

LITIGATING CAUSATION IN WORKERS' COMPENSATION

Workers' Compensation is far from a monolithic area of settled law. State systems are widely divergent, and even within the state (northern versus southern California?)

Any attempt to discern a meaningful conclusion about causation that rings true for all jurisdictions will fail just like Wylie Coyote's attempts to nab the Roadrunner. However, litigating causation of the extent of the injury limits the instances where a claimed incident is alleged to have caused every diagnoses modern medicine can discover leading to a "soft fraud" of the evolving claim.

I. Identify the Jurisdiction's Legal Standard

Each jurisdiction has created a legal standard through statute and court precedent. Just as importantly, the actual language of the statute might be eerily similar to the state next door but implemented very differently from that state, or even within a state. A state's culture should not be ignored.

A legislature might change the legal standard only to be thwarted by the courts, who feel the legislature went too far. Or, the courts might simply change the standard themselves, either in writing, or in implementation.

The Texas Supreme Court illustrates this last point by reiterating "producing cause" has always contained a "but for" component defined as "a substantial factor bringing about an injury or death, and without which the injury or death would not have occurred." *Transcontinental Insurance Company v. Crump*, 330 S.W.3d 211 (Tex. 2010). The problem was that no party discussed a "but for" component over the last 70 years.

Still, the Supreme Court's pronouncement could be "watered down" if not applied by the regulatory dispute resolution system. A change in the law, either

thru the courts of the legislature, does not always necessitate a change (or at least the change intended) if the dispute resolution system does not implement those changes. Many states have passed laws to “tighten up” their causation standards after many years of a more liberalized approach. Courts do not always comply with the legislative attempts.

For example, observers will watch with interest as the Illinois courts implement the legislative changes to their legal standard. Oklahoma observers are watching the court’s response to the legislature’s overhaul of its workers compensation system. Time will tell if the ultimate result was the one anticipated.

A jurisdiction may have multiple standards. For example, some jurisdictions cover legal aggravations while others cover exacerbations. Injuries that flow naturally and directly from the compensable injury often have their own legal test. Examples include altered gait, overuse of the un-injured extremity, or mental trauma). Mental Trauma and heart attacks often demand dedicated legal standards and precedent peculiar to a jurisdiction. And don’t forget affirmative defenses like horseplay, intoxication, Act of God, etc.

II. Expert Medical Evidence to Establish Causation

The medical standard as written and applied is equally as important as the legal standard. Some states spend scant time on causation believing such issues are part of settlement negotiations. In other states, an injured worker can rely on most cases with her own testimony – no medical causation is required.

Courts or legislatures can alter the causation landscape by requiring an expert opinion and performing an analysis on the quality of the expert and of the opinion. For example, in *Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007), the Texas Supreme Court held the general rule is that plaintiffs must provide an expert medical report unless (1) causation of the accident is not outside the knowledge and experience of the layperson, (2) the injuries themselves are not outside the knowledge and experience of the layperson, (3) there are no prior injuries, and (4) there is a temporal relationship. The court provided the following example that

would not require expert medical evidence: a driver in a MVA exited the wreckage with broken bones and lacerations need not secure an expert medical report proving the broken bones and lacerations. Now, the dispute resolution system requires a non-conclusory expert medical report that explains how the mechanism of injured caused the medical conditions claimed.

III. Mechanism of Injury

Parties often fail to focus attention on the mechanism of injury (MOI), especially as new diagnoses are added. For example, an injured worker twists his knee at work sustaining immediate pain that is not relived by medications and physical therapy. An MRI six months later reveals a torn medial meniscus and tricompartmental osteoarthritis. Few remember the actual MOI did not include direct blow to the knee, the type of MOI that causes or aggravates osteoarthritis.

Consider the 45 year old smoker with a previous lumbar injury who sustains a slip and fall on his right side with an MRI revealing a left-sided L5-S1 HNP. But the symptoms are confined to the right side. Again, many medical experts will agree the left sided HNP is not causing the right sided symptoms.

But MOI must be closely monitored. In some cases, medical reports will begin documenting MOI consistent with the condition the medical providers desire to treat or simply ignore the MOI altogether since no one is paying attention.

