COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS.:** 007173-04 046691-04 046692-04
Eugene Young	Employee
Evans Delivery	Employer
Travelers Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Costigan, Horan and Fabricant)

The case was heard by Administrative Judge Brendemuehl.

APPEARANCES

Seth J. Elin, Esq., for the employee
Gerard S. Lobosco, Esq., and Joseph P. Bernhardt, Esq., for the insurer at hearing
Nicole M. Edmonds, Esq., for the insurer on appeal

COSTIGAN, J. The insurer appeals from a decision in which the administrative judge found the employee sustained a compensable left shoulder injury on or about January 1, 2004 and awarded ongoing § 34 total incapacity benefits.[1] The insurer contends certain of the judge's evidentiary rulings were improper and violative of its due process rights. We agree and, for the reasons set forth, recommit the case for further hearing.[2]

By way of background, we first summarize the facts found by the judge. In July 2001, the employee, a truck driver, injured his left upper extremity at work when he tore his rotator cuff and partially tore his distal biceps. He underwent surgery for the rotator cuff injury, performed by Dr. Kevin S. Bowman, and had non-surgical treatment for the biceps tear. The employee returned to work eight or nine months later, with restrictions against overhead activity and lifting

[1] The judge denied and dismissed claims in the alternative for dates of injury in February and May 2004. (Dec. 22.)

[2] We summarily affirm the judge's findings and determination that Eugene Young was an employee and not an independent contractor. (Dec. 10-15.)

over ten pounds. As the pain in his left arm persisted, the employee continued to treat with Dr. Bowman, who administered cortisone injections. The employee's symptoms continued through 2002 and 2003. As of February 24, 2004, when he saw Dr. Bowman, the employee complained of severe left upper extremity pain, with weakness and numbness in his left hand. Dr. Bowman attributed the increase in the employee's symptoms to his work activities between September 2003 and February 2004. (Dec. 15-17.)

On April 2, 2004,[3] Eugene Young filed a claim against Travelers,[4] citing a date of injury of *January 1, 2004*, (see footnote 9, infra), and seeking, inter alia, § 34 total incapacity benefits from September 17, 2001 to April 2, 2003 and "from date of surgery to date and continuing;" § 35 partial incapacity benefits from April 2, 2003 and continuing [sic]; and medical benefits under §§ 13 and 30.[5] (Dec. 4; Employee Ex. 17; emphasis added.) Notwithstanding the date of injury alleged, attached to the claim, as required by 452 Code Mass. Regs. § 1.07(2), were medical records and reports covering the period from *July 30, 2001 through September 4, 2003* [sic]. Id.

At the October 26, 2004 § 10A conference, the claimant again identified January 1, 2004 as the date of injury, but claimed § 34 benefits only from and after the "date of surgery" then being

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[3] The original claim form was dated March 31, 2004 but was time-stamped as received by the department on April 2, 2004. We take judicial notice of that document contained in the Board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[4] In January 2004, prior to his claim against Travelers, the employee filed a claim against Casualty Reciprocal Exchange, seeking benefits for his left shoulder injury allegedly sustained while working for Evans Delivery on July 11, 2001. That claim was withdrawn by the employee prior to conciliation.

[5] We note that the "Employee's claim, dated March 31, 2004," admitted into evidence as Employee Ex. 17, (Dec. 4), is not the original, time-stamped claim, nor even a copy of that document. See Rizzo, supra. Employee Ex. 17 differs from the original claim in one material respect: § 34 benefits are sought from September 17, 2001 to April 2, *2002*, and § 35 benefits from April 2, *2002* and continuing. It is no trifling matter that an apparently altered document was placed into evidence by employee's counsel. See G. L. c. 152, § 14(2). In any event, the judge identified the employee's claim as seeking "Section 34, temporary total incapacity benefits from January 25, 2005 and to date and continuing or in the alternative Section 35 partial incapacity benefits. . . ." (Dec. 6.)

proposed; he also sought authorization for that surgery under §§ 13 and 30. Travelers denied liability, disability, extent of disability, and causal relationship; it also denied that Mr. Young was an employee under G. L. c. 152, § 1(4), and raised the issue of average weekly wage. The judge rejected the insurer's independent contractor defense. By conference order filed on October 29, 2004, she ordered the insurer to pay medical benefits, including the surgical procedure recommended by the employee's treating physician, Dr. Bowman, and she awarded the employee § 34 benefits of $679.92, based on an average weekly wage of $1,133.20, for an eight-week period to commence on the date of surgery. Both parties appealed. (Dec. 6.)

