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PRESENTING MEDICAL EVIDENCE IN HEART CASES*

For the Claimant - Gerald J. Haas
For the Defendant - Lowell A. Reed, Jr.
Referee's Point of View - Irvin Stander

Introduction

The proper presentation of medical evidence in workers' compensation is a highly developed art, making great demands on the skill and ability of the practitioner. This is especially true in the complex field of cardiovascular claims because of the difficult questions of medical causation. A recent Pennsylvania Bar Institute's Seminar on Workers' Compensation featured a discussion of medical evidence in heart cases. This article will summarize the presentations in that course by Gerald J. Haas, Esq., concerning the proof elements necessary in claimant's case; Lowell A. Reed, Jr., Esquire, on the factors in the defense of a cardiovascular claim; and Referee Irvin Stander on the point of view of the adjudicator. The Moderator for the session was Stanley H. Siegel, Esq., of Lewistown, Pa.

Preparation and Presentation of Claimant's Case

(A) Functions of Claimant's Attorney

- (1) Presentation of competent evidence.
- (2) Persuasion of the Referee as the ultimate fact finder.
- (3) Conducting medical research.
- (4) Conducting legal research, and being prepared to "make new law" where existing law is adverse to claimant.

(B) Hospital Records

- (1) Obtain them as soon as possible, and review admission history, examinations, diagnosis, treatment, etc.
- (2) If they show adverse facts, have claimant explain them.
- (3) History is often given by another person accompanying claimant. Check for source and accuracy.
- (4) Errors in discharge summary often compounded from earlier errors in admission history.
- (5) Check daily entries in record - they may have history of the work injury.

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- (6) Where no history of work injury is found, investigate the following possible reasons: (a) claimant was unconscious; (b) did not know work connection at that time; (c) family or another gave the history; (d) claimant was more concerned about his injury than with the cause.
- (7) Hospital records are notorious for errors.
- (8) Be careful about the claimant who calls his heart attack a myocardial infarction. Check the records to find out whether it was an infarction or a coronary condition such as "insufficiency" or "angina pectoris".

(C) Interview of Client

- (1) Get all details for the entire week before the injury; especially the last 72 hours before the event.
- (2) Get complete previous medical history. If there was a coronary event, get claimant's age, weight, smoking habits, family history, and history of hypertension, diabetes, rheumatic fever, etc.
- (3) Where claimant was doing his usual work and had preexisting heart condition, get location of happening - on job site, or other location.
- (4) Was pre-existing condition advanced enough so that ordinary work was the "straw that broke the camel's back".
- (5) Check for "bridging symptoms" between stressful event at work and infarct.

(D) The Injury and its Work-Connection

- (1) EKG and blood serum tests can almost date precipitating event - good if defendant argues that event happened before claimant came to work. Note: If incident happened before work - the work effort may have aggravated it.
- (2) Section 301(c) of the Pennsylvania Workmen's Compensation Act provides that pre-existing condition may still lead to a compensable event. Language of the Act is "regardless of previous physical condition". Also applies where condition was "aggravated", "reactivated", or "accelerated".
- (3) Check Accident and Health forms: prepare to explain inconsistencies between claimant's doctor's report and responses on Accident & Health claim forms.
- (4) Get Defendant's doctor's report for study and analysis.

(E) Trial Presentation on Behalf of Claimant

- (1) Some doctors are reluctant to testify, and the lawyer must do the following:
- (2) Explain that doctor has a duty to the patient beyond treatment.
- (3) Overcome doctor's negative attitude toward the "liberal" law as it affects claimant's getting a job after a previous cardiac happening.
- (4) Explain "legal causation": "medical causation" contrasted with "compensable (legal) causation".
- (5) Distinguish a "cause" such as atherosclerosis from "aggravation of a pre-existing condition".
- (6) Where Accident & Health form states "not related to employment", explain difference between "medical causation" and "compensable (legal) causation" as it affects the entry on the Accident & Health form.
- (7) Some doctors "hate" court; call it a "waste of time"; hate cross examination by lawyers. You can try to overcome this by careful preparation.
- (8) The treating doctor is best, but if he is not available, use an expert for opinion evidence.
- (9) Use treating doctor for claimant's pre-existing background; must get this on the record.

