Medical Causation: Pre-Existing Conditions and Independent Medical Examinations

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Independent Medical Examinations

At the commencement of a project, all parties hope for a project free of accidents and injuries. Contractors, suppliers, and designers experience enough challenges in providing the owner an aesthetically acceptable product in a timely, on-budget fashion. However, despite how careful a contractor might be or how many safety meetings a subcontractor may attend, project accidents are inevitable.

Naturally, whether a site superintendent, project manager, claims adjuster, or counsel, the initial investigation of a work-site injury always starts with two considerations: 1) What happened? and 2) Who is responsible for it? Of course, all parties, and especially their insurers, hope the answer to the second inquiry is that someone else is responsible. However, when the facts clearly reveal that your actions (or your client’s actions) were responsible for the claimant’s injuries, the evaluation of the work site personal injury claim often turns to an equally important defense: Medical Causation.

I. Medical Causation

A. Plaintiff’s Burden of Proof

While each state may utilize different legal standards and tests, the plaintiff is generally required to prove, through medical evidence, that his or her injuries were caused by and sustained in the subject accident. Otherwise, the plaintiff will not be able to carry his/her burden of proof at trial. In an effort to substantiate the alleged injuries and link them to the subject accident, the plaintiff will submit his medical records and expenses
and have his treating physician testify to the nature of the injuries, treatment, and the purported cause of the injuries.

However, plaintiff’s treating physicians are not always given the “full picture” by their patient. As you might expect, whether intentionally or not, plaintiffs leave out or neglect to tell their treating physician relevant details regarding their past that could significantly alter whether the physician relates the alleged injuries to the accident, or a portion of the alleged injuries thereto. Of course, some treating physicians simply do not have access to the plaintiff’s full medical records or the resources to access them; either way, the treating physician is at the mercy of the plaintiff’s memory or, sometimes worse, the honesty and integrity of the plaintiff in assessing causation. This leaves the treating physician in the precarious position of taking the plaintiff at his or her word. Thus, it is incumbent on the defendant to thoroughly investigate the plaintiff’s full history, including his prior medical history, work history, family history, social activities, prior injuries, prior work accidents, criminal history and familial genetic dispositions. All of these factor into the medical puzzle.

B. Use of Experts

While litigating causation, it is often possible to appeal to the common sense of a judge or jury by showing how a particular traumatic event is unlikely to have resulted in the injuries a plaintiff claims. The use of videos, photographs, property damage estimates and other evidence shedding light on the mechanics of an accident can be very helpful in this regard. Not surprisingly, there are experts in various fields who can testify about such
mechanics and their potential impact to the human body. One such expert is a biomechanical engineer.

Biomechanical engineers typically are found to be qualified to render an opinion as to the forces generated in a particular accident and the general types of injuries those forces may cause. However, biomechanical engineers ordinarily are not permitted to give opinions about the “precise cause of a specific injury” because biomechanical engineers lack the medical training necessary to identify the different tolerance levels and pre-existing medical conditions of individuals, both of which "could have an effect on what injuries resulted from an accident." As such, a biomechanical engineer, is qualified to render an opinion as to general causation, but not as to specific causation.

Thus, by means of an example, a biomechanical expert may testify as to the effect of a jackhammer’s vibration on the human body and the types of injuries that may result from exposure to various levels of vibration. However, he may not offer an opinion as to whether the vibration of the plaintiff’s jackhammer caused plaintiff’s herniated disc. Such an opinion requires the identification and diagnosis of a medical condition, which demands the expertise and specialized training of a medical doctor.

Even without being allowed to testify as to “specific causation,” the testimony of an expert in this field can be very persuasive to a trier of fact. Again, it speaks to one’s real world experience or common sense by casting doubt or skepticism that a minimal impact or a glancing blow could have really caused the serious physical injury plaintiff is claiming.

