appeal
	:	Board at No. A21-0790 entered on
SYSCO FOODS (WORKERS' COMPENSATION APPEAL BOARD),	:	July 21, 2022.
	:	
	:	ARGUED: November 20, 2025
Appellee	:	

OPINION

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

We granted allowance of appeal in this matter to consider whether an employer, which contacts directly, requests, and conducts an Independent Medical Examination ("IME") of an injured worker without notifying the worker's attorney of the requested examination, may utilize that examination to alter the worker's benefits. Based on the remedial and humanitarian purposes of the Workers' Compensation Act[1] ("the Act"), we conclude that the employer is precluded from using the improperly noticed examination. We therefore reverse the Commonwealth Court's decision.

I. Factual and Procedural Background

On July 1, 2016, while employed as a forklift operator for Sysco Foods

[1] Act of June 2, 1915, P.L. 736, No. 338, *as amended*, 77 P.S. §§ 1-1041.4; 2501-2625.

("Employer"), George B. Thomas ("Claimant") suffered a work injury to his lower left leg.[2] On July 22, 2017, Employer assumed liability for this partial disability, which it classified as a left leg contusion, through issuance of a Notice of Compensation Payable establishing an average weekly wage of $1,052.35 and a corresponding weekly compensation of $701.60.[3] *See* Stipulation of Facts, 9/7/18, at 1. Claimant's leg ultimately required amputation as a result of the injury. Consequently, on September 17, 2018, a workers' compensation judge ("WCJ") approved a stipulation that reclassified Claimant's injury as a leg contusion requiring lower leg amputation with an adjustment disorder.[4] *See* WCJ Op., 9/17/18, at 3. This stipulation increased Claimant's weekly compensation rate to $978.00 based on an average weekly wage of $1,483.85.[5]

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[2] As a result of this accident, Claimant is also involved in third-party litigation and is represented by counsel for the purposes of that litigation ("third-party counsel").

[3] The Notice of Compensation Payable does not appear in the reproduced record. *See* Pa.R.A.P. 2152(a) ("The reproduced record shall contain[:] . . . (1) [t]he relevant docket entries and any relevant related matter[;] . . . (2) [a]ny relevant portion of the pleadings, charge or findings[; and] . . . (3) [a]ny other parts of the record to which the parties wish to direct the particular attention of the appellate court[.]"). However, as the parties have stipulated to the existence of this document and the facts therein, we can rely on their recitation of the facts. *See* Pa.R.A.P. 2152(c) ("The fact that parts of the record are not included in the reproduced record shall not prevent the parties or the appellate court from relying on such parts.").

[4] An adjustment disorder is a psychiatric condition defined as an

> impairment in social or occupational functioning and unexpected severe emotional or behavioral symptoms occurring within [three] months after an individual experiences a specific identifiable stressful event, such as a divorce, business crisis, or family discord. . . . Symptoms may include anxiety, depression, and conduct disturbances and tend to remit following elimination of the stressors or acquisition of new coping skills.

Adjustment disorder, American Psychological Association Dictionary of Psychology, https://dictionary.apa.org/adjustment-disorder (last visited Nov. 9, 2026).

[5] The lower courts observed that Claimant's average weekly wage at this point was $1,584.83. However, it is unclear where this number comes from, as both the stipulation of facts and the petition for modification expressly noted the then-current average weekly (continued…)

Relevantly, on April 28, 2020, Employer filed a termination petition alleging that "Claimant [] fully recovered from the psychological injuries" as of February 10, 2020, the date of an IME conducted by Dr. Gladys Fenichel, a board-certified adult and forensic psychiatrist, for the purpose of third-party litigation. Termination Petition, 4/28/20, at 1 (unpaginated). Thus, Employer requested the termination of Claimant's benefits in relation to his adjustment disorder diagnosis. Claimant opposed the termination petition.

Thereafter, on May 14, 2020, a WCJ held a hearing via telephone, during which Employer moved for the admission of Dr. Fenichel's IME Report. Notes of Testimony ("N.T."), 5/14/20, at 14-15. Claimant objected, asserting, *inter alia*, that his workers' compensation attorney ("WC Counsel") did not receive notice of the IME, as he was unaware that Dr. Fenichel had conducted the at-issue IME that Employer now sought to admit.[6] *See generally id.* at 17-19. WC Counsel also noted that he was surprised when

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wage at $1,483.85, and the record does not reflect any change to this determination.

Subsequently, Employer filed a petition for modification with the Workers' Compensation Office of Adjudication, claiming there was work generally available in the labor market that would provide Claimant with a higher earning power, thereby reducing Claimant's weekly benefits. This modification petition is the subject of a separate appeal for which we granted allocatur. *See* Order, *Thomas v. Sysco*, No. 156 EAL 2024, 328 A.3d 1004 (Pa. Nov. 5, 2025) (*per curiam*). While the parties are the same, our disposition of the appeals is unrelated.

[6] It is entirely unclear from the record who, aside from Claimant himself and Employer's counsel for the third-party litigation, received notice of the at-issue IME. While Employer acknowledged that WC Counsel was not copied on the notice, it explained that counsel for Claimant in the third-party litigation was copied. *Id.* at 20. However, Claimant's WC Counsel denied that Claimant's third-party counsel received notice of the IME. *Id.* at 18, 23-24. Without any verifying documents in the record, it is unclear whether Claimant's third-party counsel received notice or not. *See id.* at 24 (WC Counsel explaining that he "c[ould not] verify [whether third-party counsel] did[or did not] receive [notice because he] d[id not] have the records[, and] did[not] review [third-party counsel's] mail.").