Because the insurer "did not present any conflicting medical evidence" at the conference, the judge determined there was no medical issue in dispute and no impartial medical examination under § 11A was conducted. (Dec. 7.) At hearing, the parties were allowed to introduce their respective expert medical opinions, and it was in this arena that the evidentiary skirmish began.

On December 28, 2005, the employee submitted a set of documents titled, "Employee's Hearing Medical Exhibits," which included, inter alia, the treatment notes of Dr. Bowman covering the period July 30, 2001 to September 2, 2004, and the doctor's curriculum vitae, but no narrative report. (Dec. 3; Employee Ex. 16[A].) The insurer deposed Dr. Bowman for the purpose of cross-examination on March 30, 2006.[6] (Dec. 7.) Shortly thereafter, a dispute arose as to Travelers' coverage of the employer. The judge found:

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[6] In response to employee's counsel's questioning, Dr. Bowman agreed the employee's left upper extremity pain increased, and that his condition worsened, in the period between office visits on February 24, 2004 and September 2, 2004. (March 30, 2006 Bowman Dep. 53-54.) When employee's counsel asked the doctor to assume, as the employee supposedly had testified, that the employee's job involved constant, heavy physical exertion with his arms, that he had not adhered to light duty restrictions the doctor had imposed, and that there were several specific incidents at work, including in November 2004 and May 2005 [sic], when the employee experienced increased left arm and shoulder pain, Dr. Bowman opined that "those activities could exacerbate his condition to both the left shoulder and the left elbow, including the biceps." (Id. at 56-58.) When asked whether he believed "to a reasonable degree of medical certainty that more likely than not those types of activities on a regular basis would aggravate or exacerbate a chronic shoulder bicep elbow [sic] condition," Dr. Bowman testified, "I do believe that." (Id. at 58.) The employee, however, was terminated from his job in late November 2004. (August 15, 2005 Tr. 22-23, 109-111; September 30, 2005 Tr. 21, 31-32.)

> In the course of the initial deposition of Dr. Kevin Bowman there was some discussion of an alleged aggravation of the employee's injury through November 2004. In April 2006, after the deposition, counsel for the insurer, Attorney Lobosco, advised employee counsel for the first time that there was no Workers' Comp coverage after July 27, 2004, and that he intended to file a motion to join the Workers' Compensation Trust Fund. A motion to join the Trust Fund was filed and after hearing, the motion was denied, given the prejudice to the Trust Fund. Attorney Lobosco never filed a motion to raise coverage as a defense at the time.

(Dec. 8.)[7]

> At the January 22, 2007, hearing on the insurer's renewed joinder motions, the employee offered additional medical reports into evidence: a 2004 "Attending Physician's Statement of Disability," and a July 13, 2006 narrative report, both of Dr. Kevin S. Bowman, and a January 19, 2007 narrative report of Dr. Charles Fatallah. (Employee Ex. 16[B].) The insurer decided a second deposition of Dr. Bowman was necessary, as his July 13, 2006[8] report offered a causation analysis markedly different from the one to which the doctor testified in March 2006.[9] [9] Over the employee's objection, the judge

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[7] In fact, in December 2006, Travelers' successor counsel filed a "Renewal of Its Motion to Add the Defense of 'No Coverage,' of its Motion to Reconsider the Denial of the Insurer's Motion to Join the Trust Fund and Commerce and Industry Insurance Company, and of its Motion to Join AIG Insurance Company. . . ." By order dated January 23, 2007 and contained in the board file, see Rizzo, supra, the judge ruled, "Traveler's [sic] motion to raise the defense of lack of coverage after July 27, 2004 is allowed. Parties are to confer as to what, if any, evidence will be submitted on the issue and submit all documents by March 01, 2007." In that same order, the judge again denied Travelers' motions to join AIG, Commerce and Industry and the Workers' Compensation Trust Fund, although it was established that Travelers' coverage had ceased as of July 27, 2004. Notwithstanding that fact, and that the employee had continued to work until late November 2004, employee's counsel inexplicably mounted a vigorous objection to the joinder motions.