II. **Pre-Existing Medical Conditions**
Whether a personal injury claim is made in tort or in the workers’ compensation arena, a defendant/employer is only responsible for those injuries, disabilities and treatment directly attributable to the work accident. If a claimant already suffered from the same medical condition prior to the subject accident, the defendant/employer may not be liable. Of course, seldom is it cut and dried. This is particularly so in the construction industry as so many laborers and employees have been working physically demanding jobs for years and have subjected their bodies to significant wear and tear. It is rare that a construction worker (unless quite young) would be found without degenerative changes in his or her spine, for instance. That is why it is so important for employers to conduct pre-employment physicals, maintain personnel files containing medical records and/or reference to treatment, and have employees complete thorough questionnaires both at the time of hire and periodically thereafter.

Of course, plaintiff attorneys will often contend that even though a claimant may have had a pre-existing condition, said condition was asymptomatic until the subject accident and that the defendant is responsible for the aggravation of said condition. The laws of most states agree, but generally the value of an aggravation of a pre-existing condition is far less than that of a new injury.

Plaintiffs will often deny or fail to disclose pre-existing conditions and prior treatment. Thus, it is equally advisable that pre-employment questionnaires regarding past or current medical conditions/injuries explicitly state (perhaps even under oath and penalty of perjury) that the employee is being truthful, honest and forthright with this medical history. These explicit preambles and instructions can benefit not only the current
employer, but future defendants, as a failure to be open and forthright can be seen by a trier of fact as untruthful and can negatively affect a plaintiff’s credibility.

Lastly, when pre-employment questionnaires or physicals are used to establish that the plaintiff reported no conditions at the time of employment (and subsequent to the accident), plaintiffs attempt to excuse this misrepresentation by claiming that it was done solely to procure the job. So, in essence, a plaintiff might admit that he intentionally lied on his questionnaire regarding his current ailments, but submits that this untruthfulness was warranted due to a financial need. A compelling plaintiff can sometimes make a convincing case to a jury of his peers that his family’s dependency on his income is a good excuse for misrepresenting his physical pain and condition at the time of employment. Of course, untruthfulness should not be excused or rewarded and an effective defense will help the trier of fact see through this guise.

III. Independent Medical Examinations

A. General Tenants & Requirements

Independent Medical Examinations (IME) are physicals conducted at the request of a third party and are most recognizable as an important part of all states’ bodily injury and workers compensation claims as well. The concept of an IME is fairly basic, as illustrated by the American Medical Association (AMA)’s statement that an IME has “three key characteristics: 1) Independent; 2) Medical; 3) Examination.” However, even to the AMA, an IME is considered a unique and specialized examination and report.
Moreover, dependent on the venue and the particulars of your jurisdiction, the IME process can include not only the physical examination and questioning of the plaintiff by the physician, but also a thorough review of the plaintiff’s past and current medical records in order to establish a full workup and history of the plaintiff.

**B. Other Benefits to Requesting an IME**

Certainly, the most compelling reason to request an IME is to explore the viability of a causation defense, including detailed examination of all prior and pre-existing injuries or conditions. However, the examination is not limited to this evaluation of this defense alone. While experienced IME physicians are more thorough in their reporting and assessments, other physicians tend to be more literal and opine on only the precise issues presented before them. As such, when appropriate, the IME physician should be asked to evaluate any of the following:

1) The extent of plaintiff’s alleged injury;

2) Whether any such injury could have been sustained based on the mechanics of the accident (see above);

3) The plaintiff’s need for future treatment;

4) Estimated costs and expenses associated with any future treatment;

5) Evaluation of past medical expenses incurred and reasonable marketplace costs;

6) The necessity of surgical intervention;

7) Benefits of conservative treatment;

8) Disability/Impairment Rating; and

9) Plaintiff’s physical abilities - whether plaintiff can return to work on a full, restricted, or limited basis
C. *Is an IME Provided by Statute?*

From a purely legal perspective, an initial issue is the standard for requesting an IME. For a defendant to obtain an IME, the burden of proof varies in each jurisdiction. Similar to the federal standard outlined in Federal Rule 35, most states require a showing of good cause. Yet, in California, Connecticut, and Oklahoma, good cause is only required in non-personal injury suits; and in Louisiana, Illinois, New Jersey, and New York, an IME can be sought as a matter of right once a physical or mental condition of a party is placed in controversy.