Relatedly, Claimant filed an "Application for Leave to File Post-Argument Submission" ("Application") pursuant to Pa.R.A.P. 2501(a). In the Application, Claimant attaches screenshots of various exhibits that were admitted below, as well as the docket from the third-party litigation in an attempt to demonstrate which parties received notice (continued…)

he received the at-issue IME report, originally thinking it was based on one of Dr. Fenichel's two prior examinations of Claimant for the workers' compensation claim, only to discover it was a new IME for Claimant's third-party litigation. *Id.* at 17. In response, Employer's attorney argued that Employer was also unaware that the IME was scheduled until it received Dr. Fenichel's IME Report, as notice was sent by a "third-party vend[o]r." *Id.* at 20. Employer acknowledged that WC Counsel was not copied on that notice. *Id.* Despite this, Employer maintained that Claimant, who received notice and attended the IME, was not prejudiced, as Claimant could have informed his attorney about the notice of the IME if he had questions. *Id.* at 21. In fact, Employer argued that it would be prejudiced if the WCJ did not admit the IME report and subsequent deposition. *Id.* ("[I]t's our position that we should not be prejudiced by the fact that [Claimant] went to an examination that was scheduled.").

After hearing argument, the WCJ offered WC Counsel two options: (1) reschedule the IME with Dr. Fenichel and proceed under a new petition to terminate; or (2) because counsel received the report, proceed with the litigation of the existing termination petition. *Id.* at 22. WC Counsel responded that he would have objected to the IME had he been aware in advance because Employer had "no right to another examination at that point in time[,]" and that the issuance of the report two months after the at-issue IME prevented him from having his expert, Dr. Kenneth Weiss, review it and respond. *Id.* at 22-23. The WCJ explained that because the termination petition was a new proceeding, separate from the ongoing litigation of the modification petition, Employer could "move forward with

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of the at-issue IME. Employer filed an Answer to Claimant's Application, in which it noted it was "unsure of the exact rationale for the documents that [WC C]ounsel . . . requests to submit." *See* Respondent/Appellee, Sysco Phila., LCC's Answer to Appellant's Appl. for Leave to File Post-Arg. Submission Pursuant to Pa.R.A.P. 25[01(a)], 12/5/25, at 1. Given that all parties agree Claimant's WC Counsel did not have appropriate notice of the at-issue IME, it is unnecessary to supplement the record before us. Consequently, Claimant's Application is denied.

Dr. Fenichel's deposition testimony and [Claimant would] have plenty of time to talk to Dr. Weiss and have him discuss Dr. Fenichel's opinions of full recovery." *Id.* at 24-25. The WCJ further explained

> that the IME in the [modification petition] litigation that served as support for the doctor's deposition was done in February of 2019.
>
> The new IME was done a year later.
>
> So had [WC Counsel] objected to it, more than likely [the WCJ] would have overruled [Claimant's] objection and permitted the IME to go forward anyhow.

Id. at 25.

WC Counsel responded that he understood the WCJ's rulings but preserved his objections for the record. *Id.* at 26. The WCJ then explained that even if she determined that the IME "was not proper and needed to be rescheduled[, WC Counsel] would [just] get notice of a new IME and [therefore, the parties] would be back [in court] again." *Id.* at 26-27. WC Counsel confirmed that the WCJ was correct. *Id.* at 27. Accordingly, the WCJ ruled as follows:

> So [,] let's move forward just to get some – I'm going to give you plenty of time. You'll have an opportunity to talk to your client about the content[s] of the IME since you were not present or notified about the IME.
>
> So [,] what I'm going to do is I'm going to order that [Employer] must move forward with the deposition of Dr. Fenichel within 120 days.
>
> . . . [T]hat should give you enough time to talk to your client in that period of time, send the report to [your expert,] Dr. Weiss[,] and get whatever opinions you want from [him].
>
> And then you will have [ninety] days after the date of the next hearing, which will be scheduled in 120 days. [You] will have [ninety] days after that date to complete any psychiatric evidence on behalf of [] Claimant.

Id. at 27.

At the next scheduled hearing on December 11, 2020, Employer moved for the admission of Dr. Fenichel's deposition transcript and related exhibits. N.T., 12/11/20, at

5. Claimant did not object. *Id.* at 6. Therein, Dr. Fenichel testified that she examined Claimant in 2018 and 2019, and both times, she believed that Claimant could return to work from a psychiatric perspective. Fenichel Dep. Tr., 8/20/20, at 9-10. She performed a third examination—the at-issue IME—on February 10, 2020, and noted a normal mental status finding. *Id.* at 10-11, 17-19. She opined that Claimant fully recovered from the adjustment disorder with mixed anxiety and depressed mood and explained that she would impose no restrictions on Claimant from a psychiatric perspective, and believed Claimant required no further psychiatric or psychological treatment. *Id.*

At the next hearing, WC Counsel moved for the admission of Dr. Weiss's deposition transcript and accompanying exhibits, and Employer did not object. N.T., 3/19/21, at 29-30. Therein, Dr. Weiss, a board-certified forensic psychiatrist, testified that Claimant had no signs of physical or mental distress, but his emotional expression was restricted, which Dr. Weiss opined was consistent with depression. Weiss Dep. Tr., 2/26/21, at 12. Additionally, during the evaluation, Claimant acknowledged that he had not been attending his psychotherapy sessions with Dr. Barbara Watson regularly. *Id.* at 15-16. Further, Claimant told Dr. Weiss that he is apprehensive as to how others view him due to his prosthesis, and that he had become a "recluse" because of the Covid-19 pandemic. *Id.* at 14-15. Claimant additionally told Dr. Weiss that he is constantly sad and reminded of the incident and injury. *Id.* at 16. *See also* Weiss Expert Report, 12/23/20, at 3. Dr. Weiss opined that, while Claimant's depressed mood had increased since his first examination in 2018, Claimant's post-traumatic symptoms decreased. Weiss Dep. Tr. at 18-19. From this, Dr. Weiss diagnosed Claimant with "Dysthymic Disorder (chronic depression) along with mild residuals" of post-traumatic stress disorder. Weiss Expert Report at 5. Pursuant to this diagnosis, Dr. Weiss opined that Claimant

should continue with psychotherapy and possibly begin to take antidepressant medications. *Id.*

