



IS THERE A DOCTOR IN THE HOUSE?

Telemedicine Has Its Benefits, But Not for Contested Workers' Compensation Claims

By Michael R. Duffy, Esq.

Since the outbreak of the COVID-19 pandemic, telemedicine has allowed health care providers to deliver care to patients without relying on in-person services. This is not a new technology, but the risks of spreading SARS-Cov-2 has led to greater use of telemedicine technology. This has expanded to patients requiring treatment for workers' compensation injuries and, in many cases, it has been necessary and beneficial to both the injured worker and the insurance carrier.

However, there are certainly limitations to telemedicine that cannot replace in-person evaluations.

As the nation and doctors' offices gradually reopen, a return to in-person examinations should as well. Due to the nature of litigation in the workers' compensation field, under most circumstances, an in-person, hands-on examination should not be substituted.

TELEMEDICINE AND ITS USE IN WORKERS' COMP

Telemedicine uses electronic communications and software to provide medical services to patients without an in-person visit. It may include phone calls, video chats, emails, and text messages. To effectively treat their patients, doctors can use telemedicine to ensure continuity of care to avoid possible consequences from

delayed preventive, chronic, or routine care. Telemedicine has been used for follow-up visits, medication management, mental or behavioral health services, patients who need medical care while away from home, and those who live in rural areas or far from doctors' offices. With high-quality technology accessible today, especially smartphones, it has become significantly easier for patients to utilize these services.

For many workers' compensation injuries, telemedicine is a very practical and effective means for treatment. For long-term medical care in cases where the injured worker will not make a full recovery, telemedicine is an excellent resource to manage chronic pain and



Michael R. Duffy is an associate in the workers' compensation department in the Philadelphia office of Marshall Dennehey Warner Coleman & Goggin. mrduffy@mdwgc.com



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WORKERS' COMP

counseling. Rather than requiring a patient with significant physical limitations to travel to a doctor's office, the patient can obtain the care he requires at home. Likewise, patients with psychological injuries that do not require a physical examination can seek care with ease of mind.

The issue for workers' compensation purposes arises when a claim is contested. In the litigation of a workers' compensation claim, the outcome is often determined by the credibility of medical experts. Medical professionals utilize a series of tests and examinations to determine if the patient is exhibiting signs of symptom magnification. They can also correlate objective findings with the claimant's subjective complaints, allowing for more beneficial treatment to the injured worker, such as injections or surgical intervention.

Often, injured workers rely on subjective complaints that do not correlate with objective diagnostic studies. This can include something as simple as an exceedingly high pain rating for a minor injury, or subjective reports of symptoms from tenderness to palpation. A trained medical professional can use physical examinations and tests to render an opinion on diagnoses, treatment recommendations, and work capabilities.

IN THE COURTROOM

In the litigation context, specifically for orthopedic injuries, a physical examination could be the tipping point in a determination by the workers' compensation judge. In cross-examination of a medical professional, lawyers defeat medical experts on facts, not medicine. These facts include treatment rendered to the injured worker prior to the testifying expert. An effective means of cross-examining the expert is showing him the treatment history that did not have all the positive findings on examination that the expert now claims. Questioning the credibility of the claimant's medical expert by showing that the injured worker did not exhibit positive findings on examination prior to his treatment is an effective tool for the cross-examiner.

Likewise, an effective physical examination is a great benefit to bolster the credibility of the treating doctor if he is the employer's defense expert. It also assists the independent medical examiner, who needs to have a thorough understanding of the claimant's chart and treatment history to correlate with his findings.

In most states, a medical expert is required to testify within a reasonable degree of medical certainty. Arguably, a medical expert's opinions cannot be made within a reasonable degree of medical certainty if the expert never physically examined the patient. Certainly, in cases where an X-ray shows a fracture, a physical examination would not be required to determine such an injury. However, in cases where the diagnostic studies show no positive findings, the physical examination is a crucial aspect of the expert's testimony.

Quite simply, if the panel provider utilized telemedicine and never physically examined the claimant, and the claimant's doctors had in-person examinations, the defendant is at a disadvantage. At the very least, for the purposes of litigation, the injured worker should be examined by a medical professional once before continuing with telemedicine follow-up care. It also may be prudent to examine the claimant a second time prior to discharge from care. The injured worker's attorney (and his medical expert) will certainly argue the discharge could not have been fully informed without a physical examination.

During the pandemic, judges may be more sympathetic to employers and insurers using telemedicine for contested claims due to the nature of the shutdowns, however, as society opens back up, judges may question why there was not a physical examination when facilities are open to patients. As technological improvements advance, there may be more effective means to examine a patient via video conferencing. As it currently stands during the COVID-19 pandemic, the best practice for defending a contested claim is to have an in-person physical examination. ■