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Lower Extremity Injuries and Malpractice: Identifying False or Exaggerated Claims

I. Common Medical Conditions/Injuries of the Lower Extremity (20 minutes)

Medical Issues Affecting the Lower Extremity

One of the first issues a lawyer or claim investigator must face when assessing a medical malpractice or injury claim involving the lower extremity is understanding general medical problems that may occur due to normal “wear and tear.” It is imperative fraudulent or coincidental claims are ferreted out from legitimate ones.

With aging, our feet, ankles, and knees are most prone to osteoarthritis. Osteoarthritis that is symptomatic is generally defined by the presence of pain, aching, or stiffness in a joint with radiographic changes consistent with osteoarthritis. The incidence of radiographic evidence of osteoarthritis in the knee joint in the United States for adults age 45 or older was found to be 19.2 percent in one study and 27.8 percent in another. (1) In regard to the foot, a study concluded that 19% of men and 29% of women reported that they had generalized foot pain most days. (2) Other medical issues include diabetes, peripheral vascular disease, obesity, prior injuries, prior surgery, and systemic connective tissue disorders, such as lupus and rheumatoid arthritis.

Common Injuries/Malpractice of the Lower Extremity

Recognizing common injuries and malpractice claims and their typical sequela is essential when determining the legitimacy of claim and/or mitigating damages. The incidence of lower extremity injuries in the workplace is common, with knee injuries accounting for 5% (3) and foot and ankle injuries accounting for 6.4%. (4) With the knee, strains/sprains and contusions/abrasions were most common. These often resulted from falls and bodily reaction/overexertion events. In the foot and ankle most commonly the ankle (46.9%) was injured. A diagnosis of sprain was most frequent (40.8%), followed by contusions (26.5%). A twisting mechanism of injury was seen 27.3% of the time. Malpractice claims

involving hip and knee joint replacement surgery most commonly alleged nerve injury, followed by limb length discrepancy, infection, vascular injury, hip dislocation, compartment syndrome, deep vein thrombosis, chronic pain, and periprosthetic fracture. (5) Failure to diagnose failed knee and/or hip replacements is an increasingly common claim in the medical malpractice arena.

The intersection of medical issues and injury/malpractice

Under the Illinois Workers' Compensation Act, an accident can be a single traumatic event, repetitive trauma or an aggravation of pre-existing condition. The two most relevant accident types are repetitive trauma and aggravation is it a permanent aggravation or temporary.

Lawyers and claims investigators must consider how existing or concomitant medical issues contribute to a malpractice claim or injury. Reviewing medical records may reveal prior issues that could account for part or all of the current issue or could be contributory. Common medical issues are osteoarthritis, obesity, diabetes (particularly when it impairs sensation). However, the claimant's medications could, via their side-effects, contribute to pain, such as a nerve-type pain and these should be reviewed. Prior diseases or injuries should also be considered as they could have left the claimant prone to their current problem or contributed in some way. For example, some types of cancer (and their treatment) can increase the risk for infection for the remainder of person's life. In cases where a common problem is present concomitantly with an injury, lawyers or claims investigators should consider whether the problem caused or contributed to the injury, if the contribution is a permanent material change, it will likely be found work related for Illinois Workers' Compensation. For example, neuropathy or a nerve entrapment can reduce sensation and balance in the feet, which may play a role in a fall, ankle sprain, or fracture. If the cause of the fall can be classified as only a personal medical condition, it provides a defense. If there are characteristics of the work place, that the personal fall increases the risk of injury and injury was caused, then it is possible an arbitrator may find the work place risk increased the risk to the level of making it a compensable injury. The initial investigation is very important to document the condition of the work place, any work place activity, photography to document conditions, witness statements and ideally an individual statement if medical condition allows.

Further, injuries that may seem unrelated to the current problem could contribute or be the proximate cause. For example, prior injury to the contralateral knee could possibly lead to the person placing more weight on the "good" leg, leading to problems. In cases where a common problem is present concomitantly with an injury, lawyers or claims investigators should consider whether the problem caused or contributed to the injury. For example, neuropathy or a nerve entrapment can reduce sensation and balance in the feet, which may play a role in a fall, ankle sprain, or fracture.

Finally, an increasingly common personal injury claim is that that a claimant's knee replacement was necessitated by a traumatic event. Approximately 700,000 knee replacments are performed annually in the United States, with the number projected to increase to 3.48 million procedures by 2030.

