

3361 Library

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3680
FACSIMILE: 803-253-6283

April 14, 1989

E. Ross Huff, Jr.
State Workers' Compensation Fund
Post Office Box 102100
Columbia, South Carolina 29221-5000

Dear Mr. Huff:

You have requested an opinion on the issue of whether medical records maintained by the South Carolina Department of Mental Health should be disclosed to the State Worker's Compensation Fund. You have directed our attention to S.C. Code § 42-15-60, § 42-15-70, § 42-15-80, § 42-15-95, and § 44-23-1090 as the code sections which control this question and have requested that we opine as to "which section of law would be controlling and whether or not these records are discoverable and thus available to the defendants in the defense of a workers' compensation claim."

South Carolina Code § 44-23-1090 (1976, as amended) in pertinent part provides "[a]ll ... records and reports made for the purpose of [Chapter 23 of Title 44] Chapter 9, Chapter 11, Chapter 13, Article 1 of Chapter 15, Chapter 17 or Chapter 27, and directly or indirectly identifying a patient or trainee or a former patient or trainee ... shall be kept confidential" The Chapters designated therein include, essentially, all provisions of the South Carolina Code relating to the South Carolina Department of Mental Health. Thus, it appears that the General Assembly intended that any and all documents or records which identify a person either directly or indirectly as a patient or ex-patient of the Department are to be impressed by law with confidentiality. ¹ Section 44-23-1090 goes on to make an unauthorized disclosure a misdemeanor carrying a penalty of a fine of not more than Five Hundred (\$500.00) Dollars or imprisonment for not more than one year, or both.

South Carolina Code § 42-15-95 (1976, as amended) provides:

¹ Section 44-23-1090 provides several specific exceptions to the cloak of confidentiality, several of which will be addressed hereinafter.

E. Ross Huff, Jr.
April 14, 1989
Page Two

All information compiled by any treatment facility pertaining directly to a workers' compensation claim shall be made available to the insurance carrier, the employer, the employee, their attorneys or the South Carolina Industrial Commission, upon request.

The seminal inquiry is whether S.C. Code § 42-15-95 requires the Department of Mental Health to release directly to the Industrial Commission, or others named in § 42-15-95, medical records of a patient in violation of S.C. Code § 44-23-1090, a criminal, non-disclosure statute.

In interpreting statutes the primary consideration is to ascertain the legislative intent. Multi-Cinema Ltd. v. S.C. Tax Commission, 292 S.C. 411, 357 S.E. 2d 6 (1987); Garris v. Cincinnati Ins. Co., 280 S.C. 149, 311 S.E. 2d 723 (1984). Did the General Assembly intend, by enacting S.C. Code § 42-15-95² to create an additional exception to, or impliedly repeal, S.C. Code § 44-23-1090? ² As you know, subsequent legislation is not presumed to effectuate a repeal of existing law in the absence of an expressed intent. Repeal by implication can only be found where no reasonable construction can be given to two statutes, other than that they are in irreconcilable conflict with each other. Busby v. State Farm Mut. Auto Ins. Co., 280 S.C. 330, 312 S.E. 2d 716 (Ct. App. 1984).

I cannot conclude that the General Assembly expressly intended the enactment of S.C. Code § 42-15-95 to create an additional exception to S.C. Code § 44-23-1090. As noted above, § 44-23-1090 is a penal statute and, as such, must be strictly construed. Lund v. Gray Line Water Tours, Inc. 277 S.C. 447, 289 S.E. 2d 404 (1982); 82 C.J.S. Statutes § 389. Additionally, §44-23-1090 mandates that records of the Department of Mental Health be kept confidential and not disclosed. Thus, as in other jurisdictions, there exists a strong public policy against disclosure of records identifying those who have been treated for mental health problems. Note, 1984 Op. Atty. Gen. No. 22; 1984 Op. Atty. Gen. No. 85.

