"Preclusion Confusion" (or, "The Proper Procedure for Filing Form IME-3")

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Sacrosanct to the operation of the New York State Workers' Compensation Board ("WCB") is the prevention of communication with health care professionals designed to influence their opinion rendered with respect to an injured worker. In fact, the relevant part of New York State Workers' Compensation Law ("WCL") § 13-a advises "the improper influencing or attempt by any person to improperly influence the medical opinion of any physician who has treated or examined an injured employee, shall be a *misdemeanor*."[i] To avoid "preclusion confusion," that is, that confounded wonder as to why a favorable medical opinion is omitted from the record, and, the unsavory impression arising out of suspicion such opinion was unduly influenced, a proper understanding of the prevailing procedure involving submission to the WCB of the PRACTITIONER'S REPORT OF REQUEST FOR INFORMATION/RESPONSE TO REQUEST REGARDING INDEPENDENT MEDICAL EXAMINATION (FORM IME-3), is essential.

Careful review of the current application of the process by which an independent medical examiner ("IME") presents an opinion as evidence in a workers' compensation claim, reveals compliance with same is woefully lacking in actual practice. *Of import to note,* said process concerns not only IMEs selected by a workers' compensation insurance carrier to render an opinion, but also, those IMEs selected by a claimant to do the same.

The WCB, in Subject No. 046-124, onerously yet aptly entitled "The Rights and Responsibilities of Parties to a Workers' Compensation Claim When Communicating with Treating Health Care Professionals and Independent Medical Examiners," issued November 24, 2003, recognized WCL § 137(b) mandates an IME who "receives a request for information regarding [a] claimant, including faxed or electronically transmitted requests,… shall submit a copy of the request for information to the [WC]B within ten [10] days of receipt of the request."[ii] As further recognized, pursuant to WCL § 137(c), "all responses to such requests for information…*including all materials which are provided in response to such a request*, shall be submitted by the responding [medical] practitioner to the [WC]B within ten [10] days of submission of the response to the requestor."[iii] Given these very clear directives of the WCL, the mere filing of FORM IME-3, solely, that is, without the aforementioned *materials* accompanying same, as is so common in current practice, fails to rise to the level of substantial compliance with these directives.

WCB Subject No. 046-124 cites the qualification of the term "request for information" contained in 12 NYCRR 300.2(b)(11) prior to the promulgation of the "Emergency Regulation" of same, as "any substantive communication with an IME…regarding the claimant, …including a request or referral or request for examination and any communication related thereto, questions or inquiries related to the claimant or the examination, and the provision of information to the [IM]E for review in connection with a request for the [IM]E's professional opinion with regard to the claimant or the examination."[iv] Given this definition, not only is the PRACTITIONER'S REPORT OF INDEPENDENT MEDICAL EXAMINATION (FORM IME-4) within the purview of WCL § 137, but also, any opinion solicited by FORM IME-3, inclusive of an ADDENDUM to FORM IME-4, or, a report produced in connection with a mere review of the claimant's medical records without an examination. To be compliant, any and all communication with an IME, no

matter how seemingly insignificant, should be filed with FORM IME-3.

With specific attention drawn to the ADDENDUM to FORM IME-4, consider WCB Subject No. 046-324, entitled "Update on Communications With IMEs Under Workers' Compensation Law Sections 13-a [6] and 13-n [3]," issued June 17, 2009, prescribes "[i]f the IME…does not address all of the issues requested by the [insurance] carrier, or addresses issues which were not requested by the [insurance] carrier, the IME entity, only if requested by the carrier, or any party of interest on their own initiative, *may make a written request for clarification to the IME…for an addendum.* The request for an addendum will require [FORM] IME-3 submission with the [IM]E's signature." Again, in the aforementioned scenario, the mere filing of FORM IME-3, itself, sans the required "written request for clarification" does not rise to the level of substantial compliance with the WCL.

The ramifications of failure to substantially comply with the aforementioned directives are the harsh considerations set forth in the New York State Supreme Court, Appellate Division, Third Department, holding in Estanluards v. American Museum of Natural History, 53 A.D.3d 991, 862 N.Y.S.2d 207 (3rd Dep't 2008), wherein same recognized that, *unless the claimant knowingly agrees in writing to waive the rights inuring to him and her pursuant to same,* "IME reports that do not *substantially comply* with WCL § 137 will not be admitted as evidence" into the record.[v] As the selected language of "will not" found in the holding in Estanluards removes any discretionary power from the WCB to circumvent the requirements of WCL § 137, failure to substantially comply with same by omitting from filing with the WCB and all parties in interest all materials forwarded an IME in anticipation of a medical opinion to be rendered by same with respect to a claimant, is *fatal*, resulting in the preclusion of such opinion from the record.

The ripple-effect of preclusion from the record of a medical opinion proffered by an IME will likely be manifest in denial of an opportunity to cross-examine the physician rendering a contrarian opinion, thus leaving no remedy through which the medical issue at large may be redressed. Consider the Court's holding in Robideau v. Van Rensselaer Manor, 56 A.D.3d 866, 866 N.Y.S.2d 457 (3rd Dep't 2008), wherein same observed "the [prevailing] case law makes clear that '[i]n the absence of a viable difference in the expert opinions expressed in the medical reports, *no prejudice accrues* as a result of the denial of the right to cross-examine a medical expert[.]'"[vi]

To avoid the unpleasant results arising from failure to substantially comply with the aforementioned mandates of WCL § 137, inclusive of omission of a favorable medical opinion from the record, denial of the near-ineffaceable right to cross-examine a contrarian medical expert, and, possible criminal sanction, in sum, "preclusion confusion," simply inform all parties in interest, in writing, with accompanying FORM IME-3, *what is asked of the IME each time it is asked.* Not only will the foregoing make for better practice before the WCB, but also, will keep sacrosanct that which the WCB admittedly holds so dear.

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[i] WCL § 13-a(6) (emphasis added).
[ii] WCB Subject No. 046-124, citing WCL § 137(b).
[iii] Id., citing WCL § 137(c).

[iv] Id., citing 12 NYCRR 300.2(b)(11), prior to emergency rulemaking eff. Mar. 8, 2010

[v] Estanlunards, *supra*, citing 12 NYCRR 300.2(d)(9) (emphasis added).

[vi] Robideau, *supra*, quoting Bryan v. Borg-Warner Automotive, 293 A.D.2d 856, 742 N.Y.S.2d 393 (3rd Dep't 2002); Torres v. TAD Tech. Servs. Corp., 193 A.D.2d 975, 598 N.Y.S.2d 104 (3rd Dep't 1993), and; Emanatian v. Saratoga Springs Cent. School. Dist., 8 A.D.3d 773, 778 N.Y.S.2d 218 (3rd Dep't 2004) (emphasis added).