BIOGRAPHY

HOWARD S. GROSSMAN, OF GROSSMAN ATTORNEYS AT LAW, HAS BEEN LICENSED IN THE STATE OF FLORIDA SINCE 1984. THE FIRM'S HEADQUARTERS IS LOCATED IN BOCA RATON, FLORIDA, WITH ADDITIONAL OFFICES IN WEST PALM BEACH, FLORIDA, STUART, FLORIDA, AND CLEWISTON, FLORIDA. MR. GROSSMAN RESTRICTS HIS PRACTICE TO REPRESENTATION OF INJURED WORKERS TO STATE WORKERS' COMPENSATION CLAIMS, LONGSHORE AND HARBOR WORKER'S COMPENSATION ACT CLAIMS, DEFENSE BASE ACT CLAIMS, JONES ACT SEAMAN CLAIMS, PASSENGER CRUISE SHIP CLAIMS AND PRODUCTS LIABILITY/NEGLIGENCE MATTERS.

MR. GROSSMAN'S PRACTICE INCLUDES REPRESENTATION OF INJURED WORKERS/PLAINTIFFS THROUGHOUT THE U.S. AND IN NUMBEROUS COUNTRIES ABROAD. MR. GROSSMAN HAS BEEN ADMITTED TO THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, U.S. 11TH CIRCUIT COURT OF APPEALS, U.S. DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, U.S. DISTRICT COURT OF COLORADO. HE HAS APPEARD BEFORE MULTIPLE STATE AND FEDERAL COURTS PRO HAC VICE, INCLUDING HAWAII, GEORGIA, RHODE ISLAND AND TEXAS. HOWARD HAS BEEN INCLUDED IN SUPER LAWYERS FROM 2006 AND HAS AN A.V. RATING FROM MARTINDALE HUBBEL.

MR. GROSSMAN WAS PRESIDENT OF THE SOUTH PALM BEACH COUNTY BAR ASSOCIATION FROM 2006-2007. HE IS AN ACTIVE MEMBER OF THE FLORIDA JUSTICE ASSOCIATION, FLORIDA WORKERS ADVOCATES, THE AMERICAN ASSOCIATION FOR

JUSTICE, PALM BEACH COUNTY JUSTICE ASSOCIATION, AND MORE IMPORTANTLY, A RECENT MEMBER OF WILG.

I. DIRTY DEEDS DONE DIRT CHEAP

In a never ending torrent of tactics employed by adjusters, nurse case managers, vocational rehabilitation counselors, defense medical examiners, MRI centers, transportation drivers/translators, and defense counsel, I have attempted to compile a list of the "dirty deeds" some done cheaply, (others, perhaps more costly) to delay, deny, or decrease your client's entitlement to benefits either due and owing under the Longshore and Harbor Worker's Compensation Act or the Defense Base Act. Some of these "dirty deeds" may be peculiarly present in a Defense Base Act claim where the insurance carrier has the opportunity to more easily manipulate a Third Country National ("TCN") - who does not speak English; who does not have readily available medical resources in his/her country to address some of the more intricate injuries (nor might the healthcare provider have the fund of knowledge necessary to determine medical causation in occupational exposure claims); limited access, if any, to legal counsel familiar with the intricacies of the Longshore Act as amended by the Defense Base Act. However, many of the same tricks of the trade permeate most of our cases, at one time or another.

II. RECORDED STATEMENTS OF UNREPRESENTED CLAIMANTS

Initially, the adjuster has the opportunity to take the Claimant's recorded statement over the phone, or send someone else, in person, to do their dirty work. The "field adjuster" or a private investigator who has been hired to take the Claimant's recorded statement at their home, is there not necessarily to find out the particular facts of the case (although, some do). Instead, oftentimes acting as a surveillance investigator (without the video camera – but sometimes to

obtain a photograph of the Claimant's injuries and overall appearance) to size up the Claimant, judge their credibility, comment on their appearance, their lifestyle habits (drinking/smoking cigarettes) and their living conditions. The field adjuster/investigator reports back to the adjuster regarding the statement and their overall assessment of the Claimant.