Generally, the party requesting the IME must give notice to all parties in the lawsuit and the person to be examined, of the time, place, manner, conditions, examiner, and scope of the medical examination. There are a few states, like Illinois, which do not allow the requesting party to directly choose the examiner, requiring instead that the court designate an examiner upon suggestions from the parties.

D. *IME Landmines and Procedural Issues*

While the process of IMEs is generally controlled by code or statute, many areas of controversy still arise. Examples include litigation over the place of the examination; the number of examinations; whether the examinee has a right to have representatives present at the examination; and whether the examination can be recorded. Other indirect
issues include compensation; whether discovery can be pursued for purposes of showing an examiner’s bias against the patient; and whether the examination creates a doctor-patient relationship.\textsuperscript{10}

\textit{Place of the Examination}

The requesting party usually designates the locale of the examination in its request or motion for an examination, but often contention arises over the distance a party must travel to undergo an examination. At the federal level, the general standard is to allow an examination within the jurisdiction where the suit was filed.\textsuperscript{11} Federal courts have required plaintiffs to show good cause, usually more than poor health, to overcome this standard.\textsuperscript{12} At the state court level, cases range from giving the plaintiff little to no discretion of where the IME will take place\textsuperscript{13}, to cases where the requesting party is limited to how far the examinee must travel\textsuperscript{14}, or simply limiting the examination to in-state.\textsuperscript{15}

\textit{Patient Representative}

Next, the issue of whether the plaintiff has the right to be accompanied by an attorney, family member or personal health care provider to observe the examination is commonly debated. Regarding the issue of whether the plaintiff’s attorney may be present during the examination, an Alaskan court provided a helpful analysis, finding that there were various approaches nationwide:

In California, a party compelled to submit to a physical examination is entitled to have an attorney present. Moreover, either party is entitled to request the presence of a court reporter. The fact that a court reporter is present does not preclude the attendance of plaintiff's attorney. However,
the party has no right to his attorney's presence during a psychiatric examination.

Florida, New York, and Washington permit an attorney to attend both physical and psychiatric examinations as a matter of course. In Montana, an attorney has the right to be present while a physician takes his client's medical history, but not during the physical examination. In Oregon and Wisconsin, the burden is on the injured plaintiff to show good cause justifying the attorney's presence. The federal rule, followed by several states, is that the plaintiff's attorney may not attend an examination.

The courts which do not permit attorney attendance reason that ethical problems may arise because the attorney may be called as a witness for his client. Moreover, they wish to divest the examination of any adversary character. The examinee is protected because he has access to the doctor's written report, and may depose the doctor and object to inadmissible evidence during trial. Some courts also note that physicians may refuse to perform an examination in the presence of an attorney, that the attorney is likely to interfere, and that the patient's reactions may be skewed, rendering the examination useless.

Those courts which permit an attorney to be present generally reason that the physician should be prevented from making inquiries beyond the legitimate scope of the exam, thus transforming the exam into a sort of deposition. Moreover, the attorney's presence may aid in the eventual
cross-examination of the physician. The attorney need never be called as a witness for his client if the examination is tape recorded. These courts refuse to presume that the attorney will interfere with the examination and recognize that the courts have the authority to deal with any actual interference.

In our view, those cases which allow the examinee's attorney to be present are the more persuasive. The Rule 35 examination is part of the litigation process, often a critical part. Parties are, in general, entitled to the protection and advice of counsel when they enter the litigation arena. An attorney’s protection and advice may be needed in the context of a Rule 35 examination, and we see no good reason why it should not be available.  

