

TESTIMONY ON SB 322

SB 322 seeks to rectify a tilt in the standards and procedures for Independent Medical Examinations (IMEs) in Montana. The tilt occurred with a 1998 Montana Supreme Court Decision, called the *Webb* decision. I found the implication of that decision so disturbing that I stopped doing IMEs. I will explain why.

The IME provides an opportunity for parties in a contested medical matter to objectively reexamine the issues with the opinion of an expert, "independent", disinterested, physician third party. Traditionally the IME examiner is responsible to the party that requests and pays for the medical opinion. The goal of objectivity is facilitated because the examiner is not the patient's advocate, and is relatively indemnified from the legal duties that normally apply to a treating physician.

With the *Webb* Decision, the Montana Supreme Court held that the IME "...creates a relationship between the examining physician and the examinee [patient], at least to the extent of the tests conducted." The Court left the definition of the vague, last phrase to "...be determined by future litigation."

This creates a dilemma for the IME examiner when he/she discovers a condition that poses "...an imminent danger to the examinee's physical or mental well being". Then, according to the Court, the examiner is obliged to "...take reasonable steps to communicate to the examinee the presence of any such condition... and...to exercise ordinary care to assure that when he or she advises the examinee about their condition... the advice comports with the standard of care for that health care provider's profession." Since many patients who come for an IME do not have an allopathic (i.e. MD, DO) primary or specialist physician, the examiner, by default, assumes the responsibility of the treating physician until, or unless, they find a physician to take them off the hook.

Although the *Webb* Decision artfully avoids defining the conditions that "...pose an imminent danger to the examinee's physical or mental well being...", the details of the *Webb* case set a precedent that sent a chilling message to those of us who perform IMEs. In the *Webb* case, the examinee allegedly was injured on the job and was cared for by a Chiropractor. An IME was mandated. The examiner, an experienced Orthopedic Surgeon, found no objective or quantifiable physical impairment. The Radiologist found no significant abnormality on CT of the lumbar spine. However, the examiner was concerned that the patient had not been evaluated thoroughly, and voluntarily communicated his concerns to the examinee. He did not personally arrange for continuing care by an allopathic physician. The examinee had no health insurance and did not follow the examiner's advice. More than two years later, the examinee developed sciatica and objective physical and radiographic signs. She still had no insurance and could not afford an operation. The consulting surgeon had the original CT scan "re-read" as showing a "bulging disc", and then reopened the Workman's Compensation case. The examinee later sued the examiner for malpractice.

Hence, the Webb case provided the precedent for what the Court recognizes as an "imminent threat" to a patient's well being, and how loosely the decision can be interpreted.

Most examinees that come for IMEs are injured and angry, and are in physical, psychological and financial distress. If an objective IME decision lessens their opportunity for recovery, they, and their attorney, often feel obliged to go after the next available 'deep pocket', the physician's malpractice insurance. In the *Webb* case, it was the IME examiner, not the chiropractor, who was sued. After the *Webb* decision, most of us physicians found that doing IMEs was too risky for comfort in this litigious environment. Unfortunately, this risk seems to apply equally to disability determination examinations, which are mandated by the Department of Health and Human Services.

SB 322 originally sought to remedy to confusion created by the Court's decision. There are two goals. First, there should be a mechanism to ensure that examinees are fully informed of the medical facts of the IME. Second, the examiner should be indemnified from a duty to discover *all* medical conditions, even those that may be in an insipient or occult stage, and from the responsibility of becoming the *de facto* treating physician. Although SB 322, as amended, does not accomplish all the goals, it is a step in the right direction.

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