An expert may correctly note that a MOI of carrying a 20 pound box overhead and twisting with the axial load while falling to the ground striking the right knee is the cause of the MRI findings to the knee and back discussed above. But the medical expert only knows what she is told by the injured worker or reads in the reports. Perhaps not fraud that can be prosecuted, but the result is the same: medical and indemnity payments for conditions not related to the original accident.

IV. Investigating MOI

Early and accurate establishment of the MOI can be used to refute later claims of a different MOI and thus different injuries. With the interest in security, many employers have on-site surveillance which document the injuries in real-time. Yet, often this evidence is recorded over because no one thought to ask about its very existence. Absent video, the employer must be trained to take a detailed statement from the injured worker and the witnesses concerning the MOI. The adjuster should follow with detailed MOI questions by first having the injured worker describe the accident and then repeating the MOI asking the injured workers' agreement as to the precise MOI.

Sometimes it is appropriate to ask if the injury happened the way it was described. Video reenactment is a tool utilized far too little. Video reenactment need not be a Hollywood production complete with on-site experts. Video from a mobile phone trying to pull down a file cabinet as the claimant describes or measuring the height and weight of an object claimed to have fallen are often persuasive to experts, fact-finders and even plaintiff lawyers.

V. Evidence Based Medicine

Though not a panacea, EBM has practical uses for establishing causation. Experts not citing EBM or other medical literature are not performing optimally.

VI. Choice of Experts

Workers' compensation has always had its share of biased doctors on both sides. These extremist experts write the same reports and have the same opinions case after case. Yet, securing the report with words that favor your side does little if it does not persuade the fact finder. After selecting an appropriately-qualified expert (that is more qualified than the other side's expert), parties should select an expert persuasive to the fact finder, even if that expert writes reports finding some or all of the diagnoses compensable.

In jurisdictions where the judges know all the experts, the expert selection is the single biggest deciding factor. And yet, so often clients complain about unbiased, reasonable experts who write reports that at times have opinions favoring the injured worker and therefore choose an expert that will reliably write the opinion they want. This bought-and-paid-for expert report that looks good on an adjuster's computer screen does not have the same persuasive effect to a wise and experienced judge.

VII Effective Use of Experts

Your properly-qualified and unbiased expert should draft a professional report with the fact-finder in mind. The expert must have ALL the facts from every source, including new evidence such as surveillance or video reenactments. Make sure all "diagnostic" testing is of high quality and the interpretations verified (this includes MRIs, EMG/NCV, etc.). Ask the expert to order better or more recent diagnostic testing, if appropriate. At the least, the report should accomplish the following:

- Correctly describe in detail the MOI
- Conduct a thorough physical examination
- List the medical records reviewed
- List the non-medical evidence (for example, video reenactments)
- Order new diagnostic testing or make referrals for other experts
- List co-morbidity factors
- List the relevant EBM
- Arrive at a diagnosis
- Using the appropriate standard, give an opinion on causation
- Describe all the basis for the causation opinion FOR the fact-finder
- List the weakness in the other side's expert reports

A battle of the experts comes down to the quality of the expert and the quality of that expert's opinion.

VIII Persuasive Presentation

Now cometh the lawyer. Of course, wise counsel would steer the client to the local legal and medical causation standards, both as written and as applied in this part of the jurisdiction. The chosen expert is a model of credibility. And steps have been taken to discredit their expert reports.

But the legal technician is not always the master persuader. A lawyer skilled in the art of creating the perfect argument (or written brief, or contract) is at times not comfortable trying a case. And the litigator often falls in love with her courtroom skills to the detriment of creating the evidence before the trial. But your lawyer should be proficient at creating the evidence pertinent to that jurisdiction's standards and legal culture and then skillfully weave a story with facts that of course demonstrate how their expert failed to use the correct standard but it would not have mattered anyway because the expert report failed to disclose all the facts and indeed even had the wrong MOI which of course means the fact finder is not even legally allowed to read much less consider the report. Pity too since the judge has not even heard the exquisite opinions of the expert we all love and trust with the treatment of our children who states the MOI could not possibly have caused all these alleged conditions.

Skilled lawyering paired with effective investigation can limit or prevent this soft fraud from occurring.

No matter the jurisdiction, a good practitioner is not Wylie Coyote there to build the better trap to snare the Roadrunner; rather, the practitioner reveals to the fact-finder that indeed she is the Roadrunner and the decision in this case was preordained from the beginning. No matter what state she is running thru.