As noted by this decision, one of the underlying factors courts consider for third party attendance, whether it be an attorney or physician (though admittedly more for attorney attendance), is whether the attendance interferes with the examination in any way. Physicians are more likely to be allowed to attend than attorneys, especially when the courts focus on patients’ rights and a goal of avoiding IMEs to be viewed as simply informal discovery procedures. Thus, many states have a rule or statute upholding a patient’s right to be accompanied by a physician of choice. Some states take a much broader approach, and simply give the patient the right to a third-party representative.

**Recording the Examination**
Beyond attendance, other states have dealt specifically with whether an examination can be recorded by a court reporter, or recorded by video. Utah specifically granted parties the right to record the examination, as long as it does not interfere.\textsuperscript{21} Courts in other jurisdictions have upheld similar rights. For example, in Florida, the right to video an examination came up in the context of privacy rights, where an examining doctor objected to allowing the examination to be taped.\textsuperscript{22} There, the court found that the patient’s privacy interest was the primary interest, and that as long as the patient waived that right, the examination could be recorded by video.

\textbf{Examiner Compensation}

One primary concern of the IME process is that the examiner is not regarded as independent. This stems from the view that the examiner is merely an expert hired and paid for by the defendant in a lawsuit. Many plaintiff lawyers even refer to IME’s as DME’s (Defense Medical Examination). In order to reduce the view that parties are simply buying medical testimony, the AMA instructs all physicians to not be influenced by financial compensation.\textsuperscript{23} In Florida, the Division of Workers’ Compensation has adopted rules limiting the amount of compensation that can be paid for an IME.\textsuperscript{24} If a doctor is paid more than the amount of compensation determined by the state’s three-member panel, the party can be subject to the expert testimony being excluded.\textsuperscript{25}

\textbf{Showing an Examiner’s Bias}

Since IMEs are controlled by a discovery rule in many jurisdictions, it should come as no surprise that many plaintiffs have responded to a Rule 35 request with requests for
production of an examiner’s tax records to show a bias against the plaintiff. Courts certainly understand that the percentage of time spent by a physician doing IMEs, or the compensation a physician receives for IMEs, can help the plaintiff show bias. However, courts have balanced that need against the right to be free of overly burdensome discovery requests.\textsuperscript{26} Courts have found that much of the information can be gathered with less-intrusive discovery, like depositions, to avoid requests like production of all tax records.\textsuperscript{27}

\textbf{Doctor-Patient Relationship}

Another issue to address is whether the examining physician owes the plaintiff a professional duty related to the examination. The AMA’s position is that the relationship requires a physician to inform the patient of pertinent health information and suggests a follow-up with the patient’s own physician.\textsuperscript{28} In \textit{Smith v. Radecki}, the Supreme Court of Alaska addressed this limited patient-physician relationship, and reviewed other states approaches to find that the physician ethical code was a non-binding code on the court\textsuperscript{29}:

\begin{quote}
[W]e acknowledge that courts in several other states have held that physicians owe a limited duty of care in an IME setting. For example, the Tennessee Court of Appeals held that a limited physician-patient relationship exists when an IME is conducted, such that the physician has a duty not to injure the patient during the examination. Similar decisions have been reached by courts in New York, Colorado, and Michigan. The Michigan court described the limited duty as:
\end{quote}
... not the traditional one. It is a limited relationship. It does not involve the full panoply of the physician's typical responsibilities to diagnose and treat the examinee for medical conditions. The IME physician, acting at the behest of a third party, is not liable to the examinee for damages resulting from the conclusions the physician reaches or reports. The limited relationship that we recognize imposes a duty on the IME physician to perform the examination in a manner not to cause physical harm to the examinee.

Other courts have held that physicians have limited duties of care encompassing the duty to discover and warn an examinee of conditions which pose an "imminent danger" to the examinee's health, and to provide correct information to a patient about his condition in the event the IME physician "gratuitously undertakes to render services which he should recognize as necessary to another's bodily safety."

However, other jurisdictions have found that the examination imposes a duty to exercise the level of care consistent with a doctor's professional training and expertise. Still others, like Arizona, only impose a duty to the insurer, not the patient-plaintiff.

