

Some articles about the bias of defense oriented IMEs and treating providers.

1. From an article in a Portland newspaper:

IMEs are supposed to provide an impartial second opinion, a way to inject a dose of medical reality into the realm of legal blather.

"Dr. XYZ's testimony and written reports are the product of an expert witness whose mind is made up well in advance of learning the facts, and who after learning the facts, nonetheless disputes them." --XX, Esq. He has an impressive resume. What it doesn't show is that ever since he began testifying more than 10 years ago, Dr. XYZ has done the vast bulk of his consulting work- 98 percent by his own account -for insurance companies and employers. Among plaintiffs' lawyers, Dr. XYZ is legendary. He can usually be relied on, they say, to testify that illness is probably caused by pre-existing conditions or that the patient's symptoms are exaggerated. It's no surprise that a doctor like Dr. XYZ would infuriate plaintiffs' lawyers.

But employers and insurance companies like Dr. XYZ, and he has plenty of work. At the same time, some judges have been less than impressed with Dr. XYZ's testimony. Dr. XYZ testified in a case, involving MK, a longshoreman who injured his lower back while lugging on a wrench. Dr. XYZ was hired by the defense to review MK's medical records and issue an opinion. The employer claimed that Kennedy's pain was actually the result of a long history of back trouble and was not related to the accident. This was spelled out in a statement given to Dr. XYZ when he reviewed the records. Dr. XYZ's testimony was eerily similar to the employer's statement. The parallel was so striking that administrative law Judge HH wrote: "It seems to be that Dr. XYZ's testimony in this case should be viewed principally as a forensic exercise designed to defeat a claim, rather than as a reasoned medical judgement." HH ruled in favor of the longshoreman.

**** Doesn't this sound like several defense IME Drs. we all know!**

2. New York Times Exposes Biased and Incompetent “Independent Medical Examiners”. April 3, 2009. By N. R. KLEINFELD, *New York Times*

** If you want to read more of these biased IME Dr. articles, please click through to my website, and go to the link on the Home page that says “articles”.

LB, psychologist, a senior researcher at the Veterans Administration, has developed a special technique, to root out malingering in head-injury cases, and malingerers tend to do worse on the test than genuine cases. But even if you pass the test. LB says you could still be faking it. Either way, it makes for a comfortable income: According to court transcripts, LB earns \$180,000 a year in consulting, almost entirely for insurance companies.

NN, hand surgeon. NN is by all accounts a good surgeon who has a significant private practice. But he's also a favorite of insurance lawyers because of his conservative view of carpal tunnel syndrome, he insists it is seldom, if ever, caused by repetitive motion in the workplace. Rather, NN believes that carpal tunnel has more to do with an inherited predisposition.

Even defense lawyers given the guarantee of anonymity, admit there's nothing independent about an IME. "It's a real problem," one lawyer says. "This is an industry where people are totally into developing whatever sells best to a jury." "Yes, there are some doctors who will always side with the defense," says an Oregon state Rep. That's not to say every doctor who's a regular in the courtroom is a scoundrel. Many, even most, do their best to act with integrity. When they allow themselves to become polarized and biased, doctors betray the dispassionate scientific principles they were schooled in and adopt the heat-seeking logic of the legal world, where conclusions come first and arguments are constructed later.

2. New York Times Exposes Biased and Incompetent “Independent Medical Examiners”. April 3, 2009. By N. R. KLEINFELD, *New York Times*

Dr. HS, an orthopedic surgeon, put his hand on the worker's back. “Mild spasm bilaterally,” he said softly. He pressed his fingers gingerly against the side of the man's neck. “The left cervical is tender,” he said, “even to light palpation.” Dr. HS, an independent medical examiner in the state workers' compensation system called out test results indicative of an injured man. His words were captured on videotape. Yet the report Dr. HS later submitted to the New York State Workers' Compensation Board

cleared the driver for work and told a far different story: no back spasms, no tender neck. In fact, no recent injury at all. “If you did a truly pure report,” he said later in an interview, “you’d be out on your ears and the insurers wouldn’t pay for it. You have to give them what they want, or you’re in Florida. That’s the game, baby.”

Independent medical exams are among the most disputed components of New York’s troubled workers’ compensation system. Under that system, workers with bona fide injuries are entitled to medical care and replacement wages, usually paid for by their employer’s insurer. But a New York Times review of case files and medical records and interviews with participants indicate that the exam reports are routinely tilted to benefit insurers by minimizing or dismissing injuries. “You go in and sit there for a few minutes — and out comes a six-page detailed exam that he never did,” said Dr. SL, co-director of the occupational and environmental medicine unit at MS Medical Center.