This can be the most damaging evidence gathered by the defense in support of denying compensability, ongoing compensation and/or medical treatment; despite the investigator's obvious lack of medical or legal training. It is what is said, and perhaps what is not said, during the recorded statement, that can sink the Claimant's claim before legal representation is ever sought.

Of course, the statements use is to limit the Claimant from providing information which is actually helpful to his case, and, at the same time, seeking to box the Claimant into a sworn story that he is not capable of thereafter (no matter how crafty we all think we are) of spinning it differently at his deposition or at the hearing before the Administrative Law Judge.

For example, in a recent case involving a claim under the Defense Base Act involving pulmonary injuries claimed to have been caused by exposure to toxic burn pit emissions in Iraq, the Claimant was unrepresented both at the time of his statement and at the time of his deposition. (No, we did not forget to show up at his deposition.) He had fired, or been fired by two previous attorneys. This time, I violated my own rule-never become lawyer number 3. As it turns out, representation of this Claimant was successful and allowed me the opportunity to learn about the harms posed by the desert sand storm particulate matter, burn pits and the pulmonary diseases it can cause civilian contractor employees.

In the above DBA claim involving pulmonary exposure, at the Claimant's unrepresented statement, he related his living quarters were no more than a ¼ of a mile from the burn pit, and

his work site was within a few hundred yards of the burn pit, at two different bases in Iraq. During the Claimant's unrepresented deposition, the burn pits now were at least 1 ½ miles from one base, and at least ¼ to ½ mile from his work site, and upwards of 3-4 miles from the second burn pit to his living quarters and work site. More disconcertingly, was his explanation for how it is that he began to determine that the burn pits were the cause of his pulmonary problems.

In order to reach their own "medical conclusion" (yet to have then been substantiated by not one of many doctors the Claimant had been evaluated by) his wife had gone on the Internet and Googled the causes of "returning veterans from Iraq and Afghanistan with unexplained shortness of breath."

When asked by a well known defense counsel during the Claimant's unrepresented deposition, (who lead him like a little lamb) the Claimant testified that after his sworn statement, he and his wife began to "build a case" by looking up on the Internet and other on-line sources (blogs, etc.) as to what was the basis for his unexplained shortness of breath. Trying to deal with a statement and a deposition of an unrepresented Claimant is like trying to hold jello in your hands. You know it is going to slip through your fingers and become a mess.

Normally, after each dirty trick, I would have a suggestion to counter the tactic-the only response is to repeat the old adage a client who represents himself has a fool for a client. The only thing that we can do, and some of us have already done it, is to educate potential clients through our websites that they should not provide recorded statements to the insurance adjuster without first having retained counsel. (And even then, I am not an advocate of providing Claimants for recorded sworn statements at any time in the process.)

III. STATEMENTS OF REPRESENTED CLAIMANTS

At times, I will make the offer that I will show you mine, if you show me yours. In other words, in a totally controverted claim where the Claimant is not receiving any benefits, and the adjuster is someone that I have a longstanding relationship with, that I can trust, I will agree to produce the Claimant for a statement in return for an agreement by the employer/carrier to produce for a recorded statement the person with the most knowledge regarding the defense to the claim. In 26 years, I have never had any insurance carrier or attorney take me up on this one. Otherwise, I see no benefit of a recorded statement of the Claimant, especially since you most likely do not yet have the necessary discovery (medical records, pre-employment history, physical questionnaire) to adequately prepare the Claimant for his sworn statement.

IV. ADJUSTERS AND NURSE CASE MANAGERS IMPROPERLY STEERING THE CLAIMANT'S MEDICAL TREATMENT

The goal of the insurance adjuster, if they cannot trip the Claimant up with a statement, (and I agree that this is not always the intent of the adjuster) is perhaps the more frequently used tactic of steering an unrepresented Claimant to a physician that the adjuster or the nurse case manager tells the Claimant (feigning sincerity) "I happen to know of a really good doctor and he takes care of injured workers." Euphemistically what this means is (but, of course is not disclosed to the Claimant), I know of a defense whore, who is going to evaluate you one time, determine that all of your complaints and symptoms have nothing to do with the alleged accident and any injury you believe that you sustained and offer no further treatment-as none is medically necessary.

