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Medical Support Made Somewhat Easier

Outline Authored by
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There have been plenty of days when I have spent the working hours with scientists and then gone off at night with some literary colleagues. I mean that literally…. [C]onstantly I felt I was moving among two groups-comparable in intelligence, identical in race, not grossly different in social origin, earning about the same incomes, who had almost ceased to communicate at all, who in intellectual, moral and psychological climate had so little in common that instead of going from Burlington House or South Kensington to Chelsea, one might have crossed an ocean….But though many of those writers dominated literary sensibility for a generation, that is no longer so, or at least to nothing like the same extent. Literature changes more slowly than science. It hasn't the same automatic corrective, and so its misguided periods are longer. (Emphasis added.)

C. P. Snow
The Two Cultures and the
Scientific Revolution (1959)

Note by the author of this outline: It has been nearly twenty years since the attorneys at the Wisconsin Worker's Compensation agency have made any attempt to clarify the shockingly confusing medical form that medical doctors are asked to complete on a regular basis. This is a long *misguided period* by any stretch of the imagination.

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Moderator: ALJ Thomas J. McSweeney
Panelists: Attorney John D. Neal and Attorney Patrick Gillick

I. The WC-16-B Medical Form Itself

This is the form that has not been reviewed in any meaningful sense for nearly twenty years by the Department. Appendix, pages 1 & 2. However, private attorneys and individual Department employes (sic) have of course reviewed the form. This is the fourth and probably final speech by ALJ McSweeney focusing on the medical causation questions of the WC-16-B form designated as questions or paragraphs 11, 12 and 13. The outlines for the initial three speeches are found at www.wawca.org under "Papers on WC" and are described as follows: 1) Medical-Factual Causation 1; By: ALJ Thomas J. McSweeney; Date: 2/23/01; 2) Medical-Factual Causation 2; By: ALJ Thomas J. McSweeney; Date: 9/01; and 3) The WC-16-B Department Medical Form; By: ALJ Thomas J. McSweeney; Date: 6/2/03.

II. In-Person Interview with Michael H. Gillick

On May 21, 2005, from 8:30 a.m. to 9:00 a.m. in Milwaukee, Wisconsin, Michael H. Gillick was interviewed by Thomas J. McSweeney. This division II is the result of that interview. The purpose of this 30-minute interview was to determine the role of questions 6, 7, 8, 9 and 10 of the Departmental WC-16-B form in obtaining so-called "medical support" for a temporary total claim or a temporary partial claim. Attorney Gillick was very candid and truthful in response to all questions. He gave the following responses, which have been reviewed prior to the publication of this outline. Attorney Gillick stated forcefully that questions 6 and 7 are "basically irrelevant." Question 6 reads as follows: "6. Did you treat the patient? Yes or No? If so, between what dates?" Question 7 reads as follows: "7. Date of last examination or evaluation." Interviewer McSweeney then asked if Attorney Gillick was saying that questions 6 and 7 are "basically irrelevant" for purposes of obtaining so-called "medical support" for a temporary claim. Attorney Gillick replied as follows: "No, questions 6 and 7 are 'basically irrelevant' for any purpose." Attorney Gillick then gave the example of a report by an IME doctor who obviously has never treated a patient. Next came question 8 that reads as follows: "8. Date disability from work began." Attorney Gillick then stated that this medical opinion simply states the beginning date for a claimed period of temporary total or temporary partial disability. Question 9 was then discussed and this question reads as follows: "9. Date injured was or will be able to return to a limited type of work. State any temporary limitations." Attorney Gillick then stated that question 9 establishes the end of a claimed period of temporary benefits if work is offered. However, question 9 could generate a fact question or questions whether a particular worker is able to accept the work offered given his or her restrictions. Part of this question is often made somewhat more complex by the circumstance that the treating doctor or doctors give different restrictions from those given by an IME doctor. Question 9 also provides the basis for a change from temporary total disability to temporary partial disability. Please note that question 9 does not deal with the extent of the healing period as this is the role of question 10 according to Attorney Gillick. Question 10 reads as follows: "10. Date injured was or will be able to return to full time work subject only to permanent limitations. State any permanent limitations."