[8] Dr. Bowman later explained the "new" report was actually written in January 2007. (March 6, 2007 Bowman Dep. 24.)

[9] Doctor Bowman's "new" report, addressed to employee's counsel, stated in part:

> allowed the insurer to re-depose Dr. Bowman, and to depose Dr. Fatallah, but she limited the scope of the depositions "to cross examination of material contained in the employee's recently submitted additional medical evidence and to the issue of when and whether the employee's work activities aggravated/caused the employee's alleged disability." (Dec. 7.)

Just prior to the start of Dr. Bowman's second deposition on March 6, 2007, when insurer's counsel was reviewing the doctor's medical chart on the employee, which Dr. Bowman had voluntarily provided, employee's counsel intervened and removed certain documents from the doctor's file. The documents relevant to this discussion were several letters from employee's counsel to Dr. Bowman, and the doctor's original narrative report dated July 13, 2006, which Dr. Bowman had amended with the subsequent report. (March 6, 2007 Bowman Dep. 17-24; Exs. to Dep. 1 and 2.)

Once on the record, the following clash ensued:

> Mr. Bernhardt: Doctor, I've only ever seen one, and that's the one-age report. Could I see the one that's two pages?
>
> Mr. Elin: *Actually, Doctor, I instruct you not to provide that. That is attorney work product. I paid an expense*

I am writing in response to your letter dated April 24, 2006 regarding Eugene Young. At the end of your letter you asked: "I am looking to obtain from you a short note that confirms that there was an increase in Mr. Young's symptomatology between your visit in September of 2003 and February of 2004, and that this increase was the cause of his ongoing disability as of when you saw him in September of 2004." On the Attending Physician statement I completed in 2004, I identify [sic] a work-related aggravation of January 1, 2004. While I understand no specific event occurred on that day, I used this date to represent that Mr. Young's condition became worse prior to my February 2004 visit. It is my opinion that this time frame is the cause of Mr. Young's disability.

After reviewing my notes, he does complain of increasing and severe pain at both the 2004 appointments. For this reason, *I would agree with your claim that there was an increase in Mr. Young's symptomatology between the visits in September in 2003 and the visit in February.*

(Employee Ex. 16B [Bowman July 13, 2006 report]; emphasis added.)

for that report so that it's certainly attorney work product, but I'm more than happy to identify that.

. . .

Mr. Bernhardt: Doctor, the document you were just showing me, what is that - or you were going to show me, what is that?

Mr. Elin: Doctor Bowman, please don't repond to that. We're not going to address that document unless Judge Brendemuehl identifies that it's appropriate to do so.

Mr. Bernhardt: Doctor, you can answer the question. What was that document?

Mr. Elin: Doctor, don't answer the question. The Judge will determine whether you need to answer that question or not.

. . .

Dr. Bowman: I don't know what you guys want me to do in this matter, okay?

Mr. Bernhardt: Well, I'll tell you this: I will be moving to see that document and ask you questions about it so if you don't answer the questions today and the Judge rules in my favor, we'll be back here again for you to answer questions.

Mr. Elin: That is a possibility, and if that happens *we'll pay the expense required to come back.*

Mr. Bernhardt: Well, I won't agree to that.

Mr. Elin: Okay.

Mr. Bernhardt: But Doctor, it would be much simpler if we could do it today and Attorney Elin can state his objections and the Judge can rule on them. That's typically what happens in these settings.

Mr. Elin: Doctor, it's not typically what happens in these settings. *As the treating doctor of Eugene Young, as someone who has authored reports on his behalf from my office seeking your assistance, if anything, you are my witness* **,**and I'm asking you to not respond with regards to that document. You should not respond to it.
It's attorney work product, and Judge Brendemuehl will identify - she will find that it is

attorney work product. If she finds otherwise, we'll come back, and *we will certainly pay the expense associated with you having to go through a few more questions.*

. . .

Mr. Bernhardt: Do you believe that what you wrote in that [original] report of July 13, 2006 - sitting here today, do you believe that report is accurate?

Mr. Elin: Don't answer that question, Doctor. We're not going to talk at all about the contents of the report until Judge Brendemuehl rules. And everything you've identified, Doctor Bowman, fully, basically, concludes [sic] it's attorney work product, and you're not going to be talking about that report.

Mr. Bernhardt: Doctor, as you may understand, we have a disagreement about that.