This dirty deed works well with injured workers who are Third County Nationals still living in their host country. It works equally well on those Claimants who have been expatriated

from their country to another foreign country; or just regular Joes and Jane(s) who have returned home to the states, but do not have a well-established referral source in their community, who could theoretically provide to them the names of honest, middle of the road, well qualified and respected physicians to treat their particular injury.

With TCN's, (still residing in their homeland or having been relocated to another foreign country) those folks have very limited medical treatment choices (especially in impoverished African countries) to obtain medical care that will:

1. Not only be competent;
2. Prepare and submit medical reports (translated into English) to the carrier on a timely basis as required under §702.422; and
3. Be capable of determining an impairment rating and understanding the difference between a scheduled injury and a non-scheduled injury; assigning work restrictions and elaborating on future medical needs.

Trying to obtain a reasonable care plan by a Ugandan doctor, is almost as likely you will receive the money promised to you from a Nigerian internet bank scheme.

The Ugandan doctor, and/or some other foreign country's physician (while perhaps less crafty than a physician in the USA as to what is a customary and reasonable charge for their service) has come to the conclusion that your Claimant is a meal ticket. Whatever the doctor can, and will get, from the insurance carrier in the way of report fees, examination fees, and conference fees, will be multiples of the charges that the physician could ever expect to collect from a local cash paying patient.

Although the damage hopefully may only be partially done by the time the Claimant contacts you for representation, you can prevent the carrier's selected doctor from totally

wrecking your client's claim by refusing to allow further treatment with Dr. "NO GOODNIK" and have the carrier produce the LS-1, (where your client supposedly chose this doc in the box), and then advising the adjuster of your client's choice of initial physician and that the prior hack's care is no longer desired.

Finding a local practitioner in foreign countries can be difficult-but not impossible. If you make use of the W.I.L.G. list serve and/or contact some of our brother and sister members who have uniquely positioned their practice to represent foreign DBA Claimants, you may find competent, seasoned medical providers who will treat your Claimant and provide adequate reporting of their treatment, document the Claimant's injuries and actually provide objective findings and physical limitations. Heck, they might even know how to provide an impairment rating more fairly and competently than one of the contributors to the AMA Guides to the Evaluation of Permanent Impairment.

V. CARRIER "INDEPENDENT MEDICAL EXAMINATIONS" OR AS I LIKE TO CALL THEM, "PROFESSIONAL INDEPENDENT MEDICAL PRACTITIONERS- P.I.M.P's"

Whenever the Employer/Carrier sends a Notice of an Independent Medical Examination, the thought that all of us initially have is that this is the furthest thing from an Independent Examination. Let's face it, these doctors are bought and paid for.

Dr. P.I.M.P. (a term that I cannot take credit for, but actually coined by one of our local trial associations thereafter sued by one of the defense doctors that we outed) stands for Professional Independent Medical Practitioner. One of the more notorious physicians in Palm Beach County, whose last name starts with a Z, was given the name (and emblazoned on the cover of the loose leaf handed out to our local trial lawyers) Dr. Zero Z ___ __ __ __. (Hence the lawsuit for defamation-which was rightfully dismissed.)

This is a physician who, when he does, if ever, "award" (as if it is a booby prize to an injured worker who has now lost complete function of their lower extremities) a permanent impairment is rarer than an Honus Wagner baseball card.

These P.I.M.P.s are out to malign your Claimant's credibility, their social mores, their treating physician's competence, the overbilling and medically unnecessary treatment rendered and, of course, that the Claimant had no injury to start with. But, if they somehow find the existence of an actual injury having been sustained by the Claimant, the injury must have pre-existed the date of the industrial accident. And, if the Claimant has an injury for which no reasonably intelligent human being could possibly argue it pre-existed the accident (i.e., a gunshot wound to the head) the P.I.M.P. will then opine that your Claimant has reached maximum medical improvement. The P.I.M.P. will further denigrate the Claimant by adding that he shows signs of embellishment and symptom exaggeration, (which are nonanatomical) and do not present any limitation on their ability to return to their prior job at full duty.

