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A World of Hurt

Exams of Injured Workers Fuel Mutual Mistrust



Nicole Bengiveno/The New York Times

Carol Houlder, a substance abuse counselor, waited a year for surgery on her injured ankle to be approved. “I was in so much pain and felt so hopeless for so long,” she said.

By [N. R. KLEINFELD](#)

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Dr. Hershel Samuels, an orthopedic surgeon, put his hand on the worker’s back. “Mild spasm bilaterally,” he said softly. He pressed his fingers gingerly against the side of the man’s neck. “The left cervical is tender,” he said, “even to light palpation.”

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A World of Hurt

‘That’s the Game, Baby’

A New York Times examination of New York State’s workers’ compensation system uncovered a universe of delays, suspicion and questionable rulings.

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Dr. Edward Toriello feels that workers' doctors are often biased. "I think it's human nature to help your patient. I think a lot of doctors say: 'I don't need the aggravation. It doesn't hurt to keep him out of work.'"

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The worker, a driver for a plumbing company, told the doctor he had fallen, banging up his back, shoulder and ribs. He was seeking expanded workers' compensation benefits because he no longer felt he could do his job.

Dr. Samuels, an independent medical examiner in the state workers' compensation system, seemed to agree. As he moved about a scuffed Brooklyn office last April, he called out test results indicative of an injured man. His words were captured on videotape.

Yet the report Dr. Samuels later submitted to the New York State Workers' Compensation Board cleared the driver for work and told a far different story: no back spasms, no tender neck. In fact, no recent injury at all.

"If you did a truly pure report," he said later in an interview, "you'd be out on your ears and the insurers wouldn't pay for it. You have to give them what they want, or you're in Florida. That's the game, baby."

Independent medical exams are among the most disputed components of New York's troubled workers' compensation system. Under that system, workers with bona fide injuries are entitled to medical care and replacement wages, usually paid for by their employer's insurer.

The independent exams are designed to flush out workers who exaggerate injuries or get unnecessary care, and there is no question that some of that goes on. As a check on what a worker's doctor determines, insurers are allowed to order an ostensibly neutral exam by a doctor they select and pay for. They do so regularly, with more than 100,000 exams conducted each year.

But a New York Times review of case files and medical records and interviews with participants indicate that the exam reports are routinely tilted to benefit insurers by minimizing or dismissing injuries.

"You go in and sit there for a few minutes — and out comes a six-page detailed exam that he never did," said Dr. Stephen M. Levin, co-director of the occupational and environmental medicine unit at [Mount Sinai Medical Center](#), who has been picked as the interim medical director at the compensation board. "There are some noble things you can do in medicine without treating. This ain't one of them."

New York uses independent medical examiners far more extensively than many states do, and critics say the practice adds to the mistrust in the system. The examiners' opinions can empower an insurer to slash benefits, withhold medical treatment or stall a case. Workers say that psychologically, there is something particularly damaging about being dishonestly evaluated by a medical professional.

"I was in so much pain and felt so hopeless for so long," said Carol Houlder, a [substance abuse](#) counselor who waited a year for surgery on her injured ankle to be approved. "Doctors see you're in pain and say you're not. How do they call themselves doctors?"

Many independent examiners are older, semiretired physicians who no longer treat patients, and claimants and lawyers have asserted that the memories and judgments of some of the doctors have at times been impaired by their age and frailties. The examiners do not need special training, only to have a state license and to be authorized in a specialty.

“Basically if you haven’t murdered anyone and you have a medical license, you get certified,” said Dr. Alan Zimmerman, 75, a Queens orthopedic surgeon who does the exams. “It’s clearly a nice way to semiretire.”

Some examiners see dozens of injured workers a day. Often the appointments are booked by brokers who help insurance companies find doctors. Some brokers are not registered with the state, as required, but there has been little enforcement of the rules.

Insurers, examiners and brokers, however, defend the exams as necessary and largely untarnished by bias. Dr. Brian L. Grant, chairman of Medical Consultants Network, a company based in Seattle that arranges independent exams across the country, said, “We never get pressure from an insurer.”

Many workers contest independent medical examiner opinions and often prevail. Judges can, and do, dismiss the exam findings. In fact, some lawyers and judges laugh when certain examiners’ names come up at hearings.