Dr. Bowman: I understand that you do.

Mr. Bernhardt: So it's your decision what you want to do.

Mr. Elin: Respectfully, Doctor, it's Judge Brendemuehl's decision. It's attorney work product, and Attorney Bernhardt should clearly know that. And I'm really amazed that he's continuing to try to go down this road, and I don't think Judge Brendemuehl is going be too pleased.

Mr. Bernhardt: As I said earlier off the record, if you have some case law, I'll be happy to review it. As far as I'm concerned, you're not permitted to withhold any information that's in the doctor's chart. All of this was contained in the doctor's chart. You withheld it from me and did not allow me the opportunity to review it which I believe is improper.

Mr. Elin: He didn't withhold it from you. I . . . instructed him not to.

. . .

Mr. Elin: Oh, okay. Fine. You can certainly say I did, and I did because *Doctor Bowman just identified he wrote a letter addressed to me after a correspondence from me which, I, meaning my office, paid for that report. That is pure attorney work product. There is [sic] no ifs, ands, or buts, and I'm amazed you're questioning this.*

(March 6, 2007 Bowman Dep., 15-17, 21-23; emphasis added.)

Although the subject of the dispute in this quoted exchange was the doctor's original July 13, 2006 report, at the outset of the deposition, the parties marked for identification certain letters employee's counsel had sent to Dr. Bowman, which were to be provided to the judge for her in-camera review. The insurer contended then, and does so now, that the correspondence from the employee's attorney to the employee's treating physician precipitated the change in the doctor's causation opinion and, therefore, it was entitled to review that correspondence, as well as the doctor's original July 13, 2006 report. The employee countered that *all* correspondence between him and Dr. Bowman was privileged as work product prepared in anticipation of litigation. The judge described Identification Exhibit No. 2 as,

> [d]ocuments contained in Dr. Bowman's chart that were deemed to be work product and not discoverable; including letters from employee's counsel to Dr. Bowman, dated November 04, 2003, November 24, 2003, May 06, 2004, April 26, 2004 [sic], July 13, 2006, January 16, 2007, May 09, 2007, and March 23, 2007; and Dr. Bowman's report, dated July 13, 2006.

(Dec. 5.) The judge determined these documents "to be work product as they contain the mental impressions, conclusions, opinions, and/or legal theories of the employee's attorney concerning the litigation in the present matter. The Insurer had filed a motion to compel production of these documents. The motion was denied." (Id., fn.3.)[10]

In her decision, the judge adopted Dr. Bowman's opinion that the employee suffered a work-related aggravation of his 2001 left upper extremity work injury around the time of the claimed date of injury, January 1, 2004. (Dec. 19.) She adopted the disability opinion of Dr. Fathallah, and concluded the employee was totally incapacitated from and after January 25, 2005, the date of his first biceps surgery. The judge did not find any work-related aggravation of the employee's medical condition in February, May or November of 2004. (Dec. 20.) The judge awarded § 34 and § 30 benefits accordingly. (Dec. 22.)

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[10] In her May 21, 2007 ruling on the insurer's motion to compel production, contained in the board file, (see footnote 3, supra), the judge wrote:

> The insurer has not made the showing of "substantial need" for the documents. The work product doctrine is intended to enhance the vitality of the adversary system of litigation by insulating counsel's work from intrusions, interferences, or borrowing by other parties as he prepares for trial. The materials have been prepared in relation to litigation.

We reverse the judge's work product ruling, and vacate her award of benefits. The work product privilege is codified in Mass. R. Civ. P. 26(b)(3), which provides, in pertinent part:

> *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.
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> "The burden to demonstrate that the materials sought are indeed work product within the scope of Rule 26(b)(3) is on the party resisting discovery. Sham v. Hyannis House Hotel, Inc., 118 F.R.D. 24, 25 (D.Mass. 1987); Colonial Gas Co. v. Aetna Cas. & Sur. Co., 144 F.R.D. 600, 605 (D.Mass. 1992)." Applegarth v. General Cinema, 15 Mass.L.Rptr. 38 (Mass. Super. 2002). The employee has not met that burden.