III. Have You Been Saved by LIRC Lately?

I am confident that some of you don't go to church so you must seek salvation elsewhere. Here are some encouraging words from LIRC found at David A. Schmidt v. C & N Western Wis. Excvting, et al., WC Claim No. 2002-033605 (LIRC April 5, 2005) at page 8: "Dr. Rolnick [IME doctor] also questions the credibility of Dr. Berg's [treating doctor] opinion on the fact the doctor [Dr. Berg] marked two boxes on the [WC-16-B] form practitioner's report. Dr. Rolnick suggests a doctor is credible only if he [or she] marks a single box. The courts, however, are not inclined to automatically disregard a treating doctor's opinion because he [or she] mismarked the practitioner's report form or because he [or she] marked more than one of the boxes dealing with legal causation. [LIRC footnote 4 is then set forth below] 4. *Anderson v. LIRC and Quad Graphics*, case no. 95-1023-FT (Wis. Ct. App., November 7, 1995); and *Johnson Welding and Manufacturing Company v. LIRC and Skogstad*, case no. 94CV704 (Cir. Ct. Eau Claire Cty., July 3, 1995). See also: *Shelby Mut. Ins. Co. v. DILHR*, 109 Wis. 2d 655 (Ct. App. 1982) (noting the conceptual similarity between the occupational disease and the *Lewellyn* 3 theories of causation.)" Note by ALJ McSweeney: "Rule 3" of Lewellyn ("*Lewellyn* 3") is the so-called aggravation rule. 38 Wis. 2d at 59. Many medical experts in a gradual occupational disease case will appropriately check "yes" to question 13, but then through no fault of their own also check "yes" to question 12 even though question 12 is the accident/aggravation question. This is of course because the confusing WC-16-B form does not have a separate question for gradual occupational disease with aggravation of a pre-existing condition by "work exposure" as it should. Also, in this regard, "official department policy" misstates the law in this because the Department cites footnote 4 of Lewellyn ("4. We are not here concerned with an occupational disease.") for the erroneous legal conclusion that aggravation analysis does not apply in gradual occupational disease cases. However, this footnote 4 is a footnote to "Rule 2" of Lewellyn which is the manifestation defense rule, not a rule imposing liability in any case whether it is an accident case or a gradual occupational disease case. I think it is important to remember in this context that duration, frequency and intensity are subsets of the element of "work exposure." The ultimate question then is whether this "work exposure" aggravated a pre-existing condition beyond normal progression. Finally, the term "aggravation" includes "precipitation" and "acceleration" in my view based on the holding in Marx v. Industrial Comm., 9 Wis. 2d 164, 100 N.W.2d 331 (1960). This will be discussed further in this outline under "VI. Miscellaneous Considerations" set forth below.

IV. Temporary Benefits and John D. Neal of Verona

Once upon a time, during the *misguided period* of twenty years described in the opening, ALJ McSweeney reached out to the Wisconsin legal community seeking assistance in "modernizing" the much neglected WC-16-B form. Attorney John D. Neal (then of Madison) was there for all of us. He actually took on the much avoided task of actually trying to explain and make sense of questions 9 and 10 of the WC-16-B while adding some additional language to question 15 (new "question 15b.") in the process. Appendix, pages 3 & 4. This revised form has other changes as well. The old and outdated department WC-16-B form is part of the appendix at pages 1 & 2 and the new and modern proposed form updated by Attorney Neal and other attorneys is part of the appendix at page 3 & 4. Please compare the old and new questions 9, 10 and 15. Old question 9: "Date injured was or will be able to return to a limited type of work. State any temporary

limitations." New question 9: "Date injured was first able to return to any limited type of work. State any temporary restrictions." Old question 10: "Date injured was or will be able to return to full time work subject only to permanent limitations. State any permanent limitations." New question 10: "Has the healing period ended? ___Yes;___No. If yes, on what date?" The new portion of question 15 (question 15b.") is as a result of the change to question 10: "15b. If permanent disability has resulted, state any permanent restrictions on work activities." Question 15a. is the original question 15, which reads as follows: "15a. Estimate percentage of permanent disability to the member, eye or ear involved, or compare to permanent total disability if injury is to torso or head, caused by the accident or work exposure described in Item 4." Attorney Neal has provided written responses to the questions that will be posed to him in person at the seminar. These responses are set forth below so that the audience may listen to Attorney Neal's oral responses at the seminar without the need to attend to written down his responses.