Dr. Kenneth E. Seslowe, an orthopedic surgeon who mainly does independent medical exams, is mocked at hearing offices by attorneys as Dr. Says-No, because they feel he consistently finds no disability. Asked about this, Dr. Seslowe said, “I really don’t have time for this.”

But even when the opinions are discounted, resolution can take months, years, even decades, and many workers, tired of the ordeal of five, six, seven exams, eventually give up.

Some examiners, of course, do furnish honest, well-reasoned opinions. And sorting out the yawning breach between what a worker’s doctors and an independent medical examiner conclude is complicated by the fact that some injuries and their impact on a person’s ability to work — especially soft-tissue injuries like those to the back and neck — are hard to document with indisputable tests.

Zachary S. Weiss, the chairman of the workers’ compensation board, said that he found the disparities in medical opinions shocking and that use of independent examiners was “off the charts.” But Mr. Weiss, who was appointed in late 2007, said he was unsure what would rectify the problems.

After nearly a dozen years without a medical director, the board has finally filled that job temporarily. It has introduced new, more detailed forms, which many doctors find maddening. It is also working on fresh guidelines that it hopes will better calibrate an injured worker’s care and work limits.

Dr. Robert E. Bonner, the medical director of the Hartford, an insurance company, said it was clear that the landscape had polarized. “Physicians regrettably have moved away from being neutral observers,” he said. “They’ve moved toward one camp or the other.”

Doctor vs. Doctor

When New York companies complain about the high cost of doing business in the state, they often cite fraudulent workers’ compensation claims as a key factor.

Though experts say talk of worker fraud is frequently overstated, it is widely acknowledged that some doctors collaborate with workers or their lawyers to magnify injuries or provide treatment for years without making someone better. Law firms representing workers often have cozy relationships with doctors to whom they refer patients, and vice versa.

A few years ago, Dr. Rafeak Muhammad, a Queens ophthalmologist, was barred from taking workers' compensation patients after acknowledging that he had treated several long after it was necessary. He declared them unable to work when in fact they could.

David Donaldson, senior vice president at the domestic claims subsidiary of A.I.G., one of the state's largest workers' compensation insurers, said, "Our position on I.M.E.'s is we're looking for someone who is going to give us a coldly objective view of the injury."

Critics, however, contend that independent medical examiners who reliably dispute workers' doctors are hired more often by insurers. Some workers cynically refer to them as "insurers' medical examiners."

Shu-Ying Xu, 66, a home health aide, said she met with an independent examiner in October 2006 so he could review the back, neck and leg injuries she suffered when she tried to prevent a patient from falling.

She said the exam took two minutes and was so quick that the doctor, Wayne Kerness, an orthopedic surgeon, did not ask her anything.

As a result, she said, when the doctor filed his report he said she spoke English. She does not.

He said she took no medications. She said she took nine.

He said her disability was mild and she could resume work.

She said that she was in debilitating pain and that the [Social Security Administration](#) had already concluded that by its standards, she was totally disabled.

"She can't even hold a gallon of milk," said Peter Chang, her son. He had come along to the exam to translate. Since no questions were asked, he said he had nothing to do.

After checking his notes, Dr. Kerness said it was an error to have said that Ms. Xu spoke English. Otherwise, he stood by the report. "What can I say?" he said. "People can say whatever they want."

He added: "I have my share of people I've found totally disabled and even recommended treatment that has been overlooked. I think I'm pretty heterogeneous."

A judge ultimately ruled that Ms. Xu's benefits should continue.

For decades, independent medical examiners were essentially unregulated. Reports were sometimes altered by brokers and exams often were done at airports, hotels or in the garages of doctors' homes. In 2000, a doctor examined five patients in a Long Island bar.

In 2001, the state introduced rules. Among them: doctors had to register with the board, work in a medical office and let workers record or videotape their exams. Claimants are permitted to bring along anyone they choose to witness or film the sessions.

While the law has helped, the process remains riddled with flaws. Lawyers and injured workers say many of the examiners still do brief, perfunctory, one-sided exams.

A small study conducted a few years ago at the Central New York Occupational Health Clinical Center in Syracuse found that the clinic's doctors and independent medical examiners virtually never agreed on whether a worker was disabled. When it can be proven that medical examiners have acted inappropriately, the compensation board revokes their certification — which has happened more often in recent years. But investigations are time consuming and only a dozen or so result in revocations each year.

