Best Practices for Adjusters No. 1
HOW TO USE YOUR SECOND MEDICAL OPINION (SMO)

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When to obtain a Second Medical Opinion in a Louisiana Workers' Compensation claim is one of the more difficult decisions you will have to make in the management of any claim. In this memo, we will try to provide you with tips and suggestions for making this decision a little easier.

WHAT A SECOND MEDICAL OPINION IS AND WHAT IT IS NOT

In Louisiana, an employer/carrier can require the injured employee to appear before a medical professional as is "reasonably necessary" during a claim under Louisiana Revised Statute 23:1121(A). However, an employer/carrier cannot require the employee to be examined by more than one medical professional in any field for specialty unless prior consent has been obtained from their employee or their attorney. While the wording of these provision suggests we are limited to a single specific specialty, this does allow us to use subspecialties, provided the other side also selects doctors with subspecialties. For example, if the employee selects an orthopedic surgeon who specializes in the lumbar spine and another orthopedic surgeon who specializes in shoulder injuries, you are not limited to a single orthopedic surgeon for both. We are allowed one orthopedic surgeon who specializes in the spine and a separate doctor who specializes in shoulder injuries. This doctor to whom you direct the injured employee is known colloquially as the Second Medical Opinion physician or "SMO." This SMO is to provide the employer/carrier with medical guidance for determining what decisions to take in the management of a claim.

> In some states, any doctor to whom the employee is directed is considered an Independent Medical Examination (IME) physician. In Louisiana, an IME is a separate doctor from the SMO. The SMO is our choice of physician while the IME is a doctor selected by the State or the court.

If the employer directs the employee to a specific medical professional, or if the employer directs the injured employee to a facility that then directs the injured employee to a specific medical professional, that medical professional becomes the employer/carrier's "choice of physician" in that field or specialty under Louisiana Revised Statute 23:1121(2)(b). The wording of the statute appears very restrictive – you are not allowed to obtain an additional SMO in that field or specialty without the written permission of the employee or their attorney. However, in practice, if the initial facility directs the employee to another physician, there is nothing preventing you from obtaining an additional SMO if no one objects. But if no one on the other side objects, then there is nothing preventing you from obtaining an additional SMO under those circumstances. Nevertheless, if the employee or opposing counsel objects based upon this provision, the odds of successfully

defeating that challenge are decidedly low.

Unlike some states, where more emphasis is placed on this independent medical evaluation, an SMO in Louisiana is **not** afforded any greater evidentiary weight. In Texas, for example, the Designated Doctor is powerful and is used to establish a disability rating to value future indemnity exposure. A Texas Designated Doctor and a Louisiana SMO are not equal. A Louisiana SMO is simply another medical opinion for the court to consider. As will be discussed below, the application of the "treating physician's presumption" often places the opinion of the SMO in a subordinate position to that of the employee's medical professional. Since the opinion of the SMO is not afforded any special evidentiary weight simply because of their position, it is the tactical use of the SMO that increases its usefulness. As these presumptions play a part in deciding when it is best to obtain the SMO, we will discuss these two, often competing, presumptions.

Treating physician's presumption

The "treating physician's presumption" is a rebuttable presumption that requires a court to initially give the opinions of the treating physician more evidentiary weight than afforded to the SMO. *See Schouest v. J. Ray McDermott & Co., Inc.* 411 So.2d 1042 (La. 1982). This is based upon the treating physician's greater familiarity with the employee due to the greater number of visits, the closer relationship, etc. However, this underlying premise is somewhat weakened by the increasing use of physician's assistants and nurse practitioners, but it is still routinely applied.

You can attack the presumption by obtaining the opinion of an SMO with greater training or specialization not possessed by the treating physician or supporting that the SMO had information not available to the treating physician. Obtaining the opinion of an SMO early on and updating periodically can also be used to attack the argument that the treating physician's opinion should be given more weight based on a greater familiarity. Although you cannot have your SMO examine the employee/claimant as often as the treating physician, you are permitted to periodically obtain updated SMOs to keep the treating physician honest, periodically updated SMOs are allowed to help keep the treating physician honest. There is no specific time frame during which you cannot request an updated SMO. It is simply a matter of scheduling an updated SMO and seeing if anyone objects. Finally, your attorney can attack the opinion of the treating physician and bolster the opinion of the SMO through their depositions.