Some of the Defense Medical Examiners take great pride at their depositions testifying that they have exceeded 500 defense medical examinations in one year, at the cost of $1,000 per evaluation, plus additional record review fees charged by the inch of records supplied (let alone they ever reviewed all of the documents) as if it was some form of prime rib; sprinkled in with a few helpings of nurse case manager conferences, and/or attorney pre-deposition conferences at $250 per 15 minutes. By the time this "IME" doctor adds up his services for an orthopedic examination, it could very easily bring in $2,000-$3,000 for that one time examination of your Claimant that lasted less than 10 minutes. Then, add in the DME's review of records for the deposition (done at home while in pajamas), and any other materials supplied by the defense during the course of discovery, together with yet another conference fee to go over his new

opinions, (that were not previously expressed in his 20 page report) and finally the $750.00 per hour fee for the deposition - a DME can easily make $3,500 per case. As a DME/P.I.M.P. you do enough of these per year, and it certainly makes up for any revenue loss your practice has suffered in its income stream from reductions in payments made for "treating" non-medico-legal patients (i.e., Medicare, State Workers' Compensation claims, personal injury claims and any healthcare plans). Bottom line, it is far more lucrative to restrict your practice to Defense Medical Examinations where you are not subject to taking emergency room call and seeing patients all hours of the day and being paid managed care rates.

VI. HOW CAN WE COMBAT THE P.I.M.P. RESEARCH, RESEARCH, AND YET MORE RESEARCH

Use WILG as a tool to obtain depositions, contact other attorneys to obtain the P.I.M.P.'s answers to expert witness interrogatories and request for production responses indicating the number of times the physician has testified as an expert in a medico-legal matter; how many times the doctor has testified on behalf of the defense whether it be via depositions or at trial (in any administrative matter involving state or federal compensation benefits, personal injury claims, disability cases, medical malpractice claims). In Florida, the use of *Boecher* interrogatories (discovery into the doctor's financial and litigation history bias; percentage of income derived from medico-legal work; percentage of cases or income derived from defense vs. plaintiff examinations), a list of the last three years of deposition and trial testimony showing the court and case number) is critical in showing the doctor's continued and constant use by the defense attorney and/or insurance carrier in proving bias in favor of the hiring party.

There are multiple search engines, Westlaw reports, Jury Verdict Reports that will provide you with ammunition to portray the Defense Medical Examiner as being a "darling" of the insurance industry.

One of the better judicial "outings" of a defense "P.I.M.P." was provided to me recently by one of our list serve members. In a Nebraska Workers' Compensation Court decision *David Cubrich v. Dillahunty Construction Co.* DOC: 201 NO: 1189 the court eloquently stated as follows:

> "Defendant obtained what Dr. Dean Wampler titled an "Independent Medical Examines" [sic]. Complete with predictable conclusions and customary inflammatory critique of both the injured employee and his treating physicians, and now even the vocational counselor. For example, Dr. Wampler opined Plaintiff exhibited an 'exaggerated head/stance' and 'that his true agenda is to remain disabled.' Regarding Dr. Treves, a neurosurgeon who provided presurgical evaluation and attempted conservative treatment, ultimately performed surgery and followed the patient postoperatively for months, his assessment of a permanent lifting restriction was 'completely unnecessary for successful cervical fusion.' Turning to the agreed upon vocational rehabilitation counselor, Dr. Wampler, relying upon his education and years of experience as a vocational specialist, opined the loss of earning power evaluation was 'premature and unnecessary.' I have now been on the court over 10 years, 4 as presiding judge, which required my review of hundreds of lump sum settlements. I cannot recall by memory a single instance where Dr. Wampler concurred with the opinions of a treating physician from anywhere in the country, that an employee's injury was caused by, aggravated or combined with a pre-existing condition to cause injury and the degree of permanent impairment indicated by the treating physician, regardless of specialty. Even without my 'Great Carnak' fez and cape, I can now magically prognosticate the content of the Exhibit marked 'Independent Medical Examination Report, Dr. Dean Wampler,' which causes me to 'muse' – is this sufficient to even create a reasonable controversy? I bid ye who contemplate such matters, a defense medical examination limited to medical findings and conclusions and need for future medical care is more persuasive than implied ill-motives of the employee, and incompetence of the treating physicians, and vocational counselors."