After the admission of Dr. Weiss's report and deposition testimony, Claimant testified that at his third examination with Dr. Fenichel, he complained of severe depression and anxiety, while also feeling downtrodden, sad, and unhappy. N.T., 3/19/21, at 8. Additionally, Claimant informed Dr. Fenichel that he had not adjusted to the injury or even accepted that he was injured. *Id.* at 9. Put simply, Claimant testified that he constantly dreamed about being whole again and having a "normal life." *Id.* at 12. *See generally id.* at 10. Additionally, Claimant testified that he informed Dr. Fenichel that he "cut [him]self off" from friends and family, as well as his attorneys. *Id.* at 11-12. In short, Claimant described his depression as "crippling[.]" *Id.* at 13.

Claimant further testified that he had sought help from Dr. Watson in February 2020, but he stopped seeing her in March 2020 because of his worsening depression. *Id.* at 13-14. About a week prior to the March 2021 hearing, Claimant scheduled a psychiatry appointment, and he concluded that, although his symptoms were ongoing, he believed that Dr. Watson was helping him overcome his depression. *Id.* at 15. Finally, Claimant explained that he did not believe he could return to work at present at Employer's facility given his flashbacks and anxiety, as "just the thought of going back to the scene of the accident . . . bothers him, a]nd [he] . . . get[s] nervous and shake[s] just thinking of that." *Id.* at 28. However, Claimant did not rule out returning to Employer "further down the line." *Id.*

After these hearings, the WCJ asked both parties to submit proposed findings of fact, and both parties complied. Then, on September 15, 2021, the WCJ issued her decision granting Employer's petition to terminate. Therein, she rejected Claimant's testimony regarding his continuing disability. In doing so, she explained that "Claimant's

credibility [was] impacted negatively by infrequent psychological treatment visits." WCJ Op., 9/15/21, at 7. Further, the WCJ credited the testimony of Dr. Fenichel because she evaluated Claimant three times, and, in the WCJ's view, Dr. Fenichel's opinions were well-reasoned, logical, and supported by the results of the psychiatric evaluations. *Id.* at 8. In contrast, the WCJ rejected Dr. Weiss's testimony "whenever his opinions contradict[ed] the credible psychiatric opinions of Dr. Fenichel." *Id.* Specifically, the WCJ explained that Dr. Weiss's opinions were not well reasoned or logical because they were largely based on symptoms reported by Claimant, whom the WCJ did not credit, and were inconsistent with Dr. Fenichel's opinions. *Id.* Based upon these findings, the WCJ found that Claimant had "fully and completely recovered from his work-related injury, [] was able to return to unrestricted work activities[,] and required no further psychiatric treatment." *Id.* Thus, Employer sustained its burden, and the WCJ granted the termination petition. *See id.* at 9.

Claimant appealed to the Workers' Compensation Appeal Board ("WCAB"). Relevant to the instant appeal, Claimant, citing *Pa. State Univ. v. WCAB (Sox)*, 83 A.3d 1081, 1093-94 (Pa. Cmwlth. 2013) (holding a party cannot conduct *ex parte* communication in violation of a claimant's attorney-client and doctor-patient privileges), argued that the WCJ erred because Employer contacted Claimant *ex parte* to schedule the IME by Dr. Fenichel without the knowledge or consent of WC Counsel. The WCAB concluded that Claimant's reliance on *Sox* was misplaced as it involved the interplay of attorney-client privilege between counsel for an employer and physicians employed by the employer/client and doctor-patient privilege between the same physicians and their patient, who was also the claimant. WCAB Op., 7/21/22, at 2. Instead, the WCAB emphasized that, in the instant case, Dr. Fenichel examined Claimant three times. Further,

> [w]hile we certainly do not condone [Employer's] actions of contacting Claimant without the benefit of his counsel's foreknowledge, we do not believe that this situation rises to the level that a remand is required given the multiple examinations. Purportedly, Claimant had the benefit of his counsel's advice in two of the three examinations.

Id. at 2.

Instead, the WCAB explained, this case involved a violation of Pennsylvania Rule of Professional Conduct 4.2, which states that, in representing a client, "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." *Id.* at 2-3 (quoting Pa.R.P.C. 4.2). Citing *Keppol v. WCAB (Acme Markets, Inc.)*, No. 996 C.D. 2011, 2012 WL 8682066 (Pa. Cmwlth. Feb., 10, 2012), the WCAB concluded that a remand was not warranted as the conduct at issue was "not relevant to the issues before the WCJ and on appeal." *Id.* at 3 (quoting *Keppol*, 2012 WL 8682066, at *2). Consequently, the WCAB affirmed the decision of the WCJ granting Employer's termination petition. *Id.* at 9.

The Commonwealth Court unanimously affirmed in an unpublished memorandum decision. *See Thomas v. Sysco Foods (WCAB)*, No. 899 C.D. 2022, 2024 WL 1827305 (Pa. Cmwlth. Apr. 26, 2024). Claimant raised two issues on appeal, only one of which is relevant to the instant case, that being whether the report from and testimony regarding the at-issue IME should have been excluded from evidence because WC Counsel was not given notice of the scheduled IME. *Id.* at *11.