Questions for Attorney Neal ("Mr. Neal") at the seminar:

Inquiry number 1: Is there any difference in the eyes of the law between "limitations" and "restrictions"? If so, what is the difference. If so, do doctors understand and utilize this difference or distinction? Answer: In my experience, the terms "restrictions" and "limitations" are used interchangeably by all professions (medical, legal, vocational), and are for all practical purposes, synonymous.

Inquiry number 2: Please explain why you changed the language of question 9 in the manner that you did, Mr. Neal. Answer: I changed Q. 9 in the interests of general clarity. It's very rare for a doc to project a definite opinion as to a return to light duty work in the future. If it happens, it seems to me it's almost always subject to a later revision, and is only a guess.

Inquiry number 3: Please explain why you changed the language of question 10 in the manner that you did, Mr. Neal. Answer: The change is Q. 10 is for more obvious reasons – the old question seems to me a very sidedoor or backdoor way of asking for the date the healing period ended. Why not just ask it straightaway? And in the process, we can give the author the specific opportunity to say that the healing period has not ended. Beyond that, old Q. 10 assumes that the injured worker will of necessity be able to return to "full time work." But that's not always the case.

Inquiry number 4: Pleases explain why you added "15b" to question 15, Mr. Neal. Answer: The change to Q. 15 is simply to put the statement of permanent restrictions where it logically belongs, as part of the general question as to the existence of any permanent disability.

Inquiry number 5: What reported cases, if any, effected the changes to questions 9, 10, and 15, Mr. Neal? Also, what reported cases, if any, effect an applicant's attorney approach generally to obtaining so-called medical support for a temporary claim and I am referrring to such cases as Knobbe v. Industrial Comm., 208 Wis. 185, 242 N.W. 501 (1932)(question 10?); GTC Auto Parts v. LIRC, 184 Wis. 2d 450, 516 N.W.2d 393 (1994)(question 10?); Brakebush Brothers, Inc. v. LIRC, 210 Wis. 2d 623, 563 N.W.2d 512 (1997)(question 9?), Mr. Neal? Answer: These suggested changes were not made as a response to any specific case decisions.

Inquiry number 6: Are the imposition of permanent restrictions the same as the end of the healing period as implied by question 10 of the Department's current version of the WC-16-B, Mr. Neal? Answer: Questions 6 and 8 are related in my mind. In theory, a physician cannot (or at least should not) make a determination either of functional PPD or of permanent restrictions unless and until the injured worker has reached a plateau in healing/physical status. Reaching a plateau is in my mind a different way of saying "reaching end of healing." In short, I think it's reasonable to infer that the imposition of permanent restrictions or a determination of PPD means that the person has reached end of healing.

Inquiry number 7: Is the release by a doctor to full-time work status the same as the end of the healing period, Mr. Neal? Answer: A release to full time work without restrictions may or may not coincide with "end of healing." Of course, as a practical matter, it marks the end of the claim for TTD or TPD whether the healing period has ended or not. This ties in to your question 10. "If the injury causes disability…" (s. 102.43) states the basic requirement that there is no payment for lost wages without "disability," and in this context, I interpret "disability" as meaning at least some (temporary) restriction on work activities. If you change the question to "release to full time with restrictions," you still cannot say whether the healing period has or has not necessarily ended. It's apples and oranges. But here, it makes a lot of difference since this individual would still remain entitled to TTD/TPD for lost wage, until the actual end of the healing period.

Inquiry number 8: Is the estimate of the functional permanency by a doctor the same as the end of the healing period, Mr. Neal? Answer: See the answer to question 6 just set forth above.