New York uses independent medical examiners far more extensively than many states. The examiners’ opinions can empower an insurer to slash benefits, withhold medical treatment or stall a case. Workers say that psychologically, there is something particularly damaging about being dishonestly evaluated by a medical professional.

“I was in so much pain and felt so hopeless for so long,” said CH, a substance abuse counselor who waited a year for surgery on her injured ankle to be approved. “Doctors see you’re in pain and say you’re not. How do they call themselves doctors?”

Many independent examiners are older, semiretired physicians who no longer treat patients, and claimants and lawyers have asserted that the memories and judgments of some of the doctors have at times been impaired by their age and frailties. The examiners do not need special training, only to have a state license. “Basically if you haven’t murdered anyone and you have a medical license, you get certified,” said Dr. AZ, 75, a Queens orthopedic surgeon who does the exams. “It’s clearly a nice way to semi-retire.”

Some examiners see dozens of injured workers a day. Insurers, examiners and brokers, however, defend the exams as necessary and largely untarnished by bias. Many workers contest independent medical examiner opinions and often prevail. Judges can, and do, dismiss the exam findings.

In fact, some lawyers and judges laugh when certain examiners' names come up at hearings. Dr. KS, an orthopedic surgeon who mainly does independent medical exams, is mocked at hearing offices by attorneys as Dr. Says-No, because they feel he consistently finds no disability.

But even when the opinions are discounted, resolution can take months, years, even decades, and many workers, tired of the ordeal of five, six, seven exams, eventually give up.

Some examiners, of course, do furnish honest, well-reasoned opinions. And sorting out the yawning breach between what a worker's doctors and an independent medical examiner conclude is complicated by the fact that some injuries and their impact on a person's ability to work — especially soft-tissue injuries like those to the back and neck — are hard to document with indisputable tests.

ZW, the chairman of the workers' compensation board, said that he found the disparities in medical opinions shocking and that use of independent examiners was "off the charts." But ZW, who was appointed in late 2007, said he was unsure what would rectify the problems. He has introduced new, more detailed forms and guidelines that it hopes will better calibrate an injured worker's care and work limits.

Dr. RB, the medical director of the Hartford, an insurance company, said it was clear that the landscape had polarized. "Physicians regrettably have moved away from being neutral observers," he said. "They've moved toward one camp or the other."

Doctor vs. Doctor

When New York companies complain about the high cost of doing business in the state, they often cite fraudulent workers' compensation claims as a key factor. Though experts say talk of worker fraud is frequently overstated, Critics, however, contend that independent medical examiners who reliably dispute workers' doctors are hired more often by insurers. Some workers cynically refer to them as "insurers' medical examiners."

SX, 66, a home health aide, said she met with an independent examiner in October 2006 so he could review the back, neck and leg injuries she suffered when she tried to prevent a patient from falling. She said the exam took two minutes and was so quick that the doctor, WK, an orthopedic

surgeon, did not ask her anything. As a result, she said, when the doctor filed his report he said she spoke English. She does not. He said she took no medications. She said she took nine. He said her disability was mild and she could resume work. She said that she was in debilitating pain and that the Social Security Administration had already concluded that by its standards, she was totally disabled. “She can’t even hold a gallon of milk,” said Peter Chang, her son. He had come along to the exam to translate. Since no questions were asked, he said he had nothing to do. After checking his notes, Dr. Kerness said it was an error to have said that Ms. Xu spoke English. Otherwise, he stood by the report. “What can I say?” he said. “People can say whatever they want.” A judge ultimately ruled that Ms. Xu’s benefits should continue.

A small study conducted a few years ago at the Central New York Occupational Health Clinical Center in Syracuse found that the clinic’s doctors and independent medical examiners virtually never agreed on whether a worker was disabled.

Asked about this in an interview, a defense IME Dr said: “I have no way to know if a patient has real pain. You have to remember, a lot of people don’t want to work. They lie a lot.”