Addressing the merits of the issue,[7] the panel concluded that the WCJ did not commit an error of law or abuse her discretion in allowing the litigation of the termination

[7] The panel first concluded that Employer's contention that Claimant waived the issue was without merit. In doing so, the panel emphasized that "[b]ecause Claimant already objected to any evidence from Dr. Fenichel, there was nothing to be gained from objecting again since the WCJ already essentially overruled the same objection at the hearing." *Id.* at *13.

petition to proceed, despite the fact that WC Counsel did not receive notice of the IME. To begin, the panel noted that Claimant cited both Section 31.26 of the General Rules of Administrative Practice and Procedure ("GRAPP")[8] and Section 131.11 of the Special Rules of Administrative Practice and Procedure before WCJs ("Special Rules")[9] in support of his contention that administrative regulations require service also be made upon a party's counsel. Addressing these arguments, the panel noted that Section 31.26 of GRAPP was inapplicable in the instant case because the Special Rules supersede GRAPP. *Id.* at *14 (citing 34 Pa. Code § 111.2; *Stech v. Workmen's Comp. Appeal Bd. (MJS Equip. Co.)*, 678 A.2d 1243, 1244 (Pa. Cmwlth. 1996) ("[Employer] properly notes that WCJ proceedings are governed by the Special Rules . . . , which supersede [GRAPP].")).

However, the panel did agree that Section 131.11(c) of the Special Rules applied in workers' compensation matters. After noting that there were no cases directly on point, the panel explained that, first, it is important to "understand the role, if any, counsel plays in an IME." *Id.* at *15. The panel explained that a claimant has no right to have counsel present during an IME because a WCJ is the factfinder and can accept or reject the IME physician's testimony. *Id.* (citing *Maranc v. WCAB (Bienenfeld)*, 628 A.2d 522, 525 (Pa. Cmwlth. 1993), *appeal denied*, 642 A.2d 489 (Pa. 1994)). Further, the panel explained,

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[8] *See id.* at *7 (quoting 1 Pa. Code § 31.26 ("In a proceeding where an attorney has filed a submittal on behalf of a client or has filed an appearance under [Section] 31.24(b) (relating to notice of appearance), a notice or other written communication required to be served upon or furnished to the client shall also be served upon or furnished to the attorney (or one of the attorneys if the client is represented by more than one attorney) in the same manner as prescribed for his client, notwithstanding the fact that the communication may be furnished directly to the client.")).

[9] *See id.* (quoting 34 Pa. Code § 131.11(c) ("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.")).

> counsel can adequately protect [the claimant's] interest by deposing [the IME physician] regarding his conclusions. [] [C]ounsel has the right to cross-examine [the IME physician] during any hearing or deposition in order to challenge his findings, should they be contrary to [the claimant]. [The claimant] is also entitled to produce his own physician to rebut any conclusions formulated by [the IME physician].

Id. (alterations in original) (quoting *Maranc*, *supra*). Second, the panel explained that the Commonwealth Court, "albeit in a different context, [] 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." *Id.* at *15-16 (citing *Hale v. WCAB (Fleming Cos.)*, No. 1803 C.D. 2011, 2012 WL 8693120, at *12 (Pa. Cmwlth. June 4, 2012)).

Applying these principles to the issue presented, the panel explained that the WCJ postponed the proceedings for several months to allow WC Counsel "ample time to confer with his client." *Id.* at *16. Additionally, WC Counsel had the opportunity to participate in Dr. Fenichel's deposition and cross-examine her regarding her findings from the IME. *Id.* Further, Claimant was able to have Dr. Weiss review Dr. Fenichel's report and deposition and provide his own report and testimony. *Id.* "In other words, Claimant received all of the safeguards under *Maranc* and did not establish any actual prejudice or adverse impact from the lack of notice to Claimant's [WC Counsel] under *Hale*, particularly given this was Claimant's third IME with Dr. Fenichel." *Id.* Thus, the panel affirmed the decision of the WCAB.[10]

II. Issue and Standard of Review

We granted allowance of appeal to resolve the following issue:

> Should an employer, which contacts directly and requests and conducts a mental health examination of an injured worker *ex parte* and fails to notify the worker's counsel of record of the requested examination, be barred from utilizing the examination to alter the worker's benefits given:

[10] The panel also concluded that Dr. Fenichel's opinions were sufficient to carry Employer's burden of proof on the termination petition. *See generally id.* at *16-20.

a. Section 314 of the . . . Act prohibits counsel from attending a medical examination of his client despite pending ongoing adversarial litigation in violation [of] his client's constitutional right to counsel, and

b. The [Commonwealth] Court and [] Board's condoning of these *ex parte* violations without any consequence, severely undermines the remedial and humanitarian purposes of the Act, and may, in effect, encourage it?

Order, *Thomas v. Sysco Foods*, No. 151 EAL 2024, 328 A.3d 1004 (Pa. Nov. 5, 2024) (*per curiam*).

The issue on appeal involves interpretation of the Act and thereby constitutes a question of law over which our standard of review is *de novo* and our scope of review is plenary. *Commonwealth v. Zortman*, 22 A.3d 519, 522-23 (Pa. 2011). We further note that a court's standard of review of an agency decision is limited to determining whether there has been a constitutional violation, an error of law, or a violation of agency procedure, and whether necessary findings of fact are supported by substantial evidence. *Phoenixville Hosp. v. WCAB (Shoap)*, 81 A.3d 830, 838 (Pa. 2013); 2 Pa.C.S. § 704. We additionally emphasize that the Act "is remedial in nature and intended to benefit the worker, and, thus, should be construed liberally to effectuate its humanitarian objectives." *School Dist. of Phila. v. WCAB (Hilton)*, 117 A.3d 232, 242 (Pa. 2015) (citing *Phoenixville Hosp.*, 81 A.3d at 838).