Inquiry number 9: Is a clinic note stating that the worker is "unable to work as a result of the work injury" an expert opinion that the worker is still in a healing period, Mr. Neal? Answer: My answer to this is, it depends on the context. In the weeks following an obviously serious traumatic injury, such a statement from a doctor is I think sufficient to support a payment of ongoing TTD. As time goes on, and the person's total inability to work (or status as remaining in the healing period) becomes less obvious, such a statement becomes less and less sufficient in a legal sense to support the claim for TTD. At some point, it crosses the line and is insufficient. Where exactly that line is depends on the facts of the individual case.

Inquiry number 10: What role does the language "If the injury causes disability…" from section 102.43, Wis. Stats., play in this drama, Mr. Neal? Answer: See the answer to question 7 above.

Note on Lee v. Lumberman's Mutual Casualty Co.: Neal & Danas at section 5.6 reads in part as follows: "In *GTC Auto Parts v. LIRC,* 184 Wis. 2d 450, 516 N.W.2d 393 (1994), the supreme court reversed a court of appeals decision that had extended the healing period and permitted an award of indefinite TTD benefits for an employee whose medical condition had become stationary, and who was pursuing vocational retraining the employer refused to provide. The supreme court held that LIRC has no authority to order an employer to pay TTD benefits indefinitely for reasons other than a medical condition. [New paragraph] If necessary treatment has been delayed because of the insurer's refusal to pay for it, liability for temporary disability benefits may continue even though the injured employee's condition is at a plateau. In *Lee v. Lumberman's Mutual Casualty Co.,* WC Claim No. 1996-000857 (LIRC July 2, 1997), the Labor

and Industry Review Commission (LIRC, or 'the commission') found an insurer liable for continuing TTD benefits in a case in which a recommended carpal tunnel surgery had been delayed by the insurer's denial, even though during this interval the employee's condition did not change. [New paragraph] Likewise, when surgery for a work-related injury is delayed because of a non-work-related medical condition (e.g. pregnancy), the employee may still be eligible for temporary disability benefits if the work-related injury was the cause [Do Neal & Danas actually mean "a cause/one cause" rather than "the cause/sole cause/only cause"?; in other words "material factor" analysis] of the employee's continuing unemployment. *ITW Deltar v. LIRC*, 226 Wis. 2d 11, 593 N.W.2d 908 (Ct. App. 1999)." The Lee decision by LIRC is part of the appendix at pages 33-36 and is posted on the LIRC web site also under "Lee" or "temporary disability." Carole Lee did not have non-industrial group health coverage.

V. "Written Interrogatories" Directed to Doctors.

You can't always get what you want from a medical expert through the use of the rather confusing WC-16-B form, and this is particularly true if you are facing a statutory deadline such as the 15-day rule. Attorney Patrick Gillick will be walking us through some of the attached letters and will point out some of the strong points and weak points of these letters. (Note by ALJ McSweeney: It is helpful in my view if the medical expert is able to answer to question immediately under or after the question is posed. This is preferred to a long narrative response that often will go far afield of where the attorney wants to go.) Also, Attorney Patrick Gillick will address the usefulness of asking "yes or no" questions and also the usefulness of leaving a space where a medical expert may insert a percentage opinion. It is best to have the doctor date the various opinions obtained in letter form at or near these opinions.