(F) Points in Presenting Medical Evidence at Trial

- (1) Carefully review claimant's facts - use your own notes or copy of transcript of testimony.
- (2) Base a carefully drawn hypothetical question on facts in the record, or facts to be definitely presented. (When a physician does not possess personally acquired facts regarding the claimant, his opinion can be elicited by asking a proper hypothetical question. Such a hypothetical question to a medical expert consists of the recital of a set of facts based on the evidence in the case, which the expert is requested to assume as true; and upon which he is asked whether he is able to render an opinion as to a factual conclusion at issue within a reasonable degree of medical certainty; and if so, to state his opinion.)
- (3) Present your medical expert who may base his opinion on the above, and can also consult other doctor's reports and opinions, but cannot rely entirely on other doctor's opinions.

(G) Rebuttal on Behalf of Claimant

- (1) Carefully limit cross examination.
- (2) Don't try to get defendant's doctor to admit he's wrong - this is generally a futile task.
- (3) Watch use of statistics - such as cardiac happening at work versus death while sleeping.
- (4) Attack doctor's failure to review all available records, etc.

- (5) Determine whether to bring your expert for rebuttal, or get a new expert to review the material and testify.
- (6) Carefully distinguish subjective complaints from malingering. Subjective complaints causing disability may be compensable.
- (7) To rebut vocational expert who attempts to show job availability, consider the following in your rebuttal:
 - (a) effects of medication;
 - (b) difficulties in using public transportation;
 - (c) effects of extreme cold or hot weather;
 - (d) get detailed work duties and analyze;
 - (e) show limited market for disabled persons;
 - (f) have claimant actually try to get the positions claimed to be available, and then testify about results;
 - (g) consider engaging another work evaluation expert for analysis of opposing expert's claims, followed by his testimony for the record.

Preparation and Presentation of the Defense

- (A) Investigation at Workplace
 - (1) Keynote: Decide your theory of defense, and resolve to win case on facts.
 - (2) Get interviews of co-workers and supervisors, emphasizing:
 - (a) past complaints of so-called indigestion; tightness in chest; chest or heart pains;
 - (b) usual heavy duties performed by claimant;
 - (c) detailed facts on day of occurrence and several days prior;
 - (d) off the job life-style and claimant's physical activities.
 - (3) Get personnel records; performance reports; employment application; and records of lost time from work.
 - (4) Get employer's group health insurance file regarding claimant for the past ten years.
- (B) Investigation through Claimant and Spouse
 - (1) Get medical authorizations.
 - (2) Get detailed statements of claimant and spouse of life style; heavy work done around home; snow shovelling; wood chopping; jogging; helping neighbors with chores, etc. (see medical tie-in with these items below).
 - (3) Get detailed medical history; existence of coronary risk factors; names of all doctors; hospitalizations; surgery; family medical history, etc. (medical tie-in below).

- (4) Get detailed statement of events on day of occurrence and several days and evenings prior thereto (emphasize exertion or mental stress off-the-job, such as marital or familial problems).
- (5) Confirm current physical status: ability to work and get back and forth to work.
- (6) Get commitment for rehabilitation or job availability interview.
- (7) Consider surveillance by private investigator if disability is suspect.

(C) Medical Investigation

- (1) Get all hospital records, with EKG tracings, laboratory reports and charts.
- (2) Get plant dispensary records; union welfare group or health insurance records from employer or others for old health problems. Include annual physical examinations.
- (3) Get cardiologist's or other expert's entire office records.
- (4) Using authorizations, get opinions from all claimant's doctors.
- (5) Refer all investigative and medical material to a good medical expert who agrees to testify, if opinion is favorable. Ask him very specific questions.
- (6) Research and develop medical articles on causes of heart attacks for use with your expert and in cross examination of opponent's expert.

(D) Defense Trial Preparation

- (1) Assemble all original signed statements; group health records; personnel and payroll records; time cards, etc. for use at trial.
- (2) Prepare employer's witnesses for court appearance.
- (3) Meet personally with your medical expert and prepare for direct and cross examination; discuss "soft-spots" in claimant's medical case; discuss theory of defense and have expert keep it well in mind.
- (4) Agree to deposition of claimant's expert, but only if you get a copy of his written report well in advance; and only if opponent agrees to deposition of your expert, if needed.
- (5) Don't call your witnesses out of order to save time; wait until claimant rests his case.
- (6) Get transcript of lay testimony, if possible, before claimant's doctor testifies; so that you can attack his "hypo" question, or at least evaluate it better.

