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Recurring Symptoms of IME's

Independent medical examinations have given rise to many complex issues

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While an independent medical examination is utilized in most personal injury actions, the law regarding the procedure for IMEs and the discovery issues that may arise is not fully developed. The recurring issues, along with the applicable law, are analyzed below.

Typically, an IME is arranged after the depositions have been completed and all of the records and films have been secured. At times, the defense may wish to attempt to settle the case prior to incurring the substantial expenses related to an IME and the trial deposition of the IME expert. Where such settlement efforts are not successful, the competing interests of the plaintiff moving the case to a prompt resolution and the defendant's desire to complete expert discovery may come into conflict.

Generally speaking, where the damages issues are in dispute, the trial courts will err on the side of caution and allow the defense time to complete expert discovery so as to avoid the creation of any appellate issues.

In this regard, the Superior Court has held that an IME may be compelled even after an arbitration hearing particularly where liability was admitted and the sole issue for the jury involved damages and the limited tort question. *McGratton v. Burke*, 674 A.2d 1095 (Pa. Super. 1996). One trial court went so far as to rule that an IME may be compelled even after filing cert of readiness. *Edelstein v. Tipton*, 69 Pa.D.&C.2d 248 (C.P. Philadelphia 1974).

Place and Costs of Exams

In addition to the timing of an IME, the location of the IME may become an issue. Disputes may arise as to the place of the exam and the need for the examinee to travel a distance to attend the exam. In the case of *Meeker v. Sarris*, 40 Pa.D.&C.2d 643 (C.P. Beaver 1966), the court held that a defendant, in seeking an IME of the plaintiff under Rule 4010, is not required to have such examination completed in the county of the plaintiff's residence or the county where suit was brought.

In today's practice, where there is travel involved for the plaintiff of about an hour or more to get to the place of the IME, the courts will generally require under Pennsylvania Rule of Civil Procedure 4011 that the plaintiff be reimbursed the reasonable expenses related to the same, such as mileage, tolls or food expenses.

Persons Present

Once the time and place of the IME is set up, Rule 4010 advises who may attend the IME in addition to the plaintiff. The rule expressly states that the "person to be examined shall have the right to have counsel or other representative present during the examination."

Experience advises that among those persons who have been allowed to attend IMEs with plaintiffs, include the plaintiff's attorney, a paralegal or legal assistant from plaintiff's attorney's office, or a nurse hired by the plaintiff's attorney to monitor the exam. Although it is likely cost prohibitive, it has even been held that the plaintiff may have his own treating medical expert present at the IME. *Harding v. Sears*, 47 Pa.D.&C.3d 591 (C.P. Washington 1987).

The plaintiff will not be permitted to compel the defense to pay the fees associated with having the plaintiff's attorney or representative attend the examination. *State Farm v. Morris*, 432 A.2d 1089 (Pa. Super. 1981).

Recording

While Rule 4010 specifically allows a plaintiff or his or her representative in attendance to audio record an IME, the courts have refused to extend the rule to allow for the videotaping of the same. In *State Farm v. Miller*, 8 Pa.D.&C. 4<>th 614 (C.P. Somerset 1990), the court specifically denied the plaintiff's request to videotape an IME as an unreasonable intrusion into the examining room and an undue burden on the physician.

Additionally, under Rule 4010, if an audio recording is made, the plaintiff must produce copy of tape to the defense at reasonable cost upon receipt of a request for the same.

Multiple Examinations

Generally speaking, multiple IMEs will not be allowed by the courts except where just cause exists. Dissatisfaction with an initial IME report certainly does not constitute just cause. *Farmer v. Supermarket Gen'l Corp.*, 10 Pa.D.&C.4<>th 500 (C.P. Philadelphia 1991). However, in a case where the claim was for permanent injuries and continuing pain, and a year and a half had elapsed since the defendant last had the plaintiff examined, the defendant was allowed another IME in the case of *Edelstein v. Tipton*, 69 Pa.D.&C.2d 248 (C.P. Philadelphia 1974).

Where a plaintiff has different types of injuries, such as an orthopedic injury and a dental injury, IMEs with experts of different specialties will generally be allowed.

Production of Reports

On occasion, an IME report unfavorable to the requesting party's position may be generated. The issue becomes whether the requesting party is required to produce that report, particularly where a decision is made not to call the expert as a witness at trial.

Pennsylvania Rule of Civil Procedure 4003.5(a)(3) provides that a party may not obtain discovery regarding any expert that is not expected to be called as a witness at trial, "except a medical expert as provided in Rule 4010(b) [regarding IMEs]....." [Emphasis and bracket added].