William Gurin, the board's fraud inspector general, says his unit's limited resources are best focused on more fertile areas of fraud, such as employers who underreport their work force to save on insurance premiums.

Similarly, the board struggles to regulate businesses, from storefront exam factories to multistate networks, that help produce independent exams. Decades ago, insurers hired doctors directly. Now the job is increasingly done by third-party brokers called entities.

Entities are paid by insurers — around \$500 or \$600, say, for an orthopedic exam — and they in turn pay the doctor. Often, doctors submit dictated notes or checklists to clerical staff at the firms, who then draft the reports. Other times the notes go to transcription companies. The people preparing the reports may have no medical training.

Since 2001, the state has required entities to be registered. About 170 have signed up. But a fair amount of independent exam work is performed by companies that have never registered.

It was an unregistered company, Wine Medical Management, that arranged an independent medical exam of Santos Padilla, an injured worker, in 2006. The exam was to be done by Dr. Kerness, but it was canceled, and Mr. Padilla was seen by another doctor.

But somehow the compensation board received a report signed by Dr. Kerness recounting an exam that had never happened.

Dr. Kerness blamed the bogus submission on a clerical error by Wine. He said the company, using a signature stamp, had affixed his name to a report he had not seen.

Wine went out of business last year. A former manager at Wine, Laura Urban, blamed the discrepancy on a transcription company that prepared the reports. Ms. Urban moved to Commander Management, another entity that was doing unregistered work until the board ordered it to cease.

The board is looking into the Padilla episode, and has pledged to crack down on unregistered I.M.E. entities. Only a handful have ever had their certifications revoked, usually not for creating shoddy reports but for failing to pay their doctors.

Robert Grey, a claimant lawyer, said the board should track the opinions of independent medical examiners and compare them to ultimate verdicts, and then exclude doctors who were constantly found not credible.

Currently, the best protection for a worker is to tape an exam. But few do. The board does virtually nothing to promote the practice, and some doctors do not like it. When a woman brought a camera to an appointment upstate, the doctor called the police to toss her out.

Ms. Houlder, 63, who hurt her ankle, videotaped her exam by Dr. M. Pierre Rafiy, a 77-year-old Long Island orthopedic surgeon.

In the videotape, Dr. Rafiy grasps Ms. Houlder's right ankle and says it is swollen. In the written report, he stated that there was no [swelling](#) and no disability and that she could return to work.

When subsequently deposed, he backtracked, saying it had been a secretary's mistake to say no disability. He did not correct anything else.

Asked about the exam in an interview, Dr. Rafiy said: "I have no way to know if she had real pain. You have to remember, a lot of people don't want to work. They lie a lot."

Examiners, or Advocates

Dr. Samuels, 79, with a radiant smile and a burst of snowy hair, stopped doing surgery years ago. Until recently he commonly filled his days performing insurance exams on workers, sometimes as many as 50 in an afternoon, he said in his small office in Borough Park, Brooklyn.

"You obviously can't spend a lot of time with that volume pushing up your back," he said. "You have to assume there are going to be errors. Look, there are a lot of holes in this thing."

At times, evidence shows, Dr. Samuels's official reports were quite different from what he appeared to find during an exam.

Consider his 2007 examination of Johanne Aumoithe, a pastry chef who said she had hurt her arm and neck. On a videotape that Ms. Aumoithe recorded on her cellphone, Dr. Samuels comments that she had [limited range of motion](#). His written report concluded the opposite.

Asked about the discrepancy in an interview, Dr. Samuels chuckled and said he could not even recall the people he saw yesterday. The way he worked, he said, was to submit a checklist to a Queens company called All Borough Medical, which transformed it into a narrative.

"I never write a sentence," he said. "It's really crazy, but that's how it's done."

He often inserted numbers in the checklist — say, a measure of hand strength — after the person left, rather than as he performed the tests.

Was he sure they were correct? "I'm not sure of anything," he said. "They're just a guess in the first place."

The law requires a doctor to attest to the accuracy of a finished report before signing it, but Dr. Samuels said he rarely read them. He doubted he had read the Aumoithe report. "I just sign them," he said.

If he seldom read them, how did he know they were correct?

"I don't," he said. "That's the problem. If I read them all, I'd have them coming out of my ears and I'd never have time to talk to my wife. They want speed and volume. That's the name of the game."