I am sure that each one of us can come up with their local Dr. Wampler or a Dr. Z.

VII. DEFENSE MEDICAL EXAMINER DIRTY TRICKS

An elderly physician purposely drops his instruments on the examining room floor, hoping that the seated Claimant will twist to bend over in a rapid fashion, to pick it up off the floor. The doctor then notes in his report: the Claimant had "free, unrestricted movement and full

range of lateral bending, without noticeable pain." The doctor then repeats the dropping of the instrument while the patient is now standing, so that he can then comment that "the patient was able to bend freely at the waist without any restriction."

The doctor who pretends, while performing upper and lower extremity sensory and motor testing to have the patient push "really, really hard" (against the doctor's hands as he/she pushes weakly down or against the patient's lower and upper extremities) so the doctor can comment that the patient showed good manual muscle strength. Then, the doctor will palpate the patient's back or other body part, barely touching them. The doctor's report then reads: "the patient showed no tenderness on palpation of his spine." During range of motion testing, the doctor will not use a goniometer to measure range of motion and will merely "eyeball it," not repeating the testing, as is required by the AMA Guides to evaluate whether there is similar loss of range of motion on at least three attempts.

The doctor's seven minute physical examination will include a sensory examination where the physician moves very quickly from body part to body part so that the Claimant does not have an opportunity to respond to the doctor's question: - "Do you feel that? Does it hurt when I touch you there, here, there, here, there?" The goal, is to prevent the Claimant from actually having a millisecond to think of whether they can feel the difference between the sharp end of a needle and the dull end; whether they can feel the doctor's hand passing over the lateral side of their left shin while the doctor is trying to distract them by doing the same thing on the right shin, but with much less force or pressure. All the while, the patient is supposed to immediately shout out the diminished sensation in the exact location of the doctor's probing, as if it were a game of Jeopardy.

VIII. HOW TO COMBAT THE DEFENSE DOCTOR'S DIRTY TRICKS DURING EXAMINATION

Warn your Claimants with symptoms of Post Traumatic Stress Disorder of the psychiatrist or neuropsychiatrist who has his staff slam a door or drop a heavy object to see if the Claimant has a startle response. Insist that the Claimant be allowed to bring a person to witness the Defense Medical Examination. Bring a relative who is a nurse and/or someone who is a respectable, credible individual (who is willing schlep to the examination) to watch the doctor perform the examination and then be able to testify, that the doctor's demeanor was curt; that the examination took a whole seven minutes to perform; that the doctor did not forcefully push on the upper and lower extremities. Advise the Claimant to tell the doctor when he is palpating his back, that he can "barely feel the doctor's fingers." Have the Claimant tell the doctor to slow down during sensory testing so that the Claimant has an opportunity to respond in a timely fashion as to what the Claimant can, or cannot, feel during the testing.

Finally, beware of the D.M.E. who watches your Claimant exit the building and get into their car. If the Claimant should "easily and freely" enter and sit down in the car, the P.I.M.P. will be sure to report it as his parting shot in his report.

IX. COMBATING THE D.M.E. FINDINGS

One of the ways to combat the P.I.M.P. examiner's findings, is to have your client seen the very same day by his treating doctors as the D.M.E. If Dr. P.I.M.P. found no: spasm, restrictions of range of motion, signs of radiculopathy, decrease in muscle strength testing, and/or weakness, then you have your client's doctor testify that he has been treating the patient for more than X years, or over the span of X visits, and that on the day the P.I.M.P. "examined" the Claimant he found that the claimant had spasm, decreased weakness, range of motion, etc.

X. TRICKS WITH RESPECT TO REPORTS

Commonly, we see the Defense Medical Examiner who undertakes the role of being an investigator and/or quasi attorney. The doctor has a patient questionnaire that would rival any first year defense associate's script for taking a deposition.