(E) Defenses Against Claimant's Doctors

- (1) Consult with your defense expert to prepare for cross-examination of claimant's expert.

- (2) Emphasize bias or lack of expertise.
- (3) Try to overcome treating doctor "mystique" if his opinion on causal connection is really an intellectual analysis (i.e., treating this patient should not give doctor any advantage).
- (4) Pin doctor down on reasons for conclusions and assumptions; and point to any out-of-court subjective or weak evidence relied upon by the doctor.
- (5) Use well-accepted medical articles and treatises to contradict claimant's doctor.
- (6) Have opposing doctor agree on as many of your doctor's theories as possible.
- (7) Emphasize subjective nature of facts relied upon.
- (8) Pin down what type of activity claimant can do, such as allowed physical movements; commuting; driving car; standing; sitting; walking etc.

(F) Cross Examination of Claimant

- (1) Confirm all items of old history; coronary risk factors; heavy physical and stressful work and avocation activity, etc. Get favorable facts on record, and use claimant's written statement to impeach.
- (2) Confirm history he gave in hospital - such as the record failing to disclose work connection. Be subtle.
- (3) Develop any favorable information about claimant's mental stresses and physical activities at home and in recreation.
- (4) Develop past education, transferable work skills and sedentary work experience.
- (5) Confirm with claimant that he can drive, take bus or subway, do certain physical and mental tasks as permitted by his doctor. (Necessary because of heavy affirmative burden on employer to show that claimant is able to work, and what kind of work he can do).

(G) Presenting Defense

- (1) Present contradictory fact witnesses.
- (2) Try to present your doctor in court instead of by deposition, if possible.
- (3) Meet your doctor in advance at his office to prepare for trial testimony and use of demonstrative evidence.
- (4) Develop his weaknesses on cross-examination, and try to deal with them.
- (5) Document what records and test results or tissue slides your doctor has reviewed.
- (6) Prepare for work availability proof by reviewing claimant's physical limitations, etc.
- (7) Have your doctor review transcript of opposing doctor's testimony, and develop specific areas of disagreement.
- (8) Develop your doctor's lack of bias, and try to overcome the "treating doctor mystique".

- (9) Review and explain the "jargon" of medical terms, and explain the standard of proof.
- (10) Develop alternative medical or external causes of claimant's problems. Show whether heart attack is natural or is an old disease or aging process.
- (11) Develop other experts in the field who agree with your doctor's theories.
- (12) Consider presenting two doctors on a major point of defense, if you can.
- (13) Try to get treating doctor to testify about extent of claimant's disability by use of medical authorizations. On the issue of disability, the treating doctor is the best witness.

Referee's Point of View

(A) Preparing your Case

- (1) Gather your records early, preferably before you fill out claimant's petition. This will avoid errors in dates and other important information.
- (2) On medical research: Here is a suggested standard you should try to achieve: The lawyer must, for the time being, be as well informed as the doctor in the intricacies of the particular disease involved in his case, and the present state of medical research. If you don't follow that standard, your opponent may, and then you might not be able to properly cope with him or his doctor.
- (3) Notice of doctor's testimony: Be sure to notify the referee when you are presenting a doctor's testimony, and try to arrange a definite time for his appearance. This is the only way to avoid conflicts and vexing delays.
- (4) On legal research: You must be familiar with the provisions of the Act applicable to your case: all of the elements and issues involved in proof and defense; the burdens of proof and presumptions in the Act and the decided cases; and the extent and duration of the benefits available for total and partial disability; specific loss; concurrent employment where applicable; and the rules for medical benefits.
- (5) Proving every allegation: Be prepared to prove, and proceed with proof of every allegation in the claim petition or any other petition you have filed in your case.
- (6) Role of the referee: The decided cases and the Act make the Referee the sole and ultimate arbiter of the facts. You must prepare your presentation with that in mind. Since you have the task of persuading the Referee, you should try to "know" your Referee in order to meet any special requirements he may have.
- (7) Sufficient competent evidence: When you prepare your case, you are seeking to present "sufficient competent" evidence, and

you should know the standards for such evidence. Here are some definitions from the case law which you may find helpful:

