

Username : Password : [LOGIN](#) [FREE MEMBERSHIP](#) [FORGOT YOUR PASSWORD?](#) [0 Items in your cart](#)

AGENTSOFAmericA.ORG
Bringing The Best Together.

[About AoA](#) [Benefits of AoA](#) [Advertise with AoA](#) [Contact Us](#) [Press Releases](#) [Reading](#)

[SEARCH](#)

[ADVANCED SEARCH](#)

[WRIN TV](#) [RISK MANAGEMENT & LOSS PREVENTION](#) [ENCOMPASS LEARNING](#) [EMPLOYMENT PRACTICE](#) [CONTINUING EDUCATION](#) [SOCIAL MEDIA](#) [MARKETING RESOURCES](#) [INDUSTRY RESOURCES](#) [ARTICLE LIBRARY](#)

[Home](#) | [E&O Monthly Articles](#) | [Article detail](#)

Proof? You Can't Handle the "Proof"!



By Angela DeMary, Esq. of Marshall Warner Coleman & Goggin, P.C.Dennehey

Key Points:

- It doesn't really matter how much the petitioner subjectively complains if it is not corroborated by objective proofs.
- A treating physician's opinion is entitled to be accorded more weight than a physician conducting a one-time evaluation.

[PRINT PAGE](#)

[SEND TO FRIEND](#)

[COMMENTS](#)

If you are a practitioner of workers' compensation in New Jersey, I am sure that you have encountered a motion for medical and/or temporary disability benefits, otherwise known as the "motion for med and temp." It may be that the respondent questions whether the requested treatment is related to a compensable condition, or it may be that the petitioner never even asked for the treatment, yet jumped the gun and filed the motion. Either way, the respondent must figure out how to effectively defend the motion.

One judge of workers' compensation recently addressed this issue. Specifically, the judge addressed whether a petitioner met his burden of proof in the case of *Mauricio Moscoso v. Chief Fire Equipment & Service Co.*, which involved a 2007 back injury. At the time of the incident, the petitioner was a sprinkler system installer. The petitioner's injuries included a one level bulge and one level herniation followed by laminectomy and disectomy at the L5-S1 level and L4-5 decompression with left sided radiculopathy. The claim resolved on 2009 for 27 ½ percent of permanent partial total.

In 2010, the petitioner filed an application for review and/or modification of the formal award, commonly referred to as a "reopener" petition. After filing the reopener petition, the petitioner requested additional treatment, which was denied by the respondent. The petitioner thereafter filed a motion for medical and/or temporary total disability benefits. There was a full hearing on the motion, including medical testimony. The court indicated that, although a petitioner's testimony is relevant, the issue of need for treatment underlying the motion is determined by medical testimony. The court went on to say that "[t]he medical treatment sought must be reasonable and necessary. It must also improve his medical condition. In other words, it doesn't really matter how much the petitioner subjectively complains if it is not corroborated by objective proofs."

The court compared the petitioner's testimony at the hearing of the resolution of the claim in 2009 and his testimony at the motion for medical and/or temporary disability benefits proceedings in 2011. The judge found that the petitioner's complaints did not change from 2009 when the claim initially resolved and when he reopened the claim in 2010. The court also considered the objective medical evidence. There was evidence that the petitioner relayed contradictory information regarding his complaints to the examiners.

The court recommended that the petitioner be returned to the prior authorized treating doctors to address whether there was a need for additional compensable treatment on a reopener. Specifically, the court stated, "The court observes that the best course of action that a respondent can take when a treatment request is presented is to refer the petitioner back to the original provider. This is so because a treating physician's opinion is entitled to be accorded more weight than a physician conducting a one-time evaluation."

The respondent first had the petitioner evaluated by its prior permanency examiner. The petitioner was initially evaluated by his family doctor and then the prior permanency examiner on his own behalf. The respondent ultimately had the petitioner evaluated by the prior authorized treating doctor. Only the two prior permanency examiners testified at the hearing. The report of the prior authorized treating doctor was accepted as *prima facie* evidence, but the doctor did not testify. The court thus weighed the value of all three evaluators' opinions, finding that the treating doctor's opinion carried more weight.