² South Carolina Code § 42-15-95 was created by Act No. 318 of 1980 and was effective as of March 4, 1980. Thus, § 42-15-95 was enacted subsequently to § 44-23-1090. Generally, when two statutes are inconsistent the latter prevails. S.C.E. & G. v. S.C. Public Service Authority, 215 S.C. 193, 54 S.E. 2d 777 (1949).

E. Ross Huff, Jr.
April 14, 1989
Page Three

Therefore, it is the opinion of this Office that S.C. Code § 42-15-95 does not allow the Industrial Commission to obtain directly from the South Carolina Department of Mental Health medical records of a patient in violation of S.C. Code § 44-23-1090, unless one of the specific exceptions § 44-23-1090 are triggered.

Next, one must determine whether the medical records can be obtained without violating S.C. Code § 44-23-1090. There appear to be several mechanisms whereby these medical records may be discoverable.

First, one of the exceptions to S.C. Code § 44-23-1090 may be implicated. For example, an individual or his guardian may consent to the disclosure of records pursuant to § 44-23-1090(1) or a court may order the disclosure of records pursuant to § 44-23-1090(3), which provides:

(3) A court may direct, upon its determination that disclosure is necessary for the conduct of proceedings before it and that failure to make disclosure would be contrary to the public interest;

In any event the question of whether a specific exception applies is beyond the scope of this opinion. 3

Second, the Industrial Commission may obtain the desired records through the use of the Industrial Commission's subpoena power.

The Industrial Commission has explicit authority to issue subpoenas in connection with any proceeding before it. S.C. Code § 42-3-150. Section 42-3-150 additionally prescribes the procedural mechanism for enforcement of the subpoenas by the Industrial Commission. 4 Thus, the Industrial Commission could

3 One may even argue that S.C. Code § 44-23-1090 (4) applies in that one who is seeking compensation may be an individual whose "welfare" (i.e. the receipt of compensation) would be furthered by the disclosure of records. If this were true one would expect the claimant to consent to disclosure.

4 The authority of the Industrial Commission to subpoena documents is broad; nevertheless, for the reasons set out in this Opinion, this procedure cannot be used to obtain directly medical records from the Department of Mental Health in violation of S.C. Code § 44-23-1090.

E. Ross Huff, Jr.
April 14, 1989
Page Four

issue a subpoena to the claimant directing the production of medical records. 5 Pursuant to the authority of S.C. Code § 42-3-150, a subpoena directed to a party for the production of the party's medical records should be effective. The enforcement tools found in § 42-3-150 are available to the Commission. Section 44-23-1090 does not appear to create a privilege in favor of the patient; therefore, a claimant may well be compelled to produce a copy of his medical records. 6 This approach may best serve the needs of the Industrial Commission.

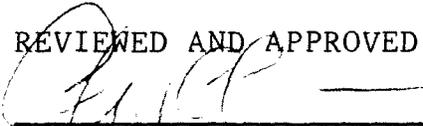
Thus, while this conclusion is not free from doubt, I conclude that S.C. Code § 42-15-95 does not authorize the Industrial Commission to obtain patient records directly from the Department of Mental Health unless one of the exceptions to S.C. Code § 44-23-1090 applies. 7 The better approach appears to be to seek the medical records directly from the patient/claimant.

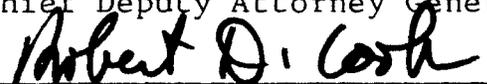
Sincerely yours,


CHARLES W. GAMBRELL, JR.
Deputy Attorney General

CWGJr:kh

REVIEWED AND APPROVED BY:


Edwin E. Evans
Chief Deputy Attorney General


Robert D. Cook
Executive Assistant for Opinions

5 This is the approach advised by our Office in connection with obtaining income tax records maintained by the South Carolina Tax Commission in proceedings before the Industrial Commission. 1986 Op. Atty. Gen. No. 11.

6 The claimant could not avoid an appropriate subpoena simply by claiming that he did not possess a copy of his medical records.

7 I caution that the conclusions of this letter should not be read to indicate that if the Department of Mental Health were to turn over records a violation of § 44-23-1090 would occur.