- (a) "Sufficient competent evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". (W.C.A.B. v. Auto Express, 346 A.2d 829, 1975)
- (b) Here's a definition in the negative: "reviewable as incompetent is only testimony which is so uncertain, equivocal, ambiguous, or contradictory as to make administrative findings of fact mere conjecture that fails to meet the test of substantiality". (Brooks v. W.C.A.B. & Knight, 392 A.2d 895 (1975)).
- (c) The courts have also defined the converse in their rule for reversal where there has been a "capricious disregard of competent evidence", where the courts state to be "a wilful and deliberate disregard of apparently trustworthy competent relevant testimony, or evidence, of which one of ordinary intelligence could not possibly challenge or entertain the slightest doubt as to its truth". (Haraszak vs. Department of Highways, 217 Pa. Super. 138, 1970).*

(B) Tools to Aid Preparation and Presentation

- (1) Trial Depositions and Discovery: The new Referees' Rule of Practice and Procedure (34 Pa. Code Ch. 131 et seq.) contain provisions for oral depositions of witnesses (other than parties) only for use as evidence at hearings, not for discovery, which may be taken at any time after 30 days from the circulation of the original petition by the Bureau, by proper notice to all parties in interest. (See Rules 131.41 through 131.46).

In addition, the Rules provide for discovery depositions of records by affidavit of a custodian of those records, to obtain copies of all relevant records regarding only employment, earnings, or work environment, treatment, mental or physical examination, hospitalization, testing, x-rays, autopsies, tissue slides and samples, including the right of inspection and analysis of all the foregoing. (See Rules 131.46 through 131.48).

- (2) Pre-trial proceedings. With the permission of the Referee, and his participation, you can use the first hearing as a pre-trial conference to explore the issues in your case, and discuss

* Is there such evidence? See NAALJ Journal (Spring, 1982) p. 31. (Ed.)

the order of presentation of the evidence, or other matters provided in Referees' Rules 131.36 through 131.39.

- (3) Medical reports must be furnished. Section 422 of the Act provides that when an employer furnishes surgical or medical services or hospitalizations; or where employee has himself procured them, there must be a complete exchange of such reports between the parties.
- (4) Subpoenas are available. The Act also empowers the Referee to order the production of books and other writings; non-production can lead to contempt action in the Common Pleas Court.

(C) Medical and Hospital Evidence.

- (1) Should be prepared and available in advance of the hearing.
- (2) Exchange medical reports with your opponent at every stage of the proceeding, especially before the hearing.
- (3) You can use the written report of a qualified physician for the history, examination, treatment, diagnosis, and causation of the condition, without requiring the personal appearance of the physician, in all cases involving 25 weeks or less of compensation. Under the Act, this report becomes admissible evidence and will support findings of fact.
- (4) Use the depositions of doctors especially when they are difficult or too expensive to bring to the hearing. This does not require the agreement of opposing counsel; but if there is an objection the Referee may require the witness to appear. (See Ref. Rules 131.41 and 131.44)
- (5) Hospital records are admissible, in all cases, "as evidence of the medical and surgical matters stated therein".

(D) Questions of Proof of Medical Evidence

(1) Rules of Evidence in Compensation Cases

The Rules of Evidence are somewhat more relaxed in workmen's compensation than in civil cases. Section 422 provides that neither the Board nor any Referee shall be bound by the common law or statutory rules of evidence in conducting any hearing or investigation, "but all findings of fact shall be based upon sufficient competent evidence to justify same".

- (2) Evidence must support findings. While it is true that the Workmen's Compensation Act is generally construed with a fair degree of liberality in favor of claimants as remedial legislation, nevertheless, all proofs must be carefully examined, and irrelevant and incompetent testimony excluded in the fact-finding process, because all findings must be based upon relevant and competent evidence.
- (3) Distinction between medical and legal causation: Causation is both a medical and legal term. The meanings are slightly different. The medical definition of cause and effect suggests

scientific certainty, so that the alleged causative element must be one recognized scientifically. Establishment of legal causation requires only that there be a cause and effect within a reasonable degree of medical certainty.