III. Parties' Arguments

Claimant asks this Court to rectify what he describes as a constitutional deprivation of counsel inherent in Section 314(a) and its application by the lower courts. Claimant explains that Section 314(a) permits an employer to obtain an initial physical examination of an injured worker "at any time after injury" and prescribes that any subsequent examination is made "upon petition of the employer . . . as the [WCJ] shall deem necessary." Claimant's Brief at 12 (quoting 77 P.S. § 651). Claimant emphasizes that under the plain language of the Act, only the initial request to examine the injured worker

is mandatory, while all others are discretionary. *Id.* at 13. Further, Section 314(b) permits a health care provider of the employee's choosing and expense to "participate" in such examination but is silent regarding counsel's attendance. *Id.* at 13-14 (quoting 77 P.S. § 651).[11]

Regardless, Claimant contends that, as interpreted, Section 314(b) "forcibly strips the injured worker of the right to and protections of retained legal counsel[,]" impermissibly affecting their property right. *Id.* at 16-17 (citing *Baksalary v. Smith*, 579 F. Supp. 218, 224-25 (E.D.Pa. 1984) ("We find that when an individual must forego the use of his compensation benefits for as long as one year, even if he receives reimbursement at the end of that period, that individual has undergone the deprivation of a constitutionally protected property interest." (citing *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (explaining the interest of an individual in continued receipt of Social Security Insurance benefits "is a statutorily created 'property' interest protected by the Fifth Amendment[]")))). "To [the Claimant the] restrict[ion] or remov[al of] that fundamental right in the midst of legal action with the sole intent of depriving the injured worker of his or her property under color of law" raises serious concerns regarding how "courts below have applied it to the protected class of injured workers locked into the [Act] for all of their rights and remedies." *Id.* at 17.

With these precepts in mind, Claimant argues that by failing to notify his attorney of the requested IME and conducting it *ex parte*, Employer violated Claimant's right to and benefit of counsel. *Id.* While Claimant argues that the current IME procedure

[11] At this point in his brief, Claimant emphasizes that the prohibition on a claimant having counsel present during an IME sought under Section 314(a) violates the claimant's constitutional right to due process under the United States Constitution and the state statutory right to counsel in legal proceedings. *Id.* at 16. Thus, to Claimant, "[t]he contracted-for right to counsel to represent one's interests, particularly in litigation [concerning] one's property rights, should be viewed as fundamental to due process." *Id.* at 16.

constitutes an "unconstitutional deprivation of counsel[,]" Claimant also notes that Section 314(b) permits the presence of a healthcare provider of the claimant's choosing. *Id.* at 24-25. However, "absent the advice of counsel, injured workers may not know of this provision or whether it is recommended." *Id.* at 25. To that end, Claimant emphasizes that the Special Rules require that "[a]ny 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." *Id.* (quoting 34 Pa. Code § 131.11(c)). Claimant avers that this notice requirement is especially relevant in the instant case because the parties were in the middle of litigating a previously filed modification provision, where psychiatric experts, including Dr. Fenichel, were retained and testified. *Id.* Claimant emphasizes that Employer failed to release Dr. Fenichel's most-recent report until after Claimant took the deposition of his expert, Dr. Weiss, in the then-pending modification petition. *Id.*

Claimant argues that the intermediate court justified Employer's "egregious misconduct by misapprehension of the record[.]" *Id.* at 26. Specifically, Claimant contends that the intermediate court's reasoning that the WCJ postponed proceedings to allow WC Counsel time to confer with his client misapprehended the fact that the parties were present on a previously filed modification petition. *Id.* Thus, Claimant explains, the WCJ simply set the normal trial schedule. *Id.* Claimant argues that, in approving this conduct, the intermediate court essentially affirmed the practice of allowing an employer to directly contact a represented injured worker in a workers' compensation action in the midst of pending litigation and schedule an IME without consequence. *Id.* at 27.

Claimant then observes that, while there are no reported cases directly addressing the issue presented in this appeal, other provisions of Pennsylvania law require notice to counsel as a prerequisite. *Id.* For example, the GRAPP requires that all notice be served

on counsel of record. *Id.* at 27-28 (quoting 1 Pa. Code § 31.26). Claimant emphasizes that the "role of counsel in workers' compensation and other proceedings is to protect the rights of the injured worker, to counsel the worker, and to provide guidance concerning the legal issues involved." *Id.* at 28. Claimant avers that depriving an injured worker of counsel in these "so-called independent medical or psychiatrist exams . . . is inconsistent with the humanitarian aspects of this remedial statute." *Id.* at 29.

Claimant finally addresses the proper sanction for misconduct by an Employer or its agents. He explains that this Court has affirmed the inherent right of courts to impose sanctions. *Id.* at 29-30 (quoting *Davis v. SEPTA*, 680 A.2d 1223, 1226-27 (Pa. Cmwlth. 1996)). Indeed, the Act itself has "several levels of imposed sanctions against the injured worker resulting in immediate loss of his or her weekly benefits for simply failing to comply in certain circumstances." *Id.* at 30-32 (citing 77 P.S. §§ 651, 772; 34 Pa. Code §§ 131.11(c), 131.50(b)). Thus, Claimant asks this Court to adopt a bright line rule, finding that this sort of conduct is "irremediable other than to strike the fruit of the poisonous record for this blatant failure to notify counsel, particularly given [Claimant] was suffering from a significant mental health deficit related to the trauma he endured, causing avoidant behavior and severe depression." *Id.* at 33-34. Claimant explains this relief is appropriate, as the *ex parte* notice letter to Claimant likely threatened the suspension of benefits for failure to attend the examination by Dr. Fenichel.[12] In sum, Claimant asks this Court to: (1) reverse the intermediate court's order; (2) find that Section 314 allows a claimant's counsel to attend IMEs; (3) create a bright line rule excluding fruits of the

[12] Claimant notes that the notice of examination was never produced by Employer in discovery, and thus, was not appended to the Record. *See also supra* note 6.

poisonous tree where a party engages in *ex parte* communication and discovery; and (4) remand for a hearing on the costs of litigation pursuant to Section 440.[13] *Id.* at 35-36.