VI. Miscellaneous Considerations

1) Attorney Neal will ask medical experts in some of his letters if an alleged material factor (in either an accident or gradual occupational disease case) reaches a certain percentage such as "at least 15%" (rather simply whether or not it is "material contributory causative factor") when seeking an expert opinion as to whether an injury was sustained. This is a relatively new use of percentages as percentages in the past have been used primarily if not exclusively to "rate" functional disability or impairment to the whole body or a particular body part such as a leg or arm either in question 15 or elsewhere. 2) ALJ McSweeney has now taken the positions that "material factor analysis" applies to accident cases, and also that "aggravation analysis" applies to gradual occupational disease cases thereby rendering the two injury situations in Wisconsin (accident and gradual occupational disease) perfectly symmetrically balanced from a theoretical standpoint. The legal conclusion regarding "material factor analysis" in an accident case is addressed in Lange v. LIRC, 215 Wis. 2d 561, 573 N.W.2d 856 (Ct. App. 1997) as quoted in the attached letter. Appendix, pages 28-30. Secondly, the application of "aggravation analysis" in gradual occupational disease cases is supported by simple common sense as bodies with pre-exisiting conditions obviously are injured by aggravation by "work exposure" as aggravation just as bodies with pre-existing conditions are injured by aggravation. In either an accident case or gradual occupational disease case there must of course be something to aggravate and that something is a pre-existing condition. See also Shelby Mut. Ins. Co. v. DILHR, 109 Wis. 2d 655, 327 N.W.2d 178 (Ct. App. 1982) as cited by Steve Sobota in support of the legal conclusion

that "aggravation analysis" applies an in gradual occupational disease case, and Maynard Electric Steel C. Co. v. Industrial Comm., 273 Wis. 38, 76 N.W.2d 604 (1956) ("…in both of those cases there was medical testimony to support the commission's findings that these short periods of exposure had aggravated a pre-existing silicosis.")(Emphasis added.) ALJ Ronald J. Ryan cited Maynard Electric in support of the legal conclusion that "aggravation analysis" applies in a gradual occupational disease case. Appendix, pages 5 through 9 are a handwritten note by Steve Sobota supported by some cases supporting his legal conclusion that "aggravation analysis" applies in a gradual occupational disease case. 3) Attorney Patrick Gillick will address the question of how often there is a need to utilize a letter asking specific questions of a medical expert rather than attempting to rely solely on the rather confusing WC-16-B form. Appendix, pages 10 through 27 are some sample letters collected by ALJ McSweeney through the years. Finally, a little known fact about Lange v. LIRC, supra, that is important in my view is that the LIRC, majority opinion and dissenting opinion all agreed on the law and the only dispute was the usual factual dispute as to which doctor to believe. In other words, Lange is not a great departure from previous cases nor did it instruct the LIRC that it had been misapplying the law. The non-work injury aspect of the case is what makes it seem much more complex than it actually is. The attached letter attempts to make Lange more understandable by putting into one quotation the most central aspects of the Lange case and in particular the court's extra language is delineating the material factor (also known as substantial factor) medical/legal causation standard in Wisconsin. Appendix, pages 28, 29 & 30. Finally, in the appendix is a note from Steve Sobota with case law supporting his legal conclusion that "material factor analysis" also known as "substantial factor analysis" applies in an accident case whether direct accident theory is used (question 11) or aggravation/indirect accident theory is used (question 12). Appendix, pages 31 & 32. Steve Sobota was specifically commenting on the possible application of "material factor analysis" when an expert is answering question 15 of the WC-16-B form to possibly provide a whole body rating or any rating. Please note that Steve Sobota in commenting on the proposed new and improved WC-16-B form was wise enough to stay completely away from questions 6 through 10. Steve Sobota was specifically commenting on the following proposed language placed in question 11: *"Note: The accident here & in question 12 need only be a material factor in the condition's onset or progression."*

VII. Is a Letter from an Attorney to a Medical Expert Leading by Asking Specific Questions?

Attorney Richard A. Fortune of Racine, Wisconsin wrote the following letter (Appendix, page 20) on June 17, 1999 in response to an applicant's attorney asking specific questions (in the text of a letter using his law firm's letterhead as found in the appendix at pages 17, 18 and 19) of a medical doctor in question form with room after each question to reply and date the reply: "I am in receipt of a copy of a letter dated June 11, 1999 from Attorney Stuart Spaude which files a copy of his letter dated April 28, 1999 with several questions that have been responded to and signed by Dr. Pilon. Please note my objection to the admissibility of Dr. Pilon's report. My objection is as to form. That is, if present to testify at the time of hearing, each of the four inquiries presented to Dr. Pilon in the letter of Mr. Spaude would be excluded on the grounds that they are clearly leading. Thus, I ask that my objection be preserved for the hearing in this matter." Attorney Fortune appears to have requested that the letter itself be excluded and also that any attempt to testify by the doctor at hearing be excluded as the "poisonous fruit" of this