**Multiple IME’s**

There are instances where a defendant will find it prudent to seek additional examinations. For example, if the doctor's initial examination was long ago or if the
plaintiff had some significant change in his or her condition since the original examination (like a surgery), the defendant can assert the need for an updated IME. Each request for independent medical examination must turn in its own facts, and the number of examinations to which a party may be subjected depends solely upon circumstances underlying the request. Even when a physical examination has been previously ordered in the same case, subsequent examinations may be ordered if the trial court deems it necessary.

By that same reasoning, there are times where additional examinations by physicians in different fields are necessary in order to achieve a “level playing field.” For example, a plaintiff who is seeking mental or emotional damages (in addition to physical) should perhaps undergo an independent psychological examination in addition to one from a physician who opines about plaintiff’s physical condition.

Disputes over the number of IME’s are decided to insure that equity prevails – the objective is to achieve fairness. When a party injects a justiciable issue into litigation, fundamental fairness mandates that the opponent be granted a timely and fair chance to develop independent evidence and a defense.

**How to Evaluate the Right Physician**

From the standpoint of a defendant or employer seeking to defeat medical causation through the use of an IME, it is imperative that the physician selected is well qualified in the field of medicine in which he will opine, is able to identify and explore the pertinent issues (including asking the right questions and thoroughly examining plaintiff’s
medical history) and finally can withstand the scrutiny of cross-examination. At deposition, trial or arbitration, the medical professional can expect to be questioned about his education, experience and background. For example, an orthopedist who does an IME could be questioned about the number of surgeries he has performed in comparison to the number performed by a treating physician.

Another frequent area of inquiry is what percentage of the examiner’s practice consists of treating patients versus performing IME’s. It goes without saying that there are many medical professionals who would prefer not to engage in the often adversarial arena that medical examiners often find themselves. For best results, it is wise to research thoroughly IME candidates with an eye toward retaining one who is highly qualified, willing to spend the time needed for a comprehensive analysis and who will remain firm when pressed about his or her opinions and practice.

E. Alternative Approach: Medical Records Review

It may be prudent in some cases to ask a medical examiner to review plaintiff’s medical records in order to obtain a preliminary opinion before making a decision about a full independent medical examination. In many states, it is permissible to obtain such an informal consultation without disclosing the consultation to plaintiff. If the physician’s opinion following the records review is unfavorable, defendant may choose not to have an IME or may elect to continue searching for a different examiner.
Of course, if the preliminary opinion is favorable to a causation defense, then it would be advisable to arrange an IME with that physician. A physician who testifies solely based on his review of medical records without an examination will be ripe for effective cross-examination.

F. Other Medical Records – Supplementing Plaintiff’s Background

Lastly, it is important to remember that records from hospitals and treating physicians are not the only source of information regarding past physical ailments, conditions, injuries, or accidents. Significant information can be gleaned from employment questionnaires/physicals; prison or Department of Corrections records; free health clinics; urgent care facilities; family or marriage counselors; and mental institutions. It is vital that defense counsel or an adjuster carefully comb through the records to identify any and all parties that could have relevant information to support the medical causation defense. While not all records produce pertinent information, the best practice is to acquire and review the records.

Further, do not overlook the benefit of providing your IME physician with these supplemental, sometimes seemingly innocuous records. While it may slightly increase the time charged by the physician to complete his records review, your IME physician is far more versed in comprehending and processing the medical jargon and assessments than a lawyer or claims handler. This prevents anything being overlooked due to ignorance or lack of medical training. If nothing else, it provides your IME physician a
greater insight into the plaintiff and his/her past history, thereby allowing him to ask much more detailed and specific questions during the examination. Ultimately, this results in a more thorough report and increased credibility.

**Conclusion**

Unfortunately, not all worksite injury cases come with a full arsenal of defenses. So, it is important to be able to pursue and present an aggressive medical causation defense. This is particularly important in the construction industry since so many laborers and workers have been working heavy manual labor for years and have subjected their bodies to significant wear and tear. Thus, is it commonplace for a construction worker to have significant degenerative changes or current age-related conditions at the time of the accident.