Conversely, Employer argues that Claimant "failed [to] properly raise and preserve his arguments[.]" Employer's Brief at 9. In support, Employer explains that it is well-settled that "an issue is waived unless it is preserved at every stage of the proceeding." *Id.* (citing *Wheeler v. WCAB (Reading Hosp. & Med. Ctr.)*, 829 A.2d 730, 735 (Pa. Cmwlth. 2003)). It emphasizes that "[l]egal issues and facts not presented to the factfinder cannot be asserted on appeal without sacrificing the integrity, efficiency, and orderly administration of the [workers' compensation] scheme of redress for a work-related injury or occupational disease." *Id.* at 9-10 (citing *DeMarco v. Jones & Laughlin Steel Corp.*, 522 A.2d 26, 29 (Pa. 1987)). Employer contends that because Claimant himself received notice of the IME, WC Counsel never presented any evidence to show that Claimant's third-party counsel never received notice, and Claimant did not continue to object to the admission of Dr. Fenichel's expert report and deposition testimony, Claimant's argument regarding WC Counsel's notice of the IME is waived.

Employer makes no attempt to meaningfully engage with Claimant's arguments on appeal, instead choosing to argue that Claimant had "ample opportunity to present

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[13] The Pennsylvania Association for Justice ("PAJ") filed an *amicus* brief in support of Claimant. The PAJ would have us go further than Appellant and argues that this Court should apply the "same safeguards" to an injured worker being examined as under our Rules of Civil Procedure, Amicus Brief at 14 (quoting Pa.R.C.P. 4010(i)), and asserts that this case "raises constitutional questions as to the right to counsel when rights are or may be infringed." *Id.* at 17. Finally, the PAJ argues that this Court should hold that, "absent a showing that there is no prejudice to a party, any evidence obtained without following proper procedures" should be inadmissible. *Id.* at 18-19. This is because "the entity that scheduled the IME knew – or certainly should have known – who [the] claimant's counsel [wa]s. [Therefore, t]hat entity failed to notify [the] claimant's counsel of the exam, and the consequences were a loss of benefits, the ultimate prejudice in a workers' compensation procedure." *Id.* at 19. Thus, "[w]here, as here, there is no explanation for the entity's failure to notify [the] claimant's counsel, and the prejudice is apparent, the evidence must be" excluded. *Id.*

evidence in opposition to [Employer's] termination petition based on Dr. Fenichel's" at-issue IME. *Id.* at 15. Employer maintains Claimant had the opportunity to avail himself of the safeguards afforded by counsel that were noted by the Commonwealth Court in *Maranc*. *Id.* Thus, Employer argues the intermediate court properly concluded that the WCJ did not commit an error of law or abuse its discretion as the factfinder in allowing the termination petition to proceed.[14] *Id.* at 15-16.

IV. Discussion

We must first address Employer's contention that Claimant waived his argument regarding lack of notice below. As our courts have repeatedly held, "[a]n issue must be preserved at every stage in the proceeding; otherwise, it is waived." *Nabisco Brands, Inc. v. WCAB (Tropello)*, 763 A.2d 555, 558 n.6 (Pa. Cmwlth. 2000). Further, "the strict doctrine of waiver is applicable to workers' compensation proceedings." *Mearion v. WCAB (Franklin Smelting & Refining Co.)*, 703 A.2d 1080, 1081 (Pa. Cmwlth. 1997), *appeal denied*, 725 A.2d 1223 (Pa. 1998). The purpose of the waiver doctrine is to ensure that the initial tribunal is "presented with all cognizable issues so that the 'integrity, efficiency, and orderly administration of the workmen's compensation scheme of redress for work-related injury' is preserved." *Smith v. WCAB (Concept Planners & Designers and Aetna Casualty Co.)*, 670 A.2d 1146, 1149 n.6 (Pa. 1996) (quoting *DeMarco*, 522 A.2d at 29).

As the Commonwealth Court aptly explained, "[w]hile our caselaw requires an issue to be raised at 'every **stage** of the proceeding' in order to be preserved, . . . Employer would have us interpret this as requiring a party raise an objection at every

[14] The remainder of Employer's brief argues that the WCJ's decision granting the termination petition was supported by substantial credible evidence and should not be overturned on appeal. *Id.* at 16-27. This issue was not included in our grant of allocatur and is therefore "beyond the scope of our present review." *Menkowitz v. Peerless Publ'ns, Inc.*, 211 A.3d 797, 809 n.12 (Pa. 2019).

opportunity in order to preserve it." *Thomas*, 2024 WL 1827305, at *5 (emphasis in original). Employer asserts this despite acknowledging that Claimant objected at the hearing that took place on May 14, 2020. Employer's Cmwlth. Ct. Brief at 20-21. Because Claimant already objected to any evidence from Dr. Fenichel, "there was nothing to be gained from objecting again since the WCJ already essentially overruled the same objection at the hearing." *Id.* at *6. Requiring Claimant to renew the same objection upon which the WCJ already ruled on three occasions does nothing to further this purpose.

More importantly, Claimant has continued to raise this issue on appeal at every **stage** of litigation. *Cf. GMS Mine Repair & Maint., Inc. v. Workers' Comp. Appeal Bd. (Way)*, 29 A.3d 1193, 1197 (Pa. Cmwlth. 2011) (holding employer's argument was waived for not raising it before the *Board*). After all, Claimant raised the issue in front of the WCJ, *see* N.T., 5/14/20, at 17 ("I never received notice of this examination of Dr. Fenichel. So[,] I'm objecting to her being used as an expert at all."), the Board, *see* On-Line Appeal and Proof of Service, 10/5/21, at 9 ("Claimant objected to the petition for termination and, specifically, Dr. Fenichel's proposed report and testimony wherein Employer contacted Claimant directly to schedule this IME without notifying Claimant's counsel, prejudicing Claimant irreparably."), the Commonwealth Court, *see* Pet. for Review in the Cmwlth. Ct., 8/22/22, at 3 (asking "[w]hether the [] Board committed [an] error of law in failing to reverse the [d]ecision of the WCJ and/or sustain [Claimant's] objections to the filing and prosecution of [Employer's] termination petition and/or strike/suppress as a witness its expert, where [Employer] *ex parte* contacted [Claimant] while the parties were in litigation on a [p]etition for [m]odification, in order to schedule the alleged independent psychiatrist examination with its expert, completely bypassing [Claimant's WC] counsel[]"), and now this Court. *See* Pet. for Allowance of Appeal, 6/3/24, at 3 (asking whether "an employer, which contacts directly and requests and conducts a mental health examination of an

injured worker *ex parte* and fails to notify the worker's counsel of record of the requested examination, [should] be barred from utilizing the examination to alter the worker's benefits[]"). Therefore, we decline to find Claimant's issue waived.

