

June 8, 2017

RE: IME's and Vocational Reports in Personal Injury

Through the course of our collective experience in measuring the economic effects of personal injury, we have repeatedly attempted to educate our clients on the distinction between *impairment* and *disability*. Although these terms may appear to be synonymous, each describes a unique aspect regarding the potentially adverse effects of an injury.

The World Health Organization defines impairment as “a problem with a structure or organ of the body.” This terminology denotes medical diagnoses which are typically standardized across the population and are therefore not unique to an individual. When applied to forensic settings, such as the Social Security Disability system or the numerous workers' compensation insurance programs, it is often left to physicians to ascertain the degree of “whole body” impairment that an individual may experience as it relates to their diagnosed conditions. For example, when presented with an individual who experiences an above-the-knee amputation, an evaluating physician will likely consult the *Guides to the Evaluation of Permanent Impairment* by the American Medical Association, which indicates that this particular event is assessed a 100 percent lower extremity impairment, which translates into a 40 percent whole body impairment. The meaning of these percentages is transparent and requires no further interpretation. Simply, the individual's lower extremity is totally impaired and this has resulted in a fractional, 40 percent, impairment of the body, as a whole. However, these percentages are frequently misinterpreted by those who are charged with evaluating the effects of injury on the specific individual in question, which is the distinguishing factor of disability.

Disability refers to the restriction or lack of ability to perform activities which would be expected to be routinely performed by the average member of the population. Using the example from above of an individual experiencing a leg amputation, the impairment was identified as a deficient lower extremity. For such an individual, the resulting disability may be the inability to walk. Since the ability to walk upright is a characteristic expected to be performed by the overall adult population, an individual lacking the ability to walk is therefore determined to have a disability. However, it is possible that such an individual would not experience a disability, even with such a profound physical impairment. Given the advent of technological innovations in biomedical engineering applications, prosthetics may enable this individual to walk upright in a manner and duration consistent with that of the average population. Therefore, the disabling aspects of this impairment may be minimized, or even eliminated entirely. Unfortunately, the effects of the impairment may have further reaching aspects which impede additional aspects of this individual's life.

While an archaic term which is frequently misused, a handicap results when an environmental condition is introduced to a person experiencing an impairment. In the example above, let us assume that this individual experiencing a leg amputation was previously employed as an underground coal miner. In such an occupation, it would be necessary for this individual to not only walk, but also bend, squat, kneel, and crawl. Even with prosthetics enabling this person the ability to ambulate reasonable distances while walking upright, the performance of the essential responsibilities and job tasks of an underground coal miner would be severely diminished. Such inabilities would result in the loss of employment in this occupation and require this person to consider alternative vocations which are more consistent with residual functional abilities. Alternatively, let us assume that this individual was not previously employed as a coal miner, but was employed as an accountant. In such a case, there is unlikely to be rigorous physical requirements related to the job duties as an accountant and the individual would be capable of continuing their employment in this occupation.

In the context of civil litigation, it is necessary to ascertain the presence of an impairment which has potentially resulted in a disabling condition. The determination of injury is often documented in medical records. Beginning with the initial treatment for the injury and continuing through the present, the medical records pertaining to an individual's injury will likely provide diagnoses, treatment history, rehabilitation progress, and future prognosis of the conditions in question. Such records may also convey some explanation of the difficulties that these impairments cause the individual to experience. In such records, progress notes may denote that the individual has difficulty lifting and carrying objects. Perhaps the ability to stand or sit for prolonged periods of time is also documented in the records. This information may be quite important for developing an understanding of how this specific injury has affected this specific person and their ability to perform the general activities of daily living and employment activities.

It is quite common for attorneys to refer plaintiffs to an independent medical examination (IME) as an effort to determine the nature and extent of the injuries sustained. This is certainly informative as a narrative description of the injuries, diagnoses, subsequent treatment, and permanency of the resulting impairments are commonly included in the IME report. Physicians completing IME reports are also frequently requested to address impairments, specifically the impairment ratings referenced in the *Guides to the Evaluation of Permanent Impairment* by the American Medical Association. In our practice, we have found that most IME reports contain a section devoted to the establishment of a whole person impairment rating, with most of these reports remaining silent on how these established impairment assessments will be expected to impede the functional abilities of the individual. It is perhaps not surprising that IME reports do not always address functional abilities, focusing instead on impairment ratings. Many statutory requirements of the workers' compensation system insist that benefits be determined by a mathematical formula, with the impairment rating being a critical variable. Since many physicians performing IMEs are accustomed to this request, an impairment rating schedule is typically encountered in an IME report, even if the injury did not occur in the workplace. Unfortunately, the IME report will frequently stop short of addressing the potentially disabling conditions experienced by the plaintiff, leaving only an impairment rating of the whole body as a barometer of these injuries.

To calculate the economic loss of earning capacity, it is necessary to determine what the residual earnings ability of the plaintiff will be upon the achievement of maximum medical improvement. Following the so-called "return to work hierarchy," rehabilitation counselors first

seek to return the injured individual to the pre-injury job held with the pre-injury employer. Next, an alternative job consistent with residual functional abilities with the pre-injury employer is considered. Next, an alternative job with an alternative employer is encouraged by the counselor. To determine which post-injury occupation is recommended for the plaintiff, it is necessary to ascertain the level of residual functional abilities. Since vocational experts are not typically qualified to make such assessments they rely upon the opinions and findings of medical experts who are trained in these areas. Certainly, physician assessments through IME reports can be insightful for these purposes, but only if the IME contains narrative descriptions of functional limitations and/or recommended restrictions.

As we have discussed above, it is common for an attorney to refer the plaintiff to a physician for an IME. However, without proper instruction, the IME report often falls short of the information necessary to determine the post-injury vocational abilities of the plaintiff. To accurately determine the economic effects of a personal injury, a vocational evaluation requires an understanding of the residual functional abilities of the plaintiff. This understanding is typically not possible when provided with an IME which only addresses impairment ratings under the AMA Guidelines. We suggest that you consider this when retaining a physician to perform an IME on the plaintiff, making sure that this report addresses the important issues pertaining to the vocational abilities retained by the plaintiff following medical recovery.

Please feel free to contact either of us if we can answer questions or be of help. We are always pleased to participate in continuing education sessions and seminars.

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