The Treating Physician: A Misnomer in Workers' Comp Litigation

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The concept of competing medical experts is commonplace in the realm of personal-injury litigation. No matter on which side of the fence the client resides, it can take a high-caliber "hired gun" to get the job done. In the world of workers' compensation, a hackneyed dichotomy still worms its way into this battle of the experts in a manner not prevalent in other, less exuberant areas of law. This distinction has come to be known as the treating physician versus the independent medical examiner.

While the seasoned workers' compensation attorney understands that this supposed distinction is, in most instances, without a difference, it appears that a mindset may still linger among some practitioners who find sport in attacking the fundamental notion of independent medical exams, labeling the examiners biased in every way imaginable.

What's more, the paradigm of the treating physician has taken on a life of its own, separate and apart from the true, original meaning. The independent medical examiner is vilified at every turn while the treating physician is made out to be valiant. To quote Queen Gertrude in Shakespeare's "Hamlet," those who shout bias doth protest too much, methinks.

The fervor with which this bias argument is made was born out of the often misquoted and misapprehended assertion that the opinions of a treating physician in a workers' compensation case should be given greater weight than the opinions of a physician who examined the claimant for the sole purpose of offering testimony.

Mind you, this is not the law and, for the most part, dubiously taken out of context. Regrettably, the backdrop from which the fundamentals of this argument developed is hardly ever brought to light by the pundits who espouse the supposed underlying rationale.

Let's be clear at the outset—Pennsylvania case law overwhelmingly supports the premise that the testimony of a treating physician is not entitled to greater weight than the testimony of any other witness, plain and simple.

To argue the contrary is a waste of time—there is nothing to debate here. It is equally clear that the term "treating physician" has taken on a vastly different meaning than the traditional definition in the workers' compensation arena.

Historically, the treating physicians who garnered positive credibility determinations from the workers' compensation judge (then referees) displayed an intricate knowledge of the claimant's pre- and post-injury states. These physicians commonly treated a claimant for many years both before and after the injury—the so-called family doctor. When used as experts in the workers' compensation setting, these treating physicians had firsthand knowledge of the claimant's injured body part prior to the workplace malady and personally tracked visits after the work incident, documenting new findings and making

conclusions based on clinical and diagnostic exam results.

In litigated cases today in Pennsylvania, one would have a difficult time encountering a treating physician as traditionally defined. In fact, one of the initial areas of inquiry on cross-examination of today's treating physician is to establish the date of first treatment. In many cases, the so-called treating physician did not even lay hands on the claimant until many months or even years after the occurrence of workplace injury. Contrary to the independent examiners, many treating experts will take the claimant at face value, placing little significance on the claimant's testimonial transcripts, surveillance footage that may discredit the claimant's subjective pain complaints or objective diagnostic testing, which confounds the very premise upon which an alleged injury is based.

Instead, the standard catch-all opinion rendered in the face of competing evidence is that "pain cannot be measured" and "I believe" that the claimant is in pain (due to the workplace injury). The question arises as to the claimant who is caught on video lifting heavy weights or exceeding known work restrictions. To that, the treating physician may argue that the claimant was having a good day. Not good enough to go back to work, but a good day nonetheless.

Suffice it to say, all of the rhetoric used to support an argument about the bias of the independent examiner hired by the employer equally and more accurately defines the treating physician introduced as the treating expert in a workers' compensation case. More often than not, these so-called treating experts are hand-picked by claimant attorneys and used as much as, if not more than, their independent examiner counterparts. It is far from happenstance that a series of injured workers from the same employer all of a sudden begin treating with the same physician, traveling near and far to visit the doctor during the period of disability.

Claimants are routinely hoisted away from their family doctors and referred to new treating physicians who better understand the workers' compensation system and know how to testify. Yet, employers are castigated for choosing medical experts to represent their interests in those very same cases.

The treating physician of today is also a very skilled clinician—a claimant can be certified disabled from employment in or around the time a claim petition is filed, released to go back to work just before his seniority rights will be affected and then recertified disabled again once those seniority rights are reinstated. While the independent medical examiner is touted as the hand puppet of the defense attorney in the workers' compensation setting, nothing could be further from the truth.

The independent examiner gets paid regardless of his or her opinions and conclusions. The same cannot be said of the treating physician.

Let's not discount dollars and cents—the standard area of cross-examination of the defense independent medical examiner seeks to establish how lucrative the "IME business" has become. These questions cannot be asked in a vacuum. When a claimant attorney refers a workers' compensation claimant to the treating physician, that referral carries with it more than a physical examination, review of records and report. The hefty deposition fee charged by the treating physician is but the tip of the iceberg in this scenario. A robust two to three days a week of therapy at the office coupled with an injection therapy over a stretch of time can make IME fees inconsequential by comparison.

Clearly, every treating physician is not a charlatan and every independent examiner is not a straight shooter. Bias is naturally inherent in every area of law and workers' compensation is no exception. We all live in glass houses. It is

time to stop the galactically mundane pursuit of trying to prove the inequality between the treating expert and the independent examiner—maybe they both are excellent clinicians who genuinely disagree about the medical issues or maybe they both are biased. Either way, we are left on a somewhat level playing field regarding expert testimony. The workers' compensation judge has the onerous task of assessing the credibility of all medical witnesses presented. The law holds that the testimony of a treating physician is not entitled to greater weight than the testimony of the independent examiner.

The judge in his or her own methodical way will ferret out the facts of the case that support positive credibility determinations among the experts presented and issue a reasoned decision in that regard.

More likely than not, whether one witness is labeled as a treating physician or as an independent medical examiner will have no bearing on the outcome of the case. The better method is to rely on the wisdom of the workers' compensation judge.

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