Turning to the merits of the question for which we granted review, as an initial matter, we note that the Special Rules govern workers' compensation matters and supersede the GRAPP. *See* 34 Pa. Code § 111.2(a) ("This chapter is intended to supersede 1 Pa. Code Part II (relating to G[RAPP]). The G[RAPP] are not applicable to activities and proceedings before the Board."). Under the Special Rules, it is well-established that "[a]ny 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." 34 Pa. Code § 131.11(c). From this, it is evident that an employer is required to serve a claimant's counsel with any notice, including notice of an IME. Because WC Counsel did not receive notice of Dr. Fenichel's third IME, Employer clearly failed to comply with the mandate of Section 131.11(c).

We must now address what, if any, consequences Employer faces in light of its violation. In addressing this question, it is important to consider the role of legal counsel in workers' compensation matters. The purpose of the Act is to protect the rights of injured workers. *See Hilton*, 117 A.3d at 242 (explaining the Act "is remedial in nature and intended to benefit the worker"). Accordingly, the Act mandates that a claimant be afforded advice, guidance, information, and counsel to ensure that the purpose of the Act is not vitiated. While there is no right to have counsel present during an IME,[15] *see*

[15] While Claimant asks this Court to overturn *Maranc* and its progeny and hold that a Claimant is entitled to have counsel present during IMEs, we decline to do so, as Claimant failed to object on this basis during the termination hearing, and thus, the issue is waived. *See* Pa.R.A.P. 302(a) ("Issues not raised in the trial court are waived and cannot be raised for the first time on appeal."). Further, "[t]his Court did not grant allocatur to consider th[is] issue . . . and thus [it is] beyond the scope of our present review." *Menkowitz*, 211 A.3d at 809 n.12.

Maranc, 628 A.2d at 524 ("Nowhere in Section 314 or elsewhere in the [A]ct does a claimant have the right to have his attorney present during an independent medical examination."), counsel is obligated to inform and advise a claimant about the procedural protections outlined in the Act and this Court's case law. *See, e.g.*, Pa.R.P.C. Preamble and Scope.

In the context of an IME, a claimant's rights include, but are not limited, to: (1) having an independent medical expert present, 77 P.S. § 651(b) ("In the case of a physical examination, the employe shall be entitled to have a health care provider of his own selection . . . participate in such examination[.]"); (2) declining attendance of a second or subsequent IME without petition of employer, 77 P.S. § 651(a) (permitting second and subsequent IMEs only upon "petition of employer" and that the WCJ deems "reasonable and necessary"); and (3) asking for a different date due to scheduling conflicts. *See id.* (explaining that, only if a claimant does not have a "reasonable cause or excuse" to not attend a scheduled IME, may a WCJ terminate benefits). Further, 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. In short, the role of counsel is the same as it is in all other legal contexts: to advise clients about how best to protect their rights while cooperating as required by law. *See* Pa.R.P.C. Preamble and Scope ("As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of

honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or others.").

The intermediate court reasoned that Claimant was not prejudiced by this lack of notice. *See Thomas*, 2024 WL 1827305, at *7 (explaining that the WCJ postponed the proceedings to allow WC Counsel to confer with his client, depose Dr. Fenichel and cross-examine her, find his own expert and provide his own report and testimony). However, such prejudice is nearly impossible to prove *post hoc*, and further permitting such gamesmanship undermines the humanitarian and remedial purposes of the Act. For example, in the instant case, the failure to provide notice of the scheduling of a third-party IME to WC Counsel allowed Employer to have access to additional information that would normally be unavailable to counsel during the pendency of the ongoing litigation. Employer obtained the at-issue IME from the third-party litigation while litigating its modification petition and promptly decided to use it. Consequently, the lack of notice provided WC Counsel with no opportunity to object to the time, place, or manner of the IME, or, perhaps more importantly, the opportunity to litigate whether an additional IME was permissible at all.[16]

The consequence of this lack of notice resulted in the "ultimate prejudice in a workers' compensation procedure[,]" Amicus Brief at 19, namely, the total loss of benefits. Given the fact that the harms of these forms of prejudice are nearly impossible to prove—especially once an IME has been conducted and a report has been written—we hold that

[16] There is nothing in the record indicating that Employer obtained the "leave of court" required to conduct this third subsequent IME pursuant to the Act. *See* 77 P.S. § 651 ("The workers' compensation judge may at any time after such first examination, *upon petition of the employer*, order the employe to submit himself to further physical examinations or expert interviews[.]" (emphasis added)). *See also* N.T., 5/14/20, at 22 ("I would have objected to the examination while we were in litigation[.]"). This is likely because the subject IME was conducted during the course of third-party litigation, highlighting the issues with permitting Employer to utilize the subject IME in this litigation.

a lack of notice of an IME to workers' compensation counsel must be presumed to have been prejudicial.[17] 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*[.]" *Hilton*, 117 A.3d at 242 (emphasis added).