A physical medicine and rehabilitation physician, orthopedist, neurologist, neurosurgeon, (or take your pick of any other non-psychological, non-psychiatric defense medical examiner) should not be asking questions about whether the Claimant had: an abusive family history (theoretically, the argument is if they have been in an abusive relationship then they may have been struck and injured before); the source of any present income; the amount of money that they saved up; do they have any wealthy relatives who may have loaned then money; what is the amount of their mortgage and other living expenses; how they were referred to their treating physicians; whether or not they have a lawyer; when they hired their lawyer; the number of times they have filed prior lawsuits or claims of any kind; their experience with the "justice system" (arrests, convictions of crimes). All under the guise, that the answers to these personal matters supposedly impact on the examination of a person who is now suffering from a below-the-knee amputation, or any other injury, for which it wouldn't medically matter one bit if they were Keith Richards from the Rolling Stones and lead a lifestyle of a degenerate rock star.

These questions are purely posed by Dr. P.I.M.P. to assist the defense attorney to paint our clients out as being drug seeking, lazy, fakers, malingerers, somatoform sufferers, and any other diagnosis that points to a conclusion (hopefully to be adopted by the ALJ) that your client is an undeserving, uninjured, embellishing sloth. Thus, it is critical for you to obtain (prior to your client stepping foot in the D.M.E.'s office) a copy of the doctor's pre-intake questionnaire and review it carefully to determine which, if any, of the questions you will allow the claimant to

answer. Additionally, let the client know that at anytime he/she should call your office during an examination, and there should be someone available to let them know that if the question the doctor is answering is inappropriate then they should not answer it.

This theory that you can move to strike the doctor's questions and the claimant's responses in a proceeding before an Administrative Law Judge, is a crock. Once the deposition testimony has been heard, and/or the report is somehow introduced into evidence, the bell has been rung, and there is no way to unring the bell. Irrespective of whether the Judge rules that he/she will not consider the doctor's inquisition of the claimant, there are very few people who can read a deposition and then forget what they read.

XI. SURVEILLANCE

Obviously, there is a legitimate reason and purpose for surveillance. Those individuals who are fraudulently gaming the system ought to have their benefits terminated if they have truly misrepresented their physical capacity to perform activities which are so obviously contrary to the testimony they have given at a deposition, during their own medical examinations and perhaps, most importantly, at the "Defense Medical Examination."

Our clients are going to be placed under surveillance and they should be told that from the day that they retain you.

What we tell our client is not to bring out the shotgun when they catch the investigator pulling up with his Lincoln Marquis with tinted windows. Let them know that they will be surveilled, and that they should continue to live their lives as they have been following the accident. However, I certainly do advise my clients that if they were to be caught playing soccer or volleyball and they claim to have a significant knee or shoulder injury, kiss their case goodbye.

A former partner of mine worked on the dark side, as a defense attorney. He used to have his investigator place hay bales in front of the door to the Claimant's residence so that the Claimant would have to lift the hay bales up in order to clear a pathway to their front door. There are also instances where the Claimant's tires were mysteriously caused to have flats (the air was let out of their tires) so that they would be forced to change the tire; all in full videotaped view of the surveillance investigator. Needless to say, the Claimant was smart enough not to change the tires and the surveillance investigator received nothing of value. However, there are certainly reported ALJ decisions where surveillance was so devastating to the Claimant's case that all compensation benefits had been denied, and the ALJ threw a medical bone to the Claimant for ongoing treatment.

Obviously, I am not here to preach that phonies or frauds should not be tossed out of the system. However, to combat surveillance tricks, consider doing the following:

You can predict with a fairly high degree of probability that your client is going to be surveilled on certain days: their depositions, the "IME, their own medical examinations and the mediation-since the defense knows where they are going to be on those particular days.