- (4) Medical proof in heart cases. In some types of injury, the causal connection is obvious and medical proof may not be necessary; but in heart attacks or other heart injuries, medical evidence will be required to establish the causal connection between employment and the injury. The decided cases further hold that the medical witness must unequivocally state that the heart attack or other heart condition actually did result from the employment. Less direct expressions of opinion do not meet the standard of proof required, and do not amount to legally competent evidence which would support the Referee's finding of fact.
- (5) Statements of Medical Opinion Analyzed. The following statements of medical opinion have been held, as a matter of law, to be too equivocal to establish causation: "could have" or "could have been the cause"; or "probably was" or "probably a cause and effect relationship"; or "highly possible", "extremely possible" or "very probably and highly possible", "would be sufficient", "might be related" or "I assume" or "I presume". These opinion phrases come from actual cases where they were rejected as causation proof.

Here are a few illustrations of medical opinions which were rendered and found to be acceptable: "I believe that it caused his death"; "I think it certainly accelerated his death"; "It is my opinion that this injury was aggravating; or "It is my opinion that the work precipitated that which caused his death, namely, the coronary occlusion".

Remember that there must be an adequate factual basis in the record upon which the medical expert predicates his opinion.

(E) General Suggestions to Trial Attorneys

- (1) Plan your work and work your plan to achieve an orderly presentation of your case in proper sequence.
- (2) Prepare your medical witness with great care. His testimony is very important, and can make or break your case.
- (3) If you are going to present a hypothetical question for your doctor to answer, prepare it carefully in writing, remembering that the "hypo" must be based on evidence presented or to be presented in the record. "Hypos" may not be based on matters not appearing on the record, or on facts not warranted by the evidence.
- (4) Prepare an initial statement of proof for presentation to the Referee to let everyone know where you're going and what you're asking for.
- (5) Get all medical authorizations and subpoenas completed before the hearing, if possible.

- (6) Review your case from your opponent's viewpoint, and then try to anticipate his moves by knowing your respective strengths and weaknesses.
 - (7) Don't assume or presume facts. That's the Referee's job. Your job is to prove facts.
 - (8) Always keep in mind that the Referee is the ultimate finder of the facts, and prepare properly to offer support for findings of facts at the Referee's level.
 - (9) Orchestrate your presentation of the case, and don't let the case slip out of your hands by failing to cover all aspects. If not, you might create a situation where the Referee has to take over.
 - (10) In proper cases when there is a sharp irreconcilable conflict in the medical evidence, try to persuade the Referee to exercise his power to appoint an Impartial Physician to examine the claimant; file a report and be available for testimony: all at the cost of the State.
 - (11) When you are ready to close your case, make a definite statement to that effect for the record. Don't keep the Referee guessing because, if you do, he may close the case for you.
 - (12) Most important, attend every hearing, and if urgent outside conditions prevent your presence, be sure to notify the Referee, your opponent and your own client well in advance of the hearing.
 - (13) Freely discuss general plans for witness and evidence presentation upon request of opposing counsel before each hearing. This cooperation will expedite the hearing and you may learn of problems or impediments in scheduling which you can avoid.
 - (14) To summarize, Louis Nizer, the famous attorney once wrote: "The only difference between a good lawyer and a bad lawyer is the effort they spend in careful preparation and presentation. The same case in the hands of a good lawyer can mean victory and in the hands of a bad lawyer can mean defeat. -- a defeat mainly caused by failure to spend adequate time and effort in preparation and presentation."
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In Butz v. Economou [438 U.S. 478(1978)] "the Supreme Court recognized that the duties performed by the federal administrative law judges were functionally comparable to those of traditional judges and on that basis accorded them judicial immunity. Recently, in FERC v. Mississippi [No. 80-1749, O.T. 1981, decided June 1, 1982], the Supreme Court ruled that proceedings before state administrative agencies also were functionally equivalent to judicial proceedings."

- Hon. Michael Levant,
 Past Chairman, CALJ,
 in 21 Judges' Journal, No. 3, p. 30 (Summer, 1982).