We agree with the insurer that the correspondence from the employee's attorney to Dr. Bowman, which was included in the employee's chart, held by the doctor, a third party medical provider, was discoverable. See Begin's Case, 354 Mass. 594, 597-598 (1968)(denial of self-insurer's attorney's right on cross-examination to examine records and notes of medical witness to which witness had referred, and upon which witness relied in direct examination, a violation of self-insurer's fundamental due process rights); Higgins v. Town of Maynard School Dept., 23 Mass. Workers' Comp. Rep. ___ (December 10, 2009)(self-insurer's evaluating medical expert's report discoverable by employee, even if not offered into evidence by self-insurer). Notwithstanding that employee's counsel sent multiple letters to Dr. Bowman, and paid what the doctor charged for provision of both his office notes and narrative reports, the doctor was not, as employee's counsel so adamantly insists, his witness. Doctor Bowman was the employee's treating orthopedic surgeon,[11] and first saw the employee, on referral by the employee's primary care

[11] As a treating physician, Dr. Bowman was required, under circumstances defined by statute and regulation, to submit his medical reports to the department and to each party in the case.

physician, on July 30, 2001, (March 30, 2006 Bowman Dep. 7-8), almost three years before the employee retained legal counsel who filed a claim on his behalf. Thus, we reject the argument that Dr. Bowman was employee's counsel's expert witness.[12]

We further note that counsel's correspondence to Dr. Bowman was quoted, in part, in the revised report the doctor testified was prepared in January 2007, (see footnotes 8 and 9, supra), a report employee's counsel himself offered into evidence. "Voluntary disclosure on the part of [the employee's] attorney . . . would indicate that [he] had waived any work-product privilege." Adoption of Sherry, 435 Mass. 331, 336 (2001). A party may resist discovery on the basis of

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General Laws c. 152, § 30A, provides:

> Any medical reports pertaining to an injury which appears to be compensable *shall* be furnished by the physician or other medical provider to the employee, the insurer, and the department within fourteen days of completion of the examination of the employee. Each failure to comply with such reporting requirement shall be punishable by a civil fine to be determined by the director of administration, of not less than twenty-five nor greater than one thousand dollars. A schedule of incremental increases relative to violations shall be determined by the commissioner.

452 Code Mass. Regs. § 1.13(1) provides, in pertinent part:

> Within 14 calendar days of the completion of an initial medical examination by an attending physician of an employee, or of any subsequent examination by such physician indicating a change in the capacity of the employee to work, the physician *shall* submit to the Department and to each party a medical report . . . On the written request of a party, the Department shall send a notice to the physician to make immediate submission of a medical report. . . .

(Emphases added.)

[12] Employee's counsel contended that because he "paid" for the doctor's narrative reports, Dr. Bowman was his witness. The folly of that argument is patent: the doctor would certainly be entitled to charge the insurer a fee for copying and providing his office notes, or even a narrative summary of the employee's treatment, but the insurer's payment of such charges would not render the doctor its medical expert.

privilege but may not, at the same time, rely on privileged communications or information as evidence at trial. G.S. Enterprises, Inc. v. Falmouth Marine, Inc., 410 Mass. 262 (1991); cf. Matter of the Reorganization of Elec. Mut. Liab. Ins. Co. (Bermuda), 425 Mass. 419, 423 (1997)(no waiver when disclosure of work product is due to inadvertence and adequate steps were taken to maintain confidentiality of the information).

In our view, employee's counsel's January 16, 2007 letter to Dr. Bowman is not so much a document which contains counsel's "mental impressions, conclusions, opinions, or legal theories," as it is a directive to the doctor regarding the opinions he is to render.[13] Stated

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[13] This letter, self-servingly marked "Attorney Work Product," is the most egregious of the letters employee's counsel sent to the employee's doctor:

Dear Dr. Bowman:

The Eugene Young matter is finally about to come to a close. However, I need your assistance one last time. After your deposition you kindly provided me a short note clarifying the issue of causation. This has become an important issue because after your deposition, Travelers informed myself and the court that it does not have any insurance coverage after August 2004. Thus, your clarification that Mr. Young's aggravation was between your September of 2003 and February of 2004 visits is essential to Mr. Young's success.

I am enclosing the previous short note you provided. In this note you comment on the May of 2004 incident to support your position that Mr. Young's aggravation was between the 9/03 and 2/04 visits, but this 5/04 incident is outside that time frame.