Many of our clients live quite a ways form the defense medical examiner. It is a perfect opportunity for the insurance carrier to hire an investigator to attempt to disprove, or at least show, that the Claimant's report of inability to sit for any extended length of time, is an exaggeration, and at worse, a complete fabrication. I tell my clients that they should not chit chat with the driver as many of them are also the translator for the defense medical examination and their routine visits. It is not uncommon for these transportation drivers/translators to reveal in their transportation notes that the Claimant asks them to take them to pick up medications that

were not exactly prescribed by physicians. Furthermore, these "witnesses" end up testifying as to their visual observation of the Claimant before and after the visits with their physicians.

On long trips to their treating doctors, and especially on the day of their defense medical examination, it's not a bad thing if the Claimant just so happens to exit the vehicle every 30 to 45 minutes (presuming it is their testimony that is their ability to sit without significant discomfort). Thus, they should be sure to tell the driver that they need to get out of the vehicle for a rest break and perhaps they just might need to rub their back, take one of their pain pills, or at the very least stretch their legs.

Once the Claimant has reached the doctor's parking lot, you can be assured that the investigator will have been filming the Claimant as they exit the vehicle. Obviously, if the Claimant is using a walker, cane, or some other orthopedic appliance (a back brace etc.) at the time of transportation to and from the doctor's office, heaven help the Claimant who ditches the orthopedic appliance upon leaving the D.M.E.

XII. FUNCTIONAL CAPACITY EVALUATIONS

I think we all take the position that an FCE is not part of a medical evaluation, and therefore, it is not subject to being compelled by the District Director or an ALJ. If your own treating doctor has required an FCE in order for the doctor to assign any permanent impairment ratings/restrictions, the first thing to do is conference with the doctor and see if this is the doctor's request or the nurse case manager's.

If thereafter, the doctor insists on using an FCE, try to get the doctor's office to request an F.M.E., a Functional Medial Evaluation. An FME is usually conducted by a physical medicine and rehabilitation physician along with an occupational therapist. Combine those two and you get some possible credibility in determining the functional limitations. However,

obviously a 3 to 4 hour FME cannot replicate a full work week that the claimant might be subjected to upon returning to light to medium work. Unfortunately, there are very few FMEs that will do examinations on serial days and it is extremely expensive.

I have recently begun working with ERGO Works, Lisa Fitzpatrick, President, who has a valid and reliable method of testing injured worker's physical function and ability. If you contact me after the seminar, I will be more than glad to let you know about her work.

There is a notorious company out of Florida that is performing FCEs using paramedics, firefighters, occupational therapy assistants, and then having these so called experts comment on the Claimant's "perceived effort" and then attempt to use Waddell's signs to show the Claimant was not putting forth adequate effort. Insufficient effort and 5/5 Waddell's is the "kiss of death" when it comes to an FCE.

XIII. DON'T GET ME STARTED ON NEUROPSYCHOLOGISTS

There are "traveling" P.I.M.P.S. performing neuropsychological interviews and testing. Not fine with just selling their soul locally, they are willing to cross state lines to evaluate your client. Where do they conduct these critical neuropsychological interviews and testing? At a doctor's office; no of course not. They conduct them at a hotel adjacent to the airport.

I have, unsuccessfully, argued that an examination done at a hotel under Rule 35 of the Federal Rules of Civil Procedure is not a reasonable place to conduct a psychological examination.

The problem with the traveling P.I.M.P.s is you have to make sure they are licensed in the state where the examination is being conducted. If not, then clearly an objection must be raised to the doctor's ability to examine your Claimant in a state in which they are not licensed. The state's board of medicine would certainly like to hear from you.

XIV. NURSE CASE MANAGERS

Nurse Case Managers may be members of the Case Management Society of America (CMS) which has adopted voluntary practice guidelines for the industry. The 2009 definition approved by CMSA to define case management is: "...a collaborative process of assessment, planning, facilitation, case coordination, evaluation and advocacy of options and services to meet an individual's and family's comprehensive health need through communication and available resources to promote quality cost-effective outcomes." Standards of Practice for Case Management, Case Management Society of America's (CMSA) Standards of Practice (SOP), Page 7. Nowhere does it state they are patient advocates for even handed medical care or balanced reporting of the Claimant's needs to the adjuster.

