HOW TO WRITE AN EVIDENTIARY MEDICAL REPORT IN A WORKERS' COMPENSATION CASE

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I. Medical-Legal Evaluation in Workers' Compensation Cases

A. Historical Background

Originally, there was no provision in the law distinguishing medical-legal reports from the reports of the treating physician. The treating physician simply addressed disputed benefit issues in connection with his provision of medical treatment and there were no separate evidentiary reports. In 1949, Labor Code §4600 was amended to provide that the employee was entitled to reimbursement for costs incurred to *successfully* prove a contested claim. Medical-legal costs were thereafter awarded, at the conclusion of the case, only in those instances in which the employee prevailed on his claim.

In 1959, this Labor Code section was again amended to delete the word *successfully* from the statute. However, early appellate decisions interpreted this amendment as having no substantive effect and involving the mere deletion of a redundancy. It was reasoned that if the cost enabled the employee to prove a contested claim, he must have been successful in those efforts. In 1963, the Court of Appeal rejected an employee's claim for medical-legal costs on the ground that the requisite liability had not been shown and the Supreme Court reversed, holding that recovery of medical-legal expenses was not dependent on the employee prevailing on his claim.

B. Rationale

The rationale underlying employer liability for medical-legal costs is that in disputes over entitlement to workers' compensation benefits, employees should be placed on a par with employers who have vastly greater financial resources. Also, legitimate injured workers with minor disabilities or disputed claims should not be deterred in pursuing their rights by the high cost of obtaining medical evidence to prove those claims. Balancing the benefit to injured workers against the detriment to employers, the scales are tipped in favor of allowing the employee to have his claim examined on the basis of the merits.

In theory, the potential risk of financing the costs of a nonmeritorious claim should not be a significant burden for industry to bear. In a system in which attorney's fees are awarded on a contingency basis, the vast majority of litigated cases should result in compensability through attorney rejection of obviously nonmeritorious claims. Further, the requirement that the costs be reasonably and necessarily incurred, and that there be a reasonable basis for asserting the claim in the first place, should make recovery of medical-legal expenses difficult in frivolous or fraudulent cases. It should be noted that California is the only state that imposes the employee's costs of obtaining medical evidence on the defendant.

C. Reports versus Testimony

In most other areas of law in which medical condition is placed in issue, a doctor whose opinion is being offered to prove the claimant's entitlement to benefits has to come to court to testify. In workers' compensation, it was decided a long time ago that it would be more efficient and less expensive to have the doctor write a report which would be taken into evidence for consideration by the judge in lieu of live testimony. If the physician's testimony is absolutely required in a workers' compensation case, it is preferable for the doctor's deposition to be taken than for him to physically come down to the WCAB and be questioned during the trial.

If the physician actually testifies in court, it is not so important that he be legally as well as medically knowledgeable. If the judge doesn't understand his opinion or if something is left out, the doctor can simply be asked to clarify. However, you can't ask a written report to answer a question and taking the doctor's deposition on every report would defeat the purpose of writing reports in the first place. Thus, it's much better if the doctor gets it right the first time.

D. Evidentiary Value of Report

All doctors are trained to write reports. If a consultation is requested by another physician, you will direct a written report to the referring doctor. Evidentiary reports are different from those of consultants because the report is designed to be read by a person without formal medical training. Therefore, you have to spell everything out. You have to explain your opinion in lay terms so that a lay person such as a claims administrator, an attorney or the WCJ will be able to understand what you are saying.

A medical-legal report is an item of documentary evidence, to be used in legal proceedings and settlement negotiations, as a substitute for the sworn testimony of a forensic medical expert. The contents of the report must be *capable* of proving or disproving disputed medical facts. The physician does not have to find a compensable injury nor entitlement to any benefit. Likewise, it is not necessary that the report be the most persuasive among multiple conflicting opinions. However, the medical opinion should be at least potentially believable. A report that insults the reader's intelligence does not meet the statutory requirements for an expert medical opinion.

E. The Industrial Medical Council's Physician's Guide

Highly recommended is the former Industrial Medical Council's "*Physician's Guide: Medical Practice in California's Workers' Compensation System.*" A copy can be downloaded from the internet at <<http://www.dir.ca.gov/IMC/physicians.html>> or, on the same web page is an order form to obtain a hard copy from the DWC Medical Unit.

II. Substantive Requirements of Medical-Legal Reports

A. California Code of Regulations

California Code of Regulations (WCAB Rules of Practice and Procedure) §10609 lists the topics to be addressed in a medical-legal report. All of these will not necessarily be applicable in a given case, but if one of these items is applicable to the case on which you are reporting, you should address it unless you have been specifically requested not to do so. If you fail to comply with one or more of these rules, your report will still be admitted into evidence, but the defects may affect the weight that is given to your opinion. In other words, the WCJ will read your report and consider your opinion but, depending on the severity of the defects, he or she may simply disregard it.

If the party or parties requesting your opinion instruct you not to address a particular topic, you should follow those instructions. Medical evidence is only needed where there is a dispute concerning a medical fact that affects the worker's entitlement to benefits. In those areas in which there is no dispute, the physician should express no opinion. It is the function of the evaluating physician, and particularly an Agreed Medical Examiner to resolve disputes; not to create them.

1. Date of the Examination

It is important for everyone who reads your report to know when you actually examined the injured worker.