The court ultimately found that there was no need for additional treatment on the reopener motion for medical and/or temporary disability benefits on three bases. First, the court found that the petitioner failed to prove a substantial worsening of subjective complaints of functionality since the entry of the prior formal award and reopener claim. Second, the petitioner's physical complaints were the same as at

[Facebook](#) [LinkedIn](#) [Twitter](#)

NOW AVAILABLE

"Insurance Agency Risk Management A Comprehensive Guide to Avoiding E & O Claims"

[Click Here To Purchase](#)

★ [MEET THE EXPERTS](#) ★ [ASK THE EXPERTS](#)

Review articles and blog posts by our list of insurance experts!

[CLICK HERE FOR EXPERTS LIST](#)

[CLICK HERE TO BECOME AN EXPERT](#)

[CLICK FOR ALL PARTICIPATING FIRMS](#)

★ [UPCOMING EVENTS](#) ★ [CALENDAR](#)

[Read more](#)

[More Events](#)

Today's Insurance News

Updated 24 Hours a Day

Provided By: [Insurance Journal](#)

National

[Attorney Behind \\$42M Award for Ohio Agent Against Nationwide Insurance to File Class Action](#)

[House to Vote on Flood Insurance Funds on Friday; Sandy Aid Later](#)

[Evolution of Cyber Coverage: How to Sell to Today's Businesses](#)

[10 Insurance Ins and Outs, Ups and Downs of Year of Dragon 2012](#)

West

[Murder Witness Sues California National Guard for Retaliation](#)

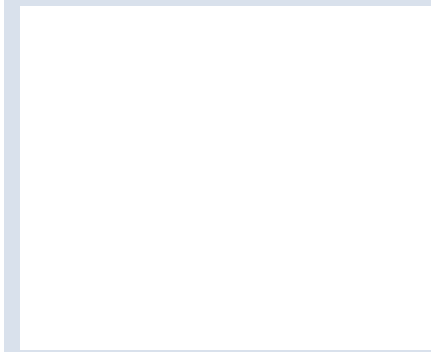
the time of the entry of prior formal award. Finally, there was no objective proof of worsening since the entry of prior formal award. The court dismissed not only the motion for medical and/or temporary total disability, but also the entire reopener claim, with prejudice, finding that the petitioner failed to prove that his condition had substantially worsened.

While findings of cases are within the discretion of each individual judge, it is important to take from this case that a motion for med and temp can be effectively defended. It is also important to note that the opinion of the treating doctor generally carries more weight than that of a one-time evaluator. Lastly, a petitioner's subjective complaints alone are not enough to sustain one's burden of proving a significant worsening of one's condition. Simply put, petitioners have a burden of proof that must be met. Failure to do so may be the downfall of an entire claim.

Angela DeMary is an associate in the Cherry Hill, New Jersey, office of Marshall Dennehey Warner Coleman & Goggin. She can be reached at 609.414.6409 or aydemary@mdwccg.com.

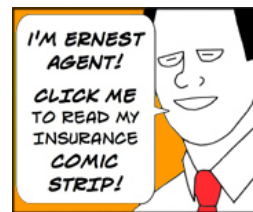
[Shell Drill Ship Runs Aground On Island Off Alaska](#)

[California Court: Parks Not Liable For Bumper Car Injuries](#)



WebCE®
Insurance CE Made Easy!
 Nationwide Catalog
 Instant Results & Certificates
 Next-Day Reporting
 Award-Winning Service
 Call 800-488-9308
<http://AOA.WebCE.com>

BenefitPlace
 Struggling for Qualified Prospects??
BenefitPlace.biz
 Delivers!!
 Call 216.577.5579



RISK MANAGEMENT & LOSS PREVENTION

EMPLOYMENT PRACTICE

CONTINUING EDUCATION

UPCOMING EVENTS

INDUSTRY RESOURCES

ARTICLE LIBRARY

YOUR FEEDBACK

©2012 AgentsofAmerica.ORG. All rights reserved.

Web Development by JCD