Invariably the nurse case manager will attempt to attend the actual physical appointment with your client's treating physician, and then let go of the claimant's arm long enough so they can begin to start arm twisting the treating doctor into taking your client off the prescriptions such as Oxycontin, Lyrica and Duragesic patches that each cost the carrier more than $500.00 to $600.00 per month.

The nurse case manager is doing this for the "claimant's benefit" as she does not want to see them addicted to the medication, which have "no efficacious benefits."

Now, the nurse has assumed the role of the treater and is directing the doctor as to which tests to perform, which medications that the claimant can, and cannot have, and how often they should, or should not, be attending physical therapy - all in the name of "evidence based medicine." Assuming that the treater has already made his fortune (and is not dependant on being referred cases by the compensation carriers) you may convince the doctor to stick to his

guns and testify as to the ongoing medical necessity of the patient's need for palliative care including medications, physical therapy, and epidurals.

The obvious method to combat this is to first make sure that the nurse case manager can do no harm. Do not allow direct contact while the claimant is in with the doctor during the office visits. Additionally, if the doctor has the courage to tell the nurse case manager that she is the one who has the M.D. on the wall, and not the nurse, then perhaps your client might get a fair shake. Otherwise, you need to find a doctor through the List Serve (if it is an out of state claimant) who a local attorney knows the doctor well enough that won't wimp out on you and will advocate for the patient's appropriate medical treatment.

XV. DEFENSE COUNSEL TRICKS

Defense attorneys who send Non-Party Subpoenas for issuance by the ALJ, and then serve the subpoenas without serving a Notice of Production from Non-Party to Claimant's counsel. Pursuant to F.R.C.P. 45(b)(1) (applied by 29 C.F.R. §18.1(a)) if the subpoena commands production of documents, then before it is served, a Notice of Production From Non-Party must be served.

Setting depositions and propounding formal discovery prior to the matter being referred from the District Director's office to the Administrative Law Judge. Defense excuses "we are not real sure what the doctor's scant notes are really saying on what the medicals are," does not entitle them to conduct formal discovery prior to the matter being referred to the ALJ.

XVI. DEFENSE VOCATIONAL REHABILIATION COUNSELOR'S ASSESSMENTS

Do not permit a vocational rehabilitation counselor an opportunity that no nurse case manager or defense medical examiner, or defense attorney would ever have – to be able to step inside the claimant's home to do a vocational evaluation. The vocational rehabilitation

counselor will surely note how clean the claimant's home is; how well they take care of their house; how well they live (i.e., their X-box games, their 60 inch flat screen TV, etc.)

XVII. 8(i) SETTLEMENTS OF UNREPRESENTED THIRD COUNTRY NATIONALS

I would like to end today's discussion, where most cases do - which is through an 8(i) settlement-assuming that the Claimant is getting a fair deal and not under duress or coercion.

However, what many of us are now hearing from previously unrepresented Third Country National Defense Base Act claimants is that fairly significant injured Claimants have signed away their future compensation and medicals for $8,000.00.

You all may have received inquiries primarily from Iraqis, who have submitted approved 8(i) settlement documents that are in both English and Arabic; and it is clear that the medicals were inadequate to support an 8(i) settlement but the District Director signed off on the settlement. Unfortunately, these folks come to you more than thirty days after the date the decision has been filed approving the 8(i) settlement.

I am unaware of anyone who has yet to successfully challenge the approval of an 8(i) settlement of an unrepresented Claimant on the basis of fraud. The Board has previously rejected the argument that it is a "Court" with equity power to rescind an 8(i) settlement, that has been approved by the District Director.

One could make a convincing case that the Department of Labor needs to open an office at the Baghdad Airport or at Kandahar Airfield so that civilian contractors can be advised of their rights prior to suffering an injury that causes significant lost time or otherwise entitles the injured worker to benefits under the Act.

CONCLUSION

It falls upon us to collective share our experiences as attorneys regarding the "dirty deeds" that our Claimants encounter so that we can find ways to ethically counter these tactics to ensure that our clients receive all the benefits for which they are entitled under the Act.