Application of the "treating physician's presumption," does not automatically equal success for the employee, but you will need to recognize that in every case, you will face the argument that the treating physician's presumption should be given more weight. Tactical use of your SMO can weaken or possibly defeat the application of this presumption.

Specialist's presumption

As with the "treating physician's presumption," the "specialist's presumption" is merely a rebuttable presumption that holds that the opinions of a specialist in a particular medical field are to be given more weight than a doctor without that specialization or unique qualification. *See Henbest v. Travelers Inc. Co.* 235 So.2d 430 (La. App. 2 Cir. 1970). The same strategy that we use to attack the "treating physician's presumption" can be used by the employee or their attorney to use to attack any attempt to use the "specialist's presumption." This is usually done in deposition when the attorney challenges our SMO's reputation and/or qualifications, where the reputation or qualifications of the SMO are challenged by the attorney for the employee. Naturally, we will prepare the SMO doctor for these attacks and to what is necessary to support their opinions in these same depositions.

Common examples of the use of the "specialist's presumption" include our recommendation that an SMO who is an orthopedic surgeon be used against a treating physician who is a chiropractor when treating an orthopedic issue. A doctor who specializes in the treatment of a specific body part may be considered a specialist as compared to a doctor who is more of a generalist.

What is important to take away from this portion of the memorandum is that the written opinion of the SMO, on its own, is almost never sufficient to defeat the claim of an injured employee.

Finally, remember the judge will rule on evidence and not on feelings, inferences, or hopes. What we may individually feel about an injured employee is **not** evidence. While we together may be able to take different facts to craft a picture to support why the employee's injuries are not related, why the complaints are not surgical, etc., **none** of that is evidence. Only a doctor can connect those dots to provide evidence that can be properly put before the court to consider a medical issue. Your SMO is **your** tool for obtaining useful evidence to support your position on medical issues.

HOW TO USE A SECOND MEDICAL OPINION

While adjusters tend to see the SMO as simply a method by which they can obtain medical evidence to challenge the opinions of the treating physician. An SMO can also serve as a tool to help you develop defenses, such as fraud, and is a mandatory requirement for seeking the appointment of an IME with the court or the state

The most important thing to remember is that the SMO is **your doctor**. Learn to develop a relationship with those SMO doctors who you use regularly. For example, we recommend that if you schedule an SMO, someone, assuming a defense attorney is not involved, should speak to the doctor to make sure the doctor knows the issues that you want them to address. A generic letter written to the doctor is often not sufficient. You do not want the doctor to have to

guess as to what is really needed. Why not speak to the doctor in advance and let them know what you need, ask them any medical questions for which you need clarification, etc.? What if your recorded interview uncovered information that is not contained in the medical reports? How do you get that information to the doctor? While speaking of the SMO questions, why leave it to the SMO coordinator to send the doctor overly generic questions? You or your attorney should take the time and review the file to identify specific issues for which you need the SMO's opinion or guidance.

Further, your SMO is your SMO for the case, and not just for the production of that one report. While any advice, comments, or reports generated by the doctor after the report will not be for free if, you learn information later that may change the SMO's original opinion, you must obtain that information, and that issue is usually critical enough to make the additional expense worthwhile. A few real-world examples include having a pain-management physician comment on the narcotic medication prescribed by the treating pain-management physician not appearing in the treating physician's urine-drug screens performed after the original SMO report. If both doctors place the employee at a light-duty restriction, and a job is offered to the employee that is rejected by the treating physician, have the SMO comment on the appropriateness of the job offered. If your SMO disagrees with the treating physician on that job offered, you can seek Independent Medical Examination from the State based upon a dispute as to work status given a job being available. What if your recorded interview has a different description of the accident? What if your records canvass or Index report support a prior accident denied by the employee to the SMO or treating physician? You will want the SMO to confirm that this information is different from that which the employee reported. Perhaps the best rule to take away from this particular discussion is that the SMO is your best tool for challenging **any** recommendation or opinion of the treating physician, not just whether surgery is necessary or whether the employee can work or not.