leading and tainted letter. Well, consider this then. ALJ McSweeney in the case of Pamela Dunnington v. Mercy Health System, et al. (WC Claim No. 2003-001360) stated in a decision dated August 6, 2003: "I think it is important to keep in mind that many if not most of the MDs who participate in our WC process were highly talented students in school. I say this because I think it is a matter of common knowledge that you don't even get into medical school in this society without being a superstar student. Superstar students whether they be in medical school or law school are able to process information more quickly and more effectively than the average person standing at a bus stop. Actually, this may not be true of your average person standing at a bus stop in Madison, Wisconsin. However, let us assume that Madison, Wisconsin is a freak community and deal with ordinary communities of the universe such as Janeville, Wisconsin." LIRC affirmed this decision 3-0 and adopted the language just quoted above by reference in its entirety. In fact, LIRC adopted the entire ALJ decision by reference. The defense attorney in the Pamela R. Dunnington case was specifically complaining that the applicant's attorney had typed in most of the language contained in a WC-16-B form. The ALJ and LIRC determined this now very common practice by many applicant's attorneys is simply a "weight" issue rather than a question of admissibility. The big and prominent law firms engage in this practice much more often than smaller law firms because smaller law firms fear a Richard Fortune letter and specifically that they are inappropriately leading the witness. The fear can now end. Also, please note that in the Pamela Dunnington case the applicant's attorney actually supplied the answers inside the boxes of the WC-16-B form rather than the questions as the questions are obviously supplied by the form itself. The doctor was simply using his massive intelligence to either accept or reject these "leading answers" and if he accepted the "leading answers" was then adopting the answers as posed to him as his own. This is obviously much more leading than simply supplying the questions and yet the LIRC was not persuaded to exclude any of the answers or even to reject them as not credible but instead adopted them in their entirely and paid the entire claim. In short, the legal dilemma of whether it is permissible for an applicant's attorney to submit specific questions to a doctor, or even supply suggested answers, has been addressed by the LIRC in the Pamela Dunnington case and other contested cases as well. The result has been a clear and overwhelming victory for applicants. Defense attorneys are of course free to make their records in this regard, but the case will be decided based on the evidentiary principles of the Dunnington case just as a contested case will not be decided solely on the basis of a medical expert checking an incorrect medical causation box or checking two appropriate inconsistent medical causation boxes.

VIII. Some Concluding Thoughts

One of our goals in this area of law practice should be clarity and simplicity whenever reasonably possible. It seems obvious that the word "accident" (questions 11 and 12) is better usage than "trauma." In many jurisdictions gradual occupational disease theory is referred to as a "micro trauma" theory. In other words, an "accident" is not the only "trauma" on the planet. Secondly, religious use of the term "occupational disease" when non-lawyers are present in the hearing room also creates unnecessary confusion. The LIRC has started to use the term "gradual occupational disease" theory rather than just "occupational disease" theory standing alone in order to more effectively communicate with all participants in the litigation process. The LIRC also uses "accident" more often than the word "trauma" and probably does so in order to avoid confusion. Finally, ALJ Ryan struck the word "accident" from both questions 11 and 12 when

revising the WC-16-B form during the summer of 1986, and instead used the word "event" when he revised the form about twenty years under the supervision of the great Harry Benkert. ALJ Ryan's rationale was that a crazy person is not engaged in an "accident" when he or she kills somebody else at the workplace. Good grief. This freak situation is obviously rare and the Department, if intelligent, would be well advised to strike the word "event" from questions 11 and 12 and restore the word "accident." Amen.

THE ANNOUNCEMENT OF THE HONORARY STEVE SOBOTA CASE LIST

Steve speaks for himself in the form of the seven pages immediately following the appendix. There is a six-page outline that he authored for use in assisting with the worker's compensation class taught at the UW-Madison Law School. The seventh page is from a book he used to find "useful terms." The case list itself is on posted at www.wawca.org The Steve Sobota Poem in your materials hopefully describes our friend well.