2. The History of the Injury

Most doctors learn how to take a medical history in medical school, but a history taken in connection with an evidentiary report is different. It's more comprehensive. The history section of a medical-legal report is supposed to enable the reader to understand what the applicant is claiming happened to him on the job that caused him to become disabled or to require medical treatment.

a. Taking an Adequate History

The degree of detail is required in order for the history to be adequate will depend on the nature of the injury and whether the defendant admits or disputes that it occurred.

1) Specific Injuries

If the fact that an industrial injury was sustained is not disputed and and the mechanism of injury fairly simple, very little will be needed in the way of description. On the other hand, disputed injuries and those in which the mechanism of injury is more obscure will require more elaboration.

2) Cumulative or Continuous Trauma Claims

A continuous trauma or cumulative trauma injury is actually a series of mini-specific injuries sustained over a period of time which can be relatively brief or which can extend over the period of the employee's working career.

a) Dates of Cumulative Trauma Injury

Labor Code §5500.5 imposes a one year limit on dates of injury in cumulative claims. However, this applies to liability only. However, the applicant's actual injury and disability may have been building up over his entire working career.

b) History of the injurious exposure

The most important aspect of medical evaluation of cumulative trauma claims is an accurate and comprehensive history of the industrial exposure.

b. Taking a Complete History

A medical-legal history must be complete and must include all of the relevant facts and conditions that arose both before and after the date of injury.

c. False and Inaccurate Histories

Substantial material misrepresentations or omissions of essential facts on the part of either the applicant or the doctor or both, will render a report worthless as evidence and will invalidate any liability for payment.

3. The Patient's Complaints

If there are major differences between the symptoms listed by the doctor in his report, on the one hand, and confirmed by the applicant in his testimony, on the other, it will not be possible to determine whether the doctor's opinion would have been the same had the true facts been considered.

4. Listing of all Information Reviewed or Relied Upon

Anything that the physician reviewed in connection with the evaluation and report or relied upon in formulating an opinion on a disputed medical fact must be identified and divulged in the report. This is not limited to documents, but may include telephone conversations with informants or tape recorded statements, for example.

5. The Patient's Medical History

This section is of crucial importance, especially if the injured worker has a history of prior treatment to the same part of body that is involved in the present claim. A failure to review relevant medical records can render a doctor's report worthless as evidence if the content of the missing records or reports was essential to an understanding of the medical issues presented.

6. Findings on Examination

Medical reports often contain a long list of tests and results and for the layperson, who knows what they are or what they mean. Particularly, if a test yields positive results or if the results were crucial to the formulation of your opinion, you must explain the nature of the test and its significance.

7. Diagnosis

Except in a few rare situations, you must have a real diagnosis. Reports of psychiatric injury and disability on post-1990 injuries require a diagnosis according the DSM-IV, or other generally approved psychiatric diagnostic manual.

If the disability is way out of proportion to the diagnosis, this requires some explanation. For example, to impose a semi-sedentary restriction on one whose only diagnosis is "musculo-ligamentous sprain and strain," without comment, is not proper. Likewise, a defense doctor who diagnoses "musculoligamentous sprain and strain, resolved" should be prepared to reconcile diagnosis with an applicant who is complaining bitterly of significant pain and disability.

8. Nature, Extent, and Duration of Disability and Work Limitations, if Any

Included in this section should be your opinion on temporary disability, if any, and whether the disability is partial or total. If partial, you must describe the temporary work restrictions or the type of modified work that would be required in order for the patient to return to work at that time. If you find the patient to be currently temporarily disabled, the estimated duration of the disability should be stated.

9. Cause of the Disability

There are three essential elements of every workers' compensation claim that must be established before there is any entitlement to benefits. The first is an industrial injury, which may be either a specific event or a cumulative series of events. Secondly, there must be disability, either temporary or permanent, and/or a need for medical treatment. Last of all, there has to be a causal connection between the two.

10. Treatment Indicated

Your prediction of the nature and extent of future medical treatment is not going be of crucial importance at trial because the WCJ only has the power to determine if the individual needs further medical treatment or not. However, where this is going figure importantly in the outcome of the case is where the parties are looking to achieve a global settlement.

11. Permanent Disability; Permanent & Stationary Status; Description of Disability; Apportionment

a. Permanent and Stationary Status

Permanent and stationary status simply means that the individual has reached the point where he has achieved maximum medical improvement from the effects of his industrial injury. The date is important because this is the point in time that temporary disability benefits cease and permanent disability benefits begin.

b. Description of Disability

If you significantly underestimate the level of permanent disability, you are not only shortchanging the injured employee, but you are placing him at risk of further injury. If you overestimate the permanent disability, you are forcing the employer to pay more than its legal liability, as well as saddling the employee with disability that he doesn't have.

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c. Apportionment

The law concerning apportionment was recently changed. The crucial question used to be what permanent disability, if any, would the injured worker have had if he hadn't been injured. Now, apportionment is based on causation. Since the statutes have not been interpreted by the Appeals Board and the appellate courts, it is still unknown what the rules will be in the end.

12. Predominate Cause in Psychiatric Injuries

In order for a claim of psychiatric injury to be found compensable, there must be competent medical evidence that actual events of the employment were the predominate cause of the injury as to all causes combined. This requirement also applies to claims in which the psychiatric injury is a compensable consequence of a physical industrial injury.

13. Reasons for the Opinion

This is the most important and crucial part of a medical-legal report. Anyone can assert bare, unsupported conclusions. It is only the forensic medical expert who can supply logical reasons for those conclusions.

14. Signature of the Physician

The evaluating physician must actually sign the report.