The only remaining task is to determine the appropriate remedy for such a prejudicial violation of the rules. Our courts have long held that once information "is in the open, the bell has been rung, and cannot be unrung by a later appeal." *Commonwealth v. Harris*, 32 A.3d 243, 249 (Pa. 2011). In this regard, "once material has been disclosed, any privilege is effectively destroyed." *Id.* In *Harris*, the Commonwealth hired a doctor who had previously treated and testified for the defendant as an expert witness. In determining that the Commonwealth was prohibited from calling that doctor as an expert, we explained that the doctor "may well be in possession of material that remains subject to privilege, and the public interest will best be served by sustaining the remaining privilege." *Id.* at 252.

In the instant case, as in *Harris*, the bell "cannot be unrung[.]" *Id.* at 249. While the at-issue IME should never have been admitted at the hearing in front of the WCJ in light of Employer's complete violation of the mandates of Section 131.11(c), it would be

[17] In his dissenting opinion, Justice Wecht presents a hypothetical in which he contends that "it can be shown that the lack of notice to counsel had no impact on the IME physician's conclusions." Dissenting Op. at 5 (Wecht, J., dissenting). In that hypothetical scenario, the claimant would have "called his attorney after receiving the scheduling notice and informed him of the upcoming IME[.]" *Id.* While Justice Wecht assumes that under the rule announced by this Court today, prejudice would be presumed, it would not, as counsel essentially received actual notice and had a meaningful opportunity to advise the claimant before the IME. With that said, the employer still would have violated the mandate of Section 131.11(c). *See* 34 Pa. Code § 131.11(c) ("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.").

illogical to permit Dr. Fenichel to conduct an additional IME with full knowledge of her at-issue IME report or for Employer to be permitted to utilize her as an expert, after she received the now excluded information via impermissible means. While Employer cites *Maranc* for the proposition that many potential issues with an IME could be resolved though deposing or cross-examining the doctor, *see Maranc*, 628 A.2d at 525 (explaining that a claimant's interest can be protected by deposing and cross-examining an expert, and by producing their own physician to rebut the employer's expert's conclusions), no amount of cross-examination can remove impermissible knowledge from that doctor's memory. As in *Harris*, it would be impossible to expect Dr. Fenichel to completely ignore her previous examinations and findings as well as everything that Claimant may have told her during this third, impermissible IME. The only way to remedy this error is to preclude Employer from utilizing Dr. Fenichel or her IME reports.

This conclusion is supported by our interpretation of the Rules of Civil Procedure. Although those rules are not controlling in workers' compensation proceedings, they may be instructive in disposing of issues arising out of such proceedings. *See Romaine v. Workers' Comp. Appeal Bd. (Bryn Mawr Chateau Nursing Home)*, 901 A.2d 477, 485 (Pa. 2006). Pennsylvania Rule of Civil Procedure 4003.6 permits attorneys to obtain information "from the treating physician of a party only upon written consent of that party or" through an authorized method of discovery. Pa.R.C.P. 4003.6(a). The rule then lists three relationships in which the rule does not prevent an attorney from obtaining information from a treating physician, including, relevantly, when a treating physician is the attorney's client. Pa.R.C.P. 4003.6(1).

In *Mertis v. Oh*, 317 A.3d 529 (Pa. 2024), we were tasked with determining whether this exception to Rule 4003.6 (the client exception) permitted "an attorney to obtain information outside the discovery process from one of the plaintiff's nonparty treating

physicians, who [became] the attorney's client after another attorney in the same law firm became previously engaged to represent a named defendant physician in the same medical malpractice action." *Id.* at 530. In that case, a patient filed a medical malpractice action against an anesthesiologist who the patient alleged negligently administered a localized anesthetic to the patient's knee prior to surgery. *Id.* at 532. The defendant anesthesiologist ultimately retained counsel. *Id.* As part of the malpractice action, the patient served a subpoena on the treating surgeon who performed the surgery on the patient's knee. *Id.* Consequently, the treating surgeon also sought counsel and ultimately retained an attorney from the same firm as the defendant anesthesiologist. *Id.*

We concluded that the law firm's concurrent representation of both the defendant anesthesiologist and the treating surgeon allowed impermissible *ex parte* communication. *See generally id.* at 533-34. This was so because the defense was permitted access to information that could only be obtained otherwise through authorized discovery that would be limited to material and pertinent information. *Id.* Similarly, in the instant case, Employer was permitted access to information—the at-issue IME—that was impermissibly obtained. Rather than request a third IME in the context of the workers' compensation litigation, Employer decided to bootstrap a termination petition to an IME that was conducted for a completely different purpose.

Further, as highlighted in the Superior Court's decision in *Marek v. Ketyer*, 733 A.2d 1268 (Pa. Super. 1999), our prohibition on *ex parte* communications protects a number of things, including "prevent[ing] disclosure of irrelevant information about the patient's medical history . . . and guards against defense counsel attempting to improperly influence the physician or to dissuade the physician from testifying." *Id.* (citing *Marek*, 733 A.2d at 1270). Thus, in *Mertis*, we held that a law firm was not permitted to obtain information from a nonparty treating physician unless the firm went through the proper

discovery methods. *Id.* at 545. To hold otherwise, we explained would create a "loophole" that would permit opposing parties to learn information from their representation of third parties. *Id.* at 544. To permit Employer to utilize the at-issue IME would, likewise, create a loophole that would allow litigants to learn otherwise protected information from their representation of third parties.

V. Conclusion

In light of the foregoing, we reverse the order of the Commonwealth Court and vacate the WCJ's order granting Employer's termination petition. Should Employer wish to move forward with a new termination petition, it must provide proper notice to Claimant and choose a new expert with whom a new IME is to be conducted.

Claimant's Application for Leave to File Post-Argument Submission is denied. *See supra* note 6.

Chief Justice Todd and Justices Donohue, Dougherty and McCaffery join the opinion.

Justice Wecht files a dissenting opinion.

Justice Brobson files a dissenting opinion.