

# THE BARRISTER



Published by the Camden County Bar Association

VOL. 66, No. 2 • February 2018

www.camdencountybar.org

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For information about available law school scholarships, visit our website at [www.camdencountybar.org](http://www.camdencountybar.org) and click on the blue "Scholarships" tab on the left side.

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## The Use of Medial Evidence in the New Jersey Division of Workers' Compensation

By Alan L. Schwalbe



The benefits available to an injured worker under the New Jersey Workers Compensation Act, as required under Title 34 of the New Jersey Statutes, provide medical care, temporary disability, (wage continuation benefits) and, in appropriate cases, permanent partial disability or permanent total disability

benefits to individuals who sustain injuries that arise out of and in the course of their employment. The New Jersey Division of Workers Compensation, (hereinafter referred to as the "Division"), is a part of the Executive Branch of the New Jersey government. The Rules governing the Division were and are designed to provide these limited benefits, referred to above, in an expeditious fashion. However, as in many legal affairs, New Jersey Workers Compensation claims are inherently adversarial in nature and, as a result, these claims are often disputed, and need to be resolved by way of litigation before the courts that are under the supervision and guidance of the Division. These litigated matters are designed to be streamlined, so the beneficent purposes of providing these benefits afforded under the New Jersey Workers Compensation Act may be achieved without protracted litigation. A relaxation of the requirements under the New Jersey Rules of Evidence, governing the courts in the State of New Jersey, is intended to help accomplish the expeditious resolution of any disputed claims so as to provide benefits in an expedited fashion.

Evidence is the available body of facts or information indicating whether a belief or proposition is true or valid. The New Jersey Rules of Evidence (N.J.R.E.) provide guidance on how evidence may be presented in New Jersey court proceedings. While N.J.R.E. 101 (a) (3) provides that, with the exception of evidentiary issues relating to privilege, proceedings before the Division of Workers' Compensation shall not be governed by these rules, resolution of the substantive rights of the parties must be based upon legally competent evidence pursuant to N.J.S.A. 34:15-56. Competent evidence is evidence that is proper, relevant and admissible. Medical evidence is expert opinion evidence. Expert opinion evidence, pursuant to N.J.R.E. 702, is information, based upon scientific, technical, or other specialized knowledge, which, in a workers compensation claim, will assist the Judge of Compensation in understanding the medical facts that may be in issue in the workers' compensation proceeding. N.J.R.E. 703 provides that these medical facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

While most workers' compensation claims are neither complicated nor contentious, the more medically complex a case becomes, the more

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## PERSONAL INJURY LAW

**Special Needs Trusts: A Cost-Benefit Analysis***(Continued from Page 7)*

- **Pooled Trust.** While a Pooled Trust is a Special Needs Trust, it is less expensive to establish and operate. These are generally suitable for smaller accounts, i.e., \$150,000 or less.
- **ABLE Accounts.** A full discussion of ABLE Accounts is beyond the scope of this article, but does it make sense to allocate some of the funds the person with disabilities is receiving to an ABLE Account?

The next consideration is a cost-benefit analysis of a Special Needs Trust. The analysis would include the following:

- **Preservation of SSI.** What is the value of SSI over the beneficiary's anticipated life expectancy?
- **Value of Medicaid.** What would be the premiums required for private medical insurance to replace Medicaid over the beneficiary's anticipated life expectancy?
- **Deductibles and Copayments.** What would the deductibles and copayments be over the individual's life expectancy under private medical insurance?
- **Private Medical Insurance.** Does the client need services not included under private medical insurance (for example, long-term care)?
- **Affordable Care Act.** Does the client qualify for private medical insurance under the Affordable Care Act (ACA) or otherwise? It should be noted that to qualify for insurance under the ACA, the client must have at least \$1,000 in taxable income per month. Is the ACA likely to provide the necessary benefits? Is the ACA likely to be modified so that needed benefits are no longer available?

- **Future Benefits.** Does the client have the opportunity to obtain means-tested benefits in the future that he or she is not currently receiving? What is the value of those benefits over the life expectancy of the individual?
- **Cost of Establishing the Trust.** What is the cost of establishing the trust?
- **Trustees' Fees.** What are the anticipated trustees' fees over the anticipated life expectancy of the beneficiary? How do these fees compare with the cost of fees for a money manager, if the client receives funds and invests them?
- **Medicaid Lien.** What is the anticipated Medicaid lien involved in a Self-Settled Special Needs Trust that would accumulate over the anticipated life expectancy of the beneficiary?

Finally, while all of these costs are, at best, speculative, try to make the analysis and compare the dollar value of the Special Needs Trust and the cost of establishing it and contrast that with the cost saving of not establishing a Special Needs Trust.

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## The Use of Medical Evidence in the New Jersey Division of Workers' Compensation

*(Continued from Page 1)*

likely it is that there will be disagreements between the petitioner and the respondent leading to protracted disputes and litigation. These medical issues may be issues of causal relationship between the work-related accident or occupational exposure, or, where that issue is not in dispute, other issues may arise regarding the proper modality of treatment to use to cure and relieve the injured worker of the effects of the injury. Ultimately, it is medical opinion that assists the Judge of Compensation in determining the nature and extent of any permanent disability as defined by the New Jersey Worker's Compensation Act. Medical opinion and medical issues are at the heart of almost all disputes concerning the benefits that the petitioner may be entitled to receive from the respondent. Medical opinion from the authorized medical provider and/or other medical experts, is the basis for the determination of what medical treatment, or medical benefits, are "reasonable and necessary" and causally related to the workplace injury so as to "cure and relieve" the petitioner's injuries. N.J.S.A. 34:15-15. Medical opinion concerning whether the petitioner's injuries are disabling is the basis for the determination of whether, and for how long, the petitioner may be entitled to temporary disability benefits. N.J.S.A. 34:15-12(a). Finally, medical opinion forms the basis for the court's determination as to the nature and extent of the petitioner's entitlement to permanent disability, and as to whether that permanent disability is partially or totally disabling. N.J.S.A. 34:15-12 (b) and (c) as defined under N.J.S.A. 34:15-36.

With this in mind it becomes apparent that attorneys representing petitioners and respondents must become knowledgeable and conversant with the medical information underlying the opinions of the medical experts who are retained by the parties in any workers' compensation dispute. Law schools, generally, do not educate or inform the legal practitioner with the medical knowledge necessary to competently challenge the opinions of a medical expert. As the attorney approaches each individual case, he or she must educate themselves as to the general body of medical knowledge that applies to the injury or occupational condition that is causally related to the accident or exposure at the heart of that particular case, as well as any medical information that is peculiar to or specifically applicable to that particular petitioner. The attorney will not be able to "out-doctor the doctor". Without the benefit of the extensive medical training that the physician had acquired during their medical education, internship, residency and practice, it would be foolish to challenge the doctor's opinion with the idea that you know more medicine than they know. However, with careful preparation and a thorough knowledge of the subject matter of your particular case, as well as an understanding of why your expert's opinion disagrees with the opinion of your opponent's expert, an effective direct examination of your expert and cross-examination of your opponent's expert can be effectively accomplished. These are crucial "keys" to effective representation of the injured workers appearing before the Division in disputed claims.