In reviewing your notes, it is clear that Mr. Young's condition significantly worsened between these visits. In the September 2003 visit, you noted that Mr. Young "denies any numbness or tingling in the upper extremity." During his physical examination, you noted that Mr. Young was experiencing "mild distress," the range of motion of Mr. Young's neck, arm and elbow was good and "unchanged from his previous examination." You recommended medication for treatment, and Mr. Young asked to wait six months before a biceps tenodesis was to be performed, signaling to me the condition was not severe at that time.

In contrast, when reviewing the February, 2004 treatment note, you identified that Mr. Young was complaining of "severe pain in the left upper extremity as well as numbness and weakness in the left hand." You identified that Mr. Young was "anxious about his pain and wants something surgically done." You identified that Mr. Young's neurological examination is difficult because

of diffuse numbness as well as diffuse weakness and breaking away." [sic] You diagnosed the numbness and tingling for the first time during your years of treatment with Mr. Young. During this visit you also for the first time identified that surgery could benefit Mr. Young; you recommended a pain clinic and a neurological consult.

Upon reviewing Mr. Young's follow-up visit in September of 2004, the symptoms and complaints are essentially the same as the February 2004 visit. In fact, while you again discussed Mr. Young's interest in surgery, you identified that Mr. Young was in "mild distress" similar to the 2003 visit. Additionally, you noted that Mr. Young "denies any new injury to the left UE."

Lastly, in reviewing your Attending Physician's Statement of Disability, you identify that Mr. Young's injury was aggravated on January 1, 2004. You explained at deposition that January 1, 2004 had no specific connection to a particular incident, but was used for legal purposes to signify that the problem began during that time frame.

Taking this all into consideration, *I am asking that you delete the references to the May 2004 cranking incident and instead simply opine that Mr. Young's work activities from September of 2003 to February of 2004 significantly aggravated Mr. Young's condition and was* [sic] *the cause of his disability. I added two sentence[s] to your note, that I hope you would include. If not, your note with the 5/04 cranking incident removed would be fine. If you agree, I do need you to add the simple sentence that "Mr. Young's work activities in early 2004 is* [sic] *the cause of his disability."*

Your office asked that I provide a copy of your deposition transcript for your review. I am also enclosing your treatment notes and another check for $250.00 for your time. *I have enclosed a copy of your original letter as well as one with my suggested changes.*

Dr. Bowman, I apologize for the short delay, but I must appear before the Judge and present your short note on Monday, January 22, 2007. Thus, if you could make the minor edits and fax me your note by Friday, January 19, 2006* [sic] *I would be most appreciative.

Thank you for your kind attention to this matter, and please call with any questions or concerns.

Very truly yours,

KECHES & MALLEN, P.C.

differently, employee's counsel was putting words in the doctor's mouth for the sole purpose of having the doctor echo those words in a revised report addressing causation and aggravation. The intent of counsel was publication by Dr. Bowman of the causation opinion counsel virtually dictated to the doctor. There is no privilege in this scenario, as "disclosing material in a way inconsistent with keeping it from an adversary waives work product protection." United States v. Massachusetts Institute of Technology, 129 F.3d 681, 687 (1st Cir. 1997).

We also consider that Dr. Bowman's *original* July 13, 2006 narrative report was subject to discovery. The report is clearly not attorney work product, nor is it otherwise a privileged communication, even though it was requested by and addressed to employee's counsel. Communications between an attorney and a third party are not within the attorney-client privilege. Commonwealth v. Noxon, 319 Mass. 495, 543-544 (1946)(conversation between defense counsel and expert witness). The doctor's original report was simply part of the employee's medical chart, held by the physician treating the employee for his industrial injury, and voluntarily produced by the doctor to insurer's counsel, until employee's counsel intervened. (See March 6, 2007 Bowman Dep. 15.)

It is axiomatic that a medical expert's opinions must be based on:

> *(a) the expert's direct personal knowledge;*
> *(b) the evidence already in the record; or*
> *(c) evidence which the parties represent will be presented during the course of the hearing*.
>
> Pursuant to 452 CMR [§] 1.12(5), any party may, for the purpose of cross-examination, depose the physician who prepared an admitted medical report. After such cross examination, the parties may conduct further examination pursuant to the rules of evidence applied in the courts of the Commonwealth.

SJE/mme
Enclosure Seth J. Elin

(Identification Ex. 2; bold emphasis in original; other emphases added.)