> Under LSA-R.S. 23:1123, if there is a dispute between the employee's treating physician and your Second Medical Opinion as to (1) work status or (2) condition, you apply to the Office of Workers' Compensation, but those two doctors must be of the same medical specialty. There is no such requirement when you petition the trial court for the appointment of an Independent Medical Examination

<u>Protection of useful information</u>

Never send the doctor useful information you want to protect or to keep out of the hands of the other side. When you send information to the doctor, it becomes part of their record and becomes subject to discovery by the other side, assuming the matter is litigated. Be mindful that if you send surveillance video to your SMO and the SMO mentions it in his report, the court may order the video be turned over to and ruin

your chance of testing the employee's honesty in a deposition.[1] When possessing useful video, photographs, Facebook information, etc., retain an attorney to meet with the Second Medical Opinion to review the information and provide the attorney their opinion but not in writing. This will provide you with information on how that information would affect the doctor's decision without leaving a discoverable paper trail. Once that information comes out into the open during the course of litigation, have the doctor provide an updated report after formally reviewing the information.

CONSIDERATIONS FOR WHEN TO SEEK A SECOND MEDICAL OPINION

There is no standard guideline for when you should obtain an SMO. It is a fairly strategic decision, and you must have a deep understanding of the case. While in no particular order, here are a few considerations upon which we rely and why these considerations are important:

- Depending upon the SMO physician, it may take 30 to 90 days, or even more in some cases, for the SMO to have a date available for the evaluation. Plan your actions in the claim accordingly. Further, do not expect a report to be drafted right away. It is not uncommon for an SMO physician to take 30 days or more to prepare their report. Some of these recommendations below will help you anticipate when an SMO report will be needed.
- Unless the need for the surgery is obvious, once the treating physician recommends any surgical procedure, you must request an SMO. For example, if the orthopedic surgeon requests authority to prepare a two-level anterior cervical discectomy and fusion, that recommendation will require an SMO. In response to any LWC-WC-1010 filed for that surgical procedure, you should deny the request and write in "pending SMO" to let the treating physician and employee/attorney that you are exercising your right to have the employee examined by an SMO. However, if the surgery requested is to stabilize a fractured wrist by the implantation of pins, it is unlikely that an SMO would offer anything more than a concurring opinion, so be selective in your use of the SMO.
- In a case where the complaints are at least reasonable, an SMO should be sought only after relevant imaging studies/medical tests have been performed and the actual films or reports obtained. This will allow your SMO to have the same films to review as the treating physician. If your SMO only has the MRI imaging report, but the treating physician has the actual films, it necessarily puts your SMO, and their report, at a disadvantage. If the treating physician orders additional imaging later, have your SMO review those additional studies.

[1] In Louisiana, we do not have to provide the other side any surveillance video until after the employee has been deposed. Some courts will order production, if it is discovered in advance that the video has been viewed by any third-party such as the SMO and certainly if sent to the employee's treating physician.