(7) The most common reason for knee replacement is that other treatments (weight loss, exercise/physical therapy, medicines and injections) have failed to relieve arthritis-associated knee pain. Knee replacements are most commonly needed in situations where the cartilage covered surfaces of the bones are worn over time due to arthritis. However, personal injury claimants are increasingly claiming that their osteoarthritis was caused by a single traumatic event, which occasionally can be supported with medical literature. (8)

Incidental abnormalities – how a molehill turns into a mountain

Confounding the lower extremity “injury” problem is that diagnostic tests may show injuries that, in reality, are incidental findings. For example, diagnostic ultrasound and MRI have been shown to find abnormalities of the Achilles tendon in asymptomatic people, and tendons on the outside of the ankle (called peroneal tendons), have been shown to be partially torn without impairing function or necessarily causing pain. When a test shows an injury, lawyers and claim’s investigators should not assume the finding is necessarily the result of the specific injury claimed by the patient. Instead, they should investigate to see if the patient’s history and other clinical findings correlate with the abnormal finding.

II. Overlooked Areas to Investigate in Lower Extremity Malpractice and Injury Claims

Footwear/Surface Issues

Lawyers and claims investigators may overlook footwear, however information from footwear may be important in determining the injury’s mechanism or legitimacy. Obtain photos of the footwear when possible, and even review the actual shoes or boots. Evaluate the condition of the footwear. If the person was in work boots, can it be determined if they were laced up when the injury occurred? In cases where high heels were worn, see if the heel broke and might have contributed to the injury. Look for consistency (or inconsistency) between the injury described by the claimant and the type of damage expected on the footwear. For example, if a car’s wheel drove over the person’s foot, check for tire tread marks on the shoe or boot. In malpractice cases, a claimant may have “rushed” to wear high heels or even stilettos before her physician allowed her to do so.

Further, depending on the injury or malpractice case, it may be appropriate to compare the size of the footwear to the injured person’s foot to determine if the fit was acceptable. A study of 440 patients at Veterans Affairs medical center found only 25.5 percent of them wore correctly fitted shoes, and patients with a diabetic foot ulcer were 5.1 times more likely to wear poorly fitted shoes. (6)

Since our lower extremities are always interacting with the ground beneath us, it is important for lawyers and claims investigators consider the surface on which the person was traveling when the injury occurred. When possible, photographs of the injury site should be obtained, along with diagrams of the area layout, when applicable. Basic surface considerations would include whether the surface was level, sloped, warped; if any obstructions or slippery materials were present; and the surface’s

components. If the injured person was walking on asphalt and fell, we might expect a scrape on the shoe or the person's arm or hand. Documentation of these facts in the initial investigation is critical to defending the claim based on the person's personal medical condition.

Compliance with Treatment

Lawyers and claims investigators should recognize that some patients disregard or not completely adhere to their doctor's orders. In fact, a large amount of research has shown that, based upon the patient's condition and the complexity of the treatment program required, only 26% of patients complied with their prescribed treatment. (9) Lawyers should question the claimant and treating physicians on this issue and be aware of notations in the records for failing to follow treatment. Missed appointments may signal that the claimant is non-compliant.

Further, lawyers and claims investigators should be aware of individuals who fail to follow the prescribed treatment of their doctor, as it may suggest a lack of motivation to get well. The validity of a claim may rest to an extent on whether the patient adhered to the doctor's recommended treatment and advice. This may include taking prescription medication, using assistive devices such as a cane or brace, attending physical and occupational therapy sessions, and keeping doctor appointments. Failure to follow the recommended treatment may suggest that the claimant's condition is not as severe or limiting as he or she is purporting. In Illinois, we cannot direct medical care, but I always recommend closely monitoring the treatment for compliance to ideally promote proper healing, return to work and MMI.

Treatments for lower extremity injuries often include an ankle brace, a walking boot, or crutches. Treating physicians may note in their patient records that the claimant or a family member volunteered that he or she is not using the prescribed device. Another major component of foot and ankle injury treatment is rest and elevation. Again, the physician's records may show that the claimant is not complying with this recommended treatment. Alternatively, the claimant themselves may take photos and videos of the extra-curricular activities they undertook while they were supposed to be resting. It may be worthwhile to search the claimant's social media sites to see if they post images of bungee jumping, river rafting, or other strenuous activities during the time they state they are injured.

Other factors

Lawyers and claims investigators should consider overall issues related to the claimant, such as age, personal habits and social activities.

Age is important as our bodies, and in particular our lower extremities, undergo change as we age, which may increase the likelihood of medical problems, surgical or treatment complications or injury. Tendons experience a decrease in water content and changes in collagen structure, making them more susceptible to injury. The fat pad under the foot may atrophy, increasing the chance of developing pain. Bones may become osteoporotic, which increases their risk for fracture.