Examiners, or Advocates

Dr. HS, 79, with a radiant smile and a burst of snowy hair, stopped doing surgery years ago. Until recently he commonly filled his days performing insurance exams on workers, sometimes as many as 50 in an afternoon. “You obviously can’t spend a lot of time with that volume pushing up your back,” he said. “You have to assume there are going to be errors. Look, there are a lot of holes in this thing.” At times, evidence shows, Dr. HS’s official reports were quite different from what he appeared to find during an exam. Asked about the discrepancies in an interview, Dr. HS chuckled and said he could not even recall the people he saw yesterday. He often inserted numbers in the checklist — say, a measure of hand strength — after the person left, rather than as he performed the tests. Was he sure they were correct? “I’m not sure of anything,” he said. “They’re just a guess in the first place.”

The law requires a doctor to attest to the accuracy of a finished report before signing it, but Dr. HS said he rarely read them. He doubted he had read the Aumoithe report. “I just sign them,” he said. If he seldom read

them, how did he know they were correct? "I don't," he said. "That's the problem. If I read them all, I'd have them coming out of my ears and I'd never have time to talk to my wife. They want speed and volume. That's the name of the game." Like many who perform the exams, he views the compensation system as bloated with charlatans.

[Lawsuit filed against the largest disability insurer in the U.S.](#)

UnumProvident has a policy of summarily denying disability claims and using its medical staff to back up the denial, according to the company's former headquarter-based medical director. The doctor, Patrick F. McSharry, also charges that nurses and non-medical employees made medical decisions and that doctors had a quota of claims to review daily, "precluding meaningful analysis."

[Employers, insurers commit fraud by lying, denying benefits](#)

While most workers compensation fraud arrests are workers accused of defrauding insurers, district attorneys in two California counties have charged senior insurance company officials with trying to defraud workers. In each case, the officials are accused of withholding information that could have meant higher benefits.

[Widespread fraud: Bogus claim](#)

The Press Democrat reports on how business and government leaders claimed up to 30% worker fraud to get reforms passed nationwide yet when the California Legislature ordered insurers to set up investigative teams and report all suspected fraud to law enforcement, suspicious claims made up less than 1% of the total.

Unum Is Still a Pain in the Back

November 28, 2011, 08:00:00AM. By [Jane Mundy](#)

This is what the [Court concluded](#) in *McCauley v. First Unum Life Ins. Co.*, Dec 2008 U.S. App. LEXIS 26094 (2nd Cir.), including a list of more than thirty cases in which First Unum's (as Unum was called in 2008) denials were found to be unlawful, including one decision in which First Unum's behavior was "culpably abusive."

(1) First Unum operated under a conflict of interest because it was

both the claims administrator and payor of benefits;

(2) First Unum's reliance on one medical report in support of its denial to the detriment of a more detailed contrary report without further investigation was unreasonable;

(3) First Unum deceptively indicated to McCauley that the medical professional assigned to review his records was a medical doctor when the individual was in fact a nurse, failed to obtain a physician's recommendation, and mischaracterized its rationale for continuing to deny benefits;

(4) First Unum has a well-documented history of abusive claims processing; and

(5) observations (2), (3) and (4), above, collectively lead to the conclusion that First Unum was in fact affected by its conflict of interest. In light of these observations, we find that a reasonable trier of fact could only come to one conclusion: First Unum's denial was arbitrary and capricious.

The court decided for the plaintiff:

[Public Fraud Unit Favors Those Who Privately Fund It](#) by the Los Angeles Times. A review of prosecutors' performance involving workers' compensation shows that their decisions--on whom to investigate and on whom to prosecute--have consistently favored those who provide them with money. The money originates with the state's employers and is handed out by employers and insurers.

[Fighting Insurance Fraud for Your Client's Sake](#) states, "In this day and age, it is virtually impossible for an injured person in America to receive a fair trial, as a result of the anti-fraud campaign, funded by big businesses, which pollute our jury pools and in some cases our judges." Examples of fraud listed are: In Missouri an adjustor for the Home Insurance Company was convicted of defrauding an injured worker by hiding the results of an IME in order to settle her case for less than full value; In California two former Freemont Insurance Company executives were charged with fraud for back dating claimants' checks in order to minimize the penalties to be

accessed by the Department of Industrial Relations; and a defense attorney in St. Louis was charged and pled guilty to misdemeanor fraud in connection with the workers' compensation matter when he withheld a medical report which demonstrated an injured worker was totally disabled.

[NAIC Slaps Insurers on Ergo Standard](#). The National Association of Insurance Commissioners refused to support the workers' compensation insurance industry in their legal challenge to the ergonomics standard issued by OSHA. NAIC commissioners say, "...one can argue that the overall effect of the standard might be to reduce the incidence of occupational injury. Such a result would reduce the cost of workers' comp coverage."