- In a case that is immediately suspect, such as a case with complaints vastly out of proportion to the injury or one where the complaints are nonsensical – a neck injury with accompanying numbness and tingling in the feet (when those body parts are not connected) – justify you obtaining an SMO earlier than you would otherwise, as it allows you to highlight these inconsistencies early. In such cases, you would rather lead than follow.
- Certain medical complaints/impressions noted by the doctor usually serve as a trigger for obtaining an SMO, or they should prompt certain actions before you obtain your SMO. Here are a few items of note:
    - Pain alone, as a medical complaint offered by an employee, is rarely a sufficient basis for an SMO, unless the pain is severe enough to involve a pain management physician or heavy narcotic medications are being prescribed without any additional treatment.
    - When dealing with spinal injuries, look for radicular complaints in the extremities such as numbness, tingling, or weakness as a physical complaint or involvement of a nerve in an MRI. This will normally suggest that a surgical recommendation, in time, is a strong possibility to relieve the pressure on that nerve.
    - Significant weakness in an extremity is usually a matter of concern when dealing with a spinal issue. Although a vast oversimplification, numbness, and tingling represent a radicular complaint that is caused by the interference due to a herniation or bulge effacing a nerve root corresponding to the location of the numbness and tingling. Severe and worsening weakness is generally the result of more severe pressure on that nerve causing damage that may be irreversible. Any detailed discussion of weakness by an orthopedic surgeon or neurosurgeon should prompt you to obtain an SMO.
    - Any ligamentous tear, and especially a rotator cuff tear, should have an imaging study such as an MRI performed quickly, and preferably within 90 days post-accident. This will allow the SMO to offer an opinion as to the age of the tear. The majority of sports medicine physicians who this preparer has deposed have opined that after about 90 days, an old tear looks the same as a new tear. So, the imaging should be performed quickly with the SMO to follow shortly thereafter.
    - If dealing with a traumatic brain injury, the traumatic effects of the injury that can be identified by imagery will not worsen or improve over time, as with other injuries, and a lot of information can be inferred based on the size and the location of the injury. Also, whether the employee lost consciousness is critical. This will require that you obtain all imaging studies and the ambulance and emergency room records so that your neuro-psychologist can review them. Also, if the employee has been seen by another neuropsychologist, you will need to obtain all the raw testing data from the tests performed by the employee's

physician rather than just the results arrived at by the treating physician's review.

- When dealing with a spinal injury, do not wait until the surgery is recommended to get your SMO. Frankly, it is unlikely that anything said in the SMO report – absent records not possessed by the treating physician and/or fraud – will cause the court an hesitation, when used against the treating physician who has seen the employee a dozen times for example prior to the SMO. Get your SMO early, and then schedule the employee for a follow-up examination by your SMO to address the need for the surgery.
- When the orthopedic surgeon mentions "failure of conservative treatment", "out of conservative treatment options", etc., you must expect a surgical recommendation by the next examination if it is missing from that actual report. You should go ahead and schedule your SMO immediately, as a surgery request will be coming shortly.

- For a employee who is treated for a major condition, and is treated for a long period of time, an updated SMO should be performed approximately every six to eight months and a records-only review after any updated test or study outside of this cycle. This will hopefully curb any tendency to laziness on the part of the treating physician who is on course to treat the employee forever when not making any headway in putting the employee back to a work capacity. Sometimes, it will help to keep the treating physician honest by knowing there is someone peering over their shoulder.
- For every treating physician retained by the employee, including any specialists within a particular field, you should also employ an SMO. If the employee gets an orthopedic surgeon, you need an orthopedic surgeon SMO. If the employee gets a pain management physician or an orthopedic surgeon who is a specialist in the spine and one who is a specialist in sports medicine for a low back and shoulder injury, you need to do your best to obtain an SMO who specializes in the treatment of the spine and another one who is a sports medicine specialist.
- Once opposing counsel receives the SMO report, they will have the treating physician review and pick holes in the report. If you take the next step of obtaining an IME from the court of the state, the opposing counsel will do the same thing with the IME report. Nothing prevents you from having your SMO review the IME report and offering their commentary on the report.
- If you receive an SMO report, and something remains unclear, is confusing, or does not address the questions you need to be addressed, follow up with the SMO to obtain a written update to address any shortcomings in that report.

SHARING THE SMO REPORT WITH THE OTHER SIDE

Under Louisiana Revised Statute 23:1125, any examination to which you directed the employee must be sent to the employee or their attorney within 30 days after you receive the written report. If you do not, you run the risk of a

$250.00 penalty and a reasonable attorney's fee. However, do you always send the report? I do not always send the report, but it is usually in furtherance of a specific strategy, and it is always cleared with the adjuster and insured. Your attorney will discuss with you why there is a need to not provide the report even with the risk involved.

CONCLUSION

As you have seen from this best practice there is a lot more to using an SMO than simply making sure you have one in a claim. Given the presumptions that exist in favor of the employee, you must learn to use your SMO, or SMOs, tactically maximize the benefit of the SMO and achieve the best possible outcome.

If you need recommendations for an SMO in a particular field, or if you would like an attorney to offer an opinion on your proposed strategy, feel free to reach out to us below.

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