These “hidden” or undocumented conditions must be thoroughly investigated by the employer, insured, or counsel and, where the cost is justified, IME physicians, biomechanical engineers and other experts should be retained to explore the viability of the claim and the actual extent of plaintiff’s alleged injuries.

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2 *Yarchak*, 208 F. Supp. 2d at 501.
3 Typically identified as an IME, but also referred to as a second medical opinion (“SMO”), Defensive Medical Examination, Comprehensive Independent Health Care Review, and Employer’s Exam. See, e.g., Ala. Code § 25-5-7(b); AS § 23.30.095(e); A.R.S. § 23-1026; C.R.S.

4 See, e.g., AMA’s The Guides Newsletter (Nov./Dec. 2005).

5 Id.

6 Fed. R. Civ. P. 35(a); see also, e.g., I.R.C.P. 35(a)(2)(A) (requiring order for an examination “may be made only on motion for good cause”). Similar rules and statutes can be found in Alabama, Arizona, Florida, Massachusetts, Michigan, Missouri, Montana, Ohio, Pennsylvania, and Texas. Most states recognize that the burden is not difficult to meet where the plaintiff’s physical status is at issue. See Heidi Oertle and Shawna Boothe, How to Correctly Approach Independent Medical Exams, Am. Bar Ass’n (July 23, 2014).

7 See, e.g., LA Code of Civil Procedure Article 1464

8 See, e.g., Mont. R. Civ. P. 35.

9 See, e.g., Ill. Sup. Ct., R 215(a) (“The motion shall suggest the identity of the examiner and set forth the examiner’s specialty or discipline. The court may refuse to order examination by the examiner suggested but in that event shall permit the party seeking the examination to suggest others.”) Sometimes an issue arises over whether a physician must perform the examination. Oertle and Boothe (“In most states, only a licensed medical doctor may perform an IME of a party. See, e.g., Mass. Bay Ins. Co. v. Stamm, 654 N.Y.S.2d 752 (App. Div. 1997) (rejecting request for examinations by a nurse, psychologist, and life-care planner because they were not physicians). Some states allow experts such as vocational rehabilitation specialists to conduct exams. See, e.g., La. Code Civ. Proc. Ann. art. 1464; Kavanagh v. Ogden Allied Maint. Corp., 705 N.E.2d 1197 (N.Y. 1998).”)

10 Some additional issues not covered here are reviewed on a case-by-case basis, such as whether the examinee can be ordered to undergo sedation or other invasive procedures of an IME, see, e.g., Lefkowitz v. Nassau County Medical Center, 462 N.Y.S.2d 903, 906 (N.Y. App. Div. 1983) (listing factors to be considered), and whether an IME examiner can request further testing, see, e.g., Bobka v. Mann, 764 N.Y.S.2d 847, 848 (N.Y. App. Div. 2003) (balancing potential risk to health and safety of examinee against need for procedures).


14 Weaver v. Mansfield Hardwood Lumber Co., 1 So.2d 103, 107 (La. Ct. App. 1941) (allowing travel of 75 miles for examination, especially where defendant paying travel costs and recognizing impractical to require specialists to make home visits).


20 See, I.R.C.P. 35(a)(3) (“right to have a representative of his or her choice present for the examination”).
21 URCP 35(a).
24 69L-7.020, F.A.C.
27 *Primm v. Isaac*, 127 S.W.3d 630, 639 (Ky. 2004) (finding that a physician could not be forced to turn over tax records in most cases where information that could show bias was usually available through deposition); *Cooper v. Schoffstall*, 905 A.2d 482, 498 (Pa. 2006); *Behler v. Hanlon*, 199 F.R.D. 553, 561-62 (D. Md. 2001).
29 238 P.3d 111, 116-17 (Alaska 2010).
34 *Cantwell v. Garcia*, 522 So.2d 721 (La.App 4, 1988); LA C.C.P. Article 1464.