Dr. Samuels said he generally received about \$100 for one of these exams.

The state does not regulate how much a doctor can make for an independent medical exam, though it does limit what a treating physician may charge an injured worker, and generally that is much lower for roughly equivalent work. Some examiners said insurers pay them by the session, say \$1,500 to be available from 8 a.m. to 4 p.m. and handle whatever workers are sent to them.

An occupational medicine doctor deposed by Scott Clippinger, a claimant lawyer, said he charged \$550 an hour for an independent medical exam. In 2006, Mr. Clippinger complained to the state board that the imbalance in fees “allows the carriers to purchase opinions.” He asked the state why it was not following a clause in state law that says that independent medical exams “shall be paid according to the fee schedule.”

The board’s response was that while the law “does provide that I.M.E. fees shall be paid according to the fee schedule, the fee schedule does not specify a particular fee for an I.M.E.”

Dr. Edward Toriello, a Queens orthopedic surgeon who cares mainly for his own patients, said he is paid nearly twice as much for an independent medical exam than he is for seeing a workers’ compensation patient he treats (\$250 versus \$140).

Like many who perform the exams, he views the compensation system as bloated with charlatans. Dr. Toriello, who does about 30 such exams a week, estimates that 80 to 85 percent of the time he finds no disability or need for medical treatment in workers whose doctors have found otherwise. He says the disparity is explained by the “comp mentality.”

“I think it’s human nature to help your patient,” he said. “I think a lot of doctors say: ‘I don’t need the aggravation. It doesn’t hurt to keep him out of work.’ ”

Dr. Zimmerman, of Queens, said he believed that 75 percent of people getting workers’ compensation did not deserve it, but also said he was not surprised to hear that insurance lawyers in Queens said his opinions were overwhelmingly disregarded by judges.

“Judges come up with wrong decisions a huge amount of time,” he said. “The lawyers work it so that anyone who scratches their toenail deserves equal treatment as someone who fell out of a 40-story building.”

Sometimes, a review of cases shows, there are stark discrepancies between the testimony independent medical examiners give at trial and their reports.

Twice in 2005, for example, Dr. Francis O’Malley, a Long Island orthopedic surgeon, testified that a disability was more serious than indicated by his reports.

In one case, Dr. O’Malley testified that a man who had hurt his back lifting packages had a “marked” partial disability. The report described the injury as a less severe “moderate” disability.

When confronted with the discrepancy, Dr. O’Malley testified, “I don’t know what’s going on.”

The reports were filed on Dr. O’Malley’s behalf by Hooper Holmes, a national medical services company that operated an I.M.E. entity. The company said that it always submitted exactly what doctors

gave it and that it believed Dr. O'Malley, who is 78, was confused. Dr. O'Malley did not return calls for comment.

In the case of William Cassone, the plumbing company driver whose father taped his examination, the exam by Dr. Samuels was arranged by All Borough Medical, an unregistered I.M.E. entity, which got the assignment from another registered entity.

Mr. Cassone had been injured years earlier but was being examined because, as he says on the videotape, he had suffered a second, recent injury.

But Dr. Samuels's report made no mention of the second injury and deemed Mr. Cassone able to work. When Mr. Cassone got the report, he said, "I was screaming so much I left the house and slept in the car."

Dr. Samuels later swore in a deposition that the report was accurate. A few weeks later, though, the board received an addendum signed by Dr. Samuels saying he had viewed the videotape and, yes, he had been told of the second injury. Still, he found no evidence of disability.

All Borough declined to comment on the case and its business.

Dr. Samuels said in a recent interview that he had never seen the addendum or the videotape and doubted he had read the original report. He said All Borough must have prepared the addendum without his knowledge.

"This is the first I've heard of this," he said. "Listen, there's a lot of hanky-panky that goes on."

Mr. Cassone's lawyer, Michael Pyrros, told a judge at a hearing that he was concerned there might have been fraud involved in the conduct of Dr. Samuels, the I.M.E. entity and the insurer. When the Cassone case next came before a judge, late last summer, a deal was reached between lawyers to grant Mr. Cassone benefits. Fraud allegations were dropped against the insurer.

Dr. Samuels, who was told to appear at the hearing, did not show up. According to a letter from his lawyer, he was unwell. His behavior was never addressed. Soon after, he retired, his official record unblemished.