In the relatively recent decision of **Lloyd v. Lloyd**, 889 A.2d 1246 (Pa. Super. 2005), the court partly relied on Rule 4003.5(a)(3) in holding that a medical expert report obtained by an opposing party must be produced. In *Lloyd*, a former wife submitted herself and her children to a custody evaluation performed by an expert at the request of her former husband. The former husband then initially listed the expert as a possible witness in his pre-trial memorandum. However, a decision was later made by the former husband not to call the expert as a witness at the hearing. The court ruled that the former wife was nevertheless still entitled to discovery of the expert report.

Thus, it appears that the Rules of Civil Procedure and Pennsylvania case law generally require the production of the IME report regardless of the opinion contained therein.

Utilizing an Opponent's Expert Opinion

Although a plaintiff may secure a copy of an IME report of a doctor that the defense does not intend to call as a witness, the plaintiff may not thereafter compel that expert to testify on behalf of the plaintiff at trial. *Boucher v. Pennsylvania Hospital*, 831 A.2d 623 (Pa. Super. 2003); *see also Spino v. John S. Tilley Ladder Co.,* 696 A.2d 1169 (Pa. Super. 1996) aff'd. 696 A.2d 1169 (Pa. 1997). The appellate courts have also gone so far as to say the plaintiff may not otherwise utilize such an IME report at trial. *Columbia Gas Transmission Corp. v. Piper*, 615 A.2d 979 (Pa. Commw. 1992).

The rationale behind this rule is an acknowledgement of an expert's proprietary interest in his own opinion and the recognition that he or she should not be required to relinquish it without his consent. An open issue arises as to whether the expert may agree to testify for the plaintiff in exchange for a fee paid by the plaintiff where the expert essentially remains under the employ of the defendant that originally retained the expert.

However, it has been established that where an IME doctor's deposition for trial has been completed, any party may use that deposition for any purpose at trial under Pennsylvania Rule of Civil Procedure 4020(a)(5). *See Wiley v. Snedaker*, 765 A.2d 816 (Pa. Super. 2000). The rationale behind this rule is that, in such a situation, the defense made the witness available, the expert freely testified, and his testimony thereby became available for use by either party.

Discovery of Bias

A recent hot issue in this area is the extent to which plaintiff's counsel may obtain discovery regarding the potential bias of an IME doctor. Although the Federal Rules of Civil Procedure expressly sets forth the parameters of discovery in this regard under F.R.C.P. 26 (a)(2)(B), no such rule is found in the Pennsylvania Rules of Civil Procedure. Rather, until recently, the state trial courts have been on their own in attempting to carve out their own rules.

One issue that has arisen in the state courts is the ability of a litigant to discover written communications between the opposing party and that party's expert. One trial court that addressed this issue required the production of all written correspondence between plaintiff's attorney and plaintiff's expert witness, but allowed plaintiff's attorney to redact his opinion work product. *Pavlak v. Dyer*, 59 Pa.D.&C.4<>th 353 (C.P. Pike 2003).

In its Jan. 9, 2007 decision in *Feldman v. Ide*, 915 A.2d 1208 (Pa. Super. 2007), the state Supreme Court attempted to clarify other issues surrounding a party's right to discovery of an expert's potential bias. In *Feldman*, the Court relied upon its prior holding in *Cooper v. Schoffstall*, 905 A.2d 482 (Pa. 2006), in ruling that a plaintiff in a personal injury case is not entitled to limited discovery on the financial background expert unless a threshold is first met showing that expert is a professional witness or might color his or her opinion in light of substantial financial incentives.

The *Feldman* court noted that the plaintiff may attempt to meet the required threshold showing through interrogatories inquiring as to "the approximate amount of compensation received and expected in the pending case, the character of the witnesses' [sic] litigation-related activities, and, in particular, the approximate percentage devoted to specific types of litigation and/or work on behalf of a particular litigant, class of litigant, attorney, and/or attorney organization; the number of examinations, investigations, or inquiries performed in a given year, for up to the past three years; the number of instances in which the witness has provided testimony within the same time period; the approximate portion of the witness's overall professional work devoted to litigation-related services; and the approximate amount of income each year, for up to the past three years, garnered from the performance of such services."

From the *Feldman* opinion it appears that if the threshold showing is met, the courts may allow discovery into a professional witness' finances possibly up to three years back.

As IMEs remain an integral part in evaluating plaintiff's claims of personal injury, the above law will have to be continually developed. Obviously, the law surrounding the use of medical experts and particularly those cases regarding discovery on the potential bias of a medical expert, should also be deemed to apply to plaintiff's experts retained for litigation purposes as well. •