Division of Workers Compensation – 2013 May Day Seminar

Respondent's Position re: Need for Treatment/Second Opinion Exams

A second medical opinion is a useful tool and is regularly sought by parties on both sides during the treatment phase of a Workers Compensation matter. It is especially useful in cases of planned significant surgery. The second opinion exam offers an injured worker an affirmance that the proposed operation is the best treatment choice. It can also present an option for an alternative procedure. Frequently, the second opinion confirms the surgical proposal. In the remainder, where alternative surgical choices are presented, one review found that more times than not the claimant chose the second recommendation.

Second opinions are a long standing and historically accepted course of action to validate or refute medical decisions, and our courts have recognized this. The court in *Vispisiano v. Ashland Chemical Co*., 107 NJ 416, (1987), says that the conduct of patients seeking second medical opinions is "… not uncommon and is a commendable course of action generally to be encouraged", at 437. As medical services become more sophisticated, and surgeries become more common, increased use of the second opinion option will ensure that the patient is presented with all sides of the procedure that is contemplated. In addition, the second opinion exam by a qualified physician assures the Respondent that the recommended procedure is medically necessary and reasonable given the compensable injury.

Increasingly, the treatment effort is designed to be cooperation between the injured worker, the medical provider, and the carrier. Second opinions are one tool used to enhance this function. In the case of contemplated surgery it is often welcomed to give broader scope to the available options presented in the course of treatment.

NJSA 34:15-15 obligates the Respondent to direct medical care:

> *The employer shall furnish to the injured worker such medical, surgical and other treatment, and hospital service as shall be necessary to cure and relieve the worker of the effects of the injury and to restore the functions of the injured member or organ where such restoration is possible…and the Division of Workers' Compensation after investigating the need of the same and giving the employer an opportunity to be heard, shall determine that such physicians' and surgeons' treatment and hospital services are or were necessary….*

This does not mean that the Respondent *controls* what the treating doctor does or says in the course of treatment. Rather, physicians make independent judgments on treatment issues. On those occasions in which a proposed course may be questioned by a Respondent, it is the carrier's burden to ensure that appropriate medical care that is being recommended is reasonable and necessary to cure and relieve the worker of the effects of the injury and to restore function. In such cases a second opinion may be called for. Section 19 permits the employee, self-insured, or carrier to obtain a report through examination with a medical expert.

NJSA 34:15-19: **Examination of employee as to physical condition; X-rays.**

> *After an injury, the employee, if so requested by his employer, must submit himself for physical examination and X-ray at some reasonable time and place within this state, and as often as may be reasonably requested, to a physician or physicians authorized to practice under the laws of this state. If the employee requests, he shall be entitled to have a physician or physicians of his own selection present to participate in such examination. The refusal of the employee to submit to such examination shall deprive him of the right to compensation during the continuance of such refusal. When a right to compensation is thus suspended no compensation shall be payable in respect to the period of suspension. On request, the workmen's compensation bureau may examine the X-ray for the purpose of determining the amount of disability due, if any.*

The statute requires that the exam be scheduled only as often as reasonably requested, and allows for the presence and participation of a physician of the claimant's choice if he or she so requests. The Petitioner's failure to attend permits the carrier to suspend benefits. It was designed to ".. afford the employer certain protection." *Pastor v. Bakelite Co*., 83 NJ Super 252 (App Div. 1964).

The reason for second opinions is to ensure that nothing is overlooked, especially when a physician is seeking aggressive curative treatment. Where the second doctor confirms the opinion of the first, the questions are resolved and treatment continues. This procedure is valuable to both the Petitioner and the Respondent. Where the second opinion physician opines that a proposed course of treatment is not appropriate, the carrier is obliged to not approve it. In fulfilling its duty to both parties, the carrier must ensure that inappropriate treatments are not undertaken. Carriers go to great lengths to study and

assess a wide range of modalities of evolving treatments. Often “fringe” treatments such as IDETs or manipulation under anesthesia may come under scrutiny because outcomes are unproven or fail to show real benefit.