Personal habits, such as smoking, excessive alcohol consumption and the amount and quality of sleep may contribute to injury or non-compliance with medical treatment. Cigarette smoking can impair circulation of the blood, impede healing, and thin the bones in the foot or ankle—this may increase the possibility of fractures. Alcohol abuse can cause neuropathy of the feet, reducing sensation. Illicit drug abuse should also be considered. However, in an Illinois Workers' Compensation claim there is no apportionment, so if there was an accident that caused or permanently aggravated a condition, there is likely to be liability.

Information on social factors and personal habits can be obtained by examining past medical and employment histories. In civil litigation, this information may be discovered through interrogatories or depositions of the claimant or witnesses. In an Illinois Workers' Compensation claim, there is no discovery, such as interrogatories, discovery depositions. We have a limited ability to use a subpoena and outside investigators to obtain information that can be presented to a physician in a evidence deposition and may be offered into evidence.

III. Advanced Strategies to Separate Legitimate Malpractice and Injury Claims from Fraudulent or Exaggerated Ones

When Treating Physicians Become Expert Witnesses

Lawyers and claims investigators should be aware that treating physicians who are utilized as expert witnesses may feel an emotional connection with the claimant (their "patient") that may allow them to reach conclusions to help their patient. This could be unintentional, or at the time, be perceived as insignificant. For example, a patient may ask the doctor if walking on hard concrete floors could have contributed to his/her foot pain. A doctor may say it could and this could be misconstrued that the floor at the claimant's workplace caused the problem. Physicians statements of causation should be considered cautiously and taken together with all the facts; rather than taking a physician's statement at face value. This is where the documentation gathered at the investigation is so helpful. It helps remove the emotion from the equation. For instance, if an injured person routinely reported to her treater that she fell due to defect in the floor and the photo shows no defect, it is possible that the underlying basis for treater's opinion is invalid. Similarly, when an injured person routinely reported compliance with wearing a walking boot and multiple days of surveillance contradicts those statements, you increase the odds the treater will change their opinion as to condition and work capacity.

In some of these instances plaintiff lawyers may try to show that the treating physician is in a better position to judge the causation factor, as opposed to defense experts who may not have seen or treated the claimant. Defense lawyers may need to explore the reliability and thoroughness of the treating physician's statements regarding causation. Disproving the assumptions underlying the opinions, can lead a physician to change opinions.

Photography/Illustrations

Depending on the case specifics, a claimant's injury or malpractice claim could be related incorrectly by the claimant. For example, a foot injury could actually be part of the ankle or vice a versa.

As a result, lawyers or claims investigators may want to have the claimant identify the precise location of the pain and injury, and have it photographed. The claimant could also (or alternatively) mark a hard-copy diagram of the anatomy in question, pinpointing the exact location of concern. This type of precision will enable any abnormalities that are discovered to subsequently be ruled in or out more easily as effects of the injury or malpractice.

Claimants may have their own notes, drawings or photographs and these should be obtained, if applicable to the case. Even clothing, such as pant or socks may have relevance and lawyers may want to explore if these are available for review. This is not typical for a workers' compensation claim.

Surveillance/Gait Analysis

Surveillance is a valuable tool to help determine if a claimant's claim is legitimate or if they are exaggerating or malingering. For example, one of the more difficult medical conditions to verify is chronic regional pain syndrome (CRPS; previously referred to as reflex sympathetic dystrophy). Scientific literature has established that surveillance video may show a person claiming to have CRPS/RSDS is malingering. (10) Illinois Workers' Compensation law prohibits, the employer, adjuster or defense attorney from direct contact with a treating physician, however, surveillance showing activity level or shoe choice contrary to what is reported to a treating physician, can be a useful tool when combined with an Independent Medical Exam opinion to address the severity of the condition, the need for treatment and work status.

Forensic gait analysis is now being utilized by law enforcement to help link or exclude suspects whose faces are hidden from criminal activity captured on video cameras. Some forensic podiatrists provide forensic gait analysis in civil and criminal matters. (11) For example, gait analysis may reveal a person who has a particular injury is walking consistent with said injury or inconsistently.

Key Questions to Explore – Your Roadmap for Success

Every malpractice or injury case involving the lower extremity is different. No one suggestion contained herein is applicable or necessary for every case. Lawyers and claims investigators must identify the areas of the case that are relevant. Thorough questioning during deposition (in workers' compensation, evidence depositions of treating physicians or IME physicians) on the specific area of pain, activity at the time of the incident, footwear, compliance with medical treatment, personal habits and timeline issues are key to exploring the legitimacy and/or strength of a given malpractice or injury claim.

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