452 Code Mass. Regs. § 1.11(6).

(Emphasis added.) See Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 592 (2000)(expert medical opinion must be based solely on the expert's "direct personal knowledge" or admissible evidence in the record and not on assumptions not established by such evidence).

Here, Dr. Bowman admitted that he had neither seen nor spoken with the employee in the year between his depositions in March 2006 and March 2007 -- indeed, not since his last office visit on September 2, 2004. (March 6, 2007 Bowman Dep. 12, 25, 49.) Moreover, he had not received any additional medical reports from other physicians or diagnostic test results which post-dated his last appointment with the employee and which might have been the basis for any change in his causation opinion. (Id. at 20-21.) The inescapable inference to be drawn is that the only new "information" the doctor received was contained in the letter dated January 16, 2007 from employee's counsel, requesting a revised report with a different opinion as to causation and aggravation. (Id. at 24-25; Identification Ex. 2.) Without access to that letter and the doctor's *original* July 13, 2006 narrative report, the insurer had no ability to effectively cross-examine Dr. Bowman on inconsistencies between his opinion as expressed therein and any later changes in his view of the employee's medical case, as he expressed in the revised July 13, 2006 narrative report and testified to at his March 6, 2007 deposition.

The rule of evidence is well settled that if a witness either upon his direct or cross-examination testifies to a fact which is relevant to the issue on trial the adverse party, for the purpose of impeaching his testimony, may show that the witness has made previous inconsistent or conflicting statements, ether by eliciting such statements upon cross-examination of the witness himself, or proving them by other witnesses.

Robinson v. Old Colony Street Ry., 189 Mass. 594, 596 (1905).

The fact that the prior inconsistent statement is in the form of an opinion does not necessarily preclude its use to impeach the witness. [Footnote omitted.] This is obviously true where the witness has expressed a contrary opinion on the stand. . . . McGrath v. Fash, 244 Mass. 327 . . . (1923). P.J. Liacos, M. Brodin and M. Avery, Massachusetts Evidence § 6.6.2, at 273 (6 th ed. 1994). Where the prior statement bears upon a central issue in the case -- here, causal relationship -- the judge has no discretion to exclude extrinsic evidence of it. See Schwartz v. Goldstein, 400 Mass. 152 (1987)(prior inconsistent statement of physician witness admissible for impeachment even though it constituted a breach of confidentiality).

Thus, contrary to the judge's findings, we conclude that neither Dr. Bowman's original July 13, 2006 report, nor the letters sent to him by employee's counsel, were protected from discovery under the attorney work product privilege.[14] Cf. Commissioner of Revenue v. Comcast Corp., 453 Mass. 293 (2009)(communications between an in-house corporate counsel and outside tax consultants consulted for advice on structuring stock sale protected from disclosure by work product doctrine).

Accordingly, we reverse the administrative judge's evidentiary ruling, vacate the award of benefits, and recommit the case to her for further proceedings consistent with this opinion including, but not limited to, the production to the insurer of all documents contained in Identification Exhibit 2. The insurer is entitled to re-depose Dr. Bowman, and we order employee's counsel to pay the costs attendant to such deposition.[15] See Wheeler v. Yellow Freight Systems, Inc., 17 Mass. Workers' Comp. Rep. 194 (2003)(self-insurer's counsel's obstruction of employee's counsel's cross-examination of impartial medical examiner a due process violation under O'Brien's Case, 424 Mass. 16 (1996); continued deposition at expense of self-insurer's counsel).

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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[14] Even assuming *arguendo* that such privilege attached to one or more of the documents, see footnote 10, supra, we consider that the insurer had "a substantial need" of such documents. " 'Substantial need' means considerably more than pleasant desirability; it requires showing that the item plays an exceptionally important part in the preparation of the discoverer's case for trial." Applegarth, supra at 43, quoting J.W. Smith and H. Zobel, Massachusetts Rules Practice § 26.5 at 210 (1975). We do not see how the insurer could have obtained, even with undue hardship, "the substantial equivalent of the materials by other means." Mass. R. Civ. P. 26(b)(3). The judge's refusal to allow the insurer access to the documents at issue impaired the insurer's ability to effectively cross-examine the medical expert whose causal relationship opinion the judge adopted. This worked a denial of the insurer's due process rights. See Begin's Case, supra.

[15] Counsel is on record as having acknowledged this potential result. (See March 6, 2007 Bowman Dep. 16.)

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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