In such cases disputes may arise. Our compensation courts are uniquely set up to deal with these. If the Respondent determines that the second opinion represents the most appropriate treatment option, and authorizes that in accordance with Section 15, the petitioner has the right to petition the court to Order the alternative treatment.

Such disputes occur rarely. Statistics show that motion practice in New Jersey is historically very low. According to the Task Force Reports available on the Division’s website, for 2002 and 2004, the percentages are low, 2.6% of all the cases at the time. Further, and more importantly, the Task Force, which was chaired by Judge Rosemary Granados, confirmed that the vast majority of petitioners receive appropriate medical treatment. Around half of the motions filed are resolved without the necessity of a hearing. This is an affirmance that the quality of medical care is very high. Employer choice is a success. Parenthetically the following statements are part of the published Mission Statement of NJM’s Medical Services Administration:

> To provide high quality comprehensive medical care to injured workers for employment-related injuries and diseases in accordance with statutory or federal regulations and requirements, and to manage a system that provides accurate, timely and reasonable reimbursement to our healthcare providers. It is our responsibility to
>
> - Ensure that claimants have access to qualified providers of medical care and that treating providers and facilities are reimbursed at fair and reasonable rates
>
> - Monitor the quality of care rendered to our claimants, identify opportunities for improvement, and implement initiatives to improve provider performance and claimants' outcomes
>
> - Focus on employee development
>
> - Ensure regulatory compliance

Litigated disputes on second opinion matters are rare. But when a motion is filed the burden of persuasion is upon the moving party. The petitioner has the burden of proof to establish all elements of

the case. *Bird v. Somerset Hill Country Club*, 309 NJ Super 517, (App Div. 1998), *Viera v. Level Line Inc*., 276 NJ Super 646, (App Div. 1994). Regarding the burden of proof, see the Supreme Court's decision in the matter of Squeo v. Comfort Control, 99 NJ 588 (1985) at 599:

> *Although this Court has liberally construed the Act to promote its beneficent purposes, we have always imposed the limitation that no expense may be recovered that is not shown to be reasonable and necessary by sufficient competent medical evidence.*
>
> > *The services must be shown by competent medical testimony to be such as are reasonable and necessary for the particular patient, taking into consideration his individual condition and need…*
>
> *We have also emphasized that the claimant bears the burden thus to establish his claim. Kahle v. Plochman, supra 85 NJ at 548, 428 A 2d 913.*

Also see for guidance *Evidence Rule 101*, Burden of Persuasion, which defines it as the obligation of a party to meet the requirements of a rule of law that the fact be proved…by a preponderance of the evidence. This is not an onerous task, especially with advent of SKYPE-type technology. In a decision by Judge Butler, *Baez v. South Jersey Health System*, found at WL 2002 32639665, he comments on the requirements of Rule 12:235-5.2(b)2. There must be a showing that the requested treatment will be curative and that it is necessary and the pleading must state the specific type of treatment being sought". A request to "try" a shoulder specialist was deemed inadequate. Indeed, only after commenting on the quality of all the medical testimony at trial did the Supreme Court affirm the decision in favor of Mr. Squeo. The court instructed at 606:

> *We stress that in determining what is reasonable and necessary; the touchstone is not the injured worker's desires or what he thinks to be most beneficial. Rather it is what is shown by sufficient competent evidence to be reasonable and necessary to cure and relieve him. (Emphasis added).*

A motion must also include a statement of time lost by the petitioner, an affidavit or certification by the petitioner or attorney, and a medical report, in this case presumably the first doctor's report. Such a filing can make out a *prima facie* case and the Respondent must then file an answer to the motion, with

certifications and/or medical reports. Second opinions are permissible and necessary devices in the Compensation system. They can be useful in securing treatment options for both parties.