In a number of circumstances, practitioners may be involved in providing physical examinations outside of the traditional physician-patient relationship. Some non-traditional settings for providing physical examinations include Fitness for Duty Exams, Department of Transportation "DOT" Physicals, Federal Aviation Administration Flight Physicals and Occupational Safety and Health Administration Compliance Exams. This article will focus on DOT examinations and certifications, but much of this information may apply equally to other non-traditional examination settings as well.

The DOT medical examination is designed to make sure that commercial drivers can safely perform the job. Commercial motor vehicle drivers are required to meet the medical standards of the Federal Motor Carrier Safety Administration (FMCSA), which are provided by the Department of Transportation. A DOT physical examination is conducted by a licensed examiner and may be issued for up to twenty-four (24) months, but the examiner can issue a certificate for under 24 months in order to monitor a condition like high blood pressure. In 1992, the regulations were amended to allow chiropractic physicians to perform DOT certification examinations as long as state licensure permits such examinations.

In 1999, the issue of DOT certifications made national attention after a bus driver who got into an accident which killed 22 passengers was found tested positive for marijuana and over the counter sleep medication. After this accident, the National Transportation Safety Board issued recommendations to the FMCSA to "prevent medically unqualified drivers from operating commercial vehicles" and "establish a medical oversight program for all interstate commercial drivers." As part of these recommendations, in 2005, the law was changed to require registration of DOT examiners which was implemented in 2014.

Physicians who perform DOT examinations should be aware that they face possible claims and lawsuits if the examination and certification are not done properly. Cases against examiners have not been frequent, however, medical conditions of drivers continually change and may be implicated in crashes involving trucks. Due to the substantial injuries and damages which may result from trucking incidents, claims or lawsuits may result in significant liability exposure. Liability in the context of DOT examinations may arise in a number of settings, including: 1) liability to third-parties for death or injury caused by an improperly certified driver, 2) liability to the Company who employs the driver based on a poorly performed examination (either to recover damages it has paid or for cost of work related injuries), 3) liability to the driver who is injured due to improper certification, or interference with employment due to improper withholding of certification, and (4) disability discrimination actions by drivers against employers or potential employers.

Several decisions dating back to 1976 have imposed liability on physicians or institutions in a number of settings where third parties are injured as a result of the
The hallmark case of Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (Cal 1976) was groundbreaking in recognizing a duty on the part of a physician to protect third party non-patients from injuries on account of a patient. Other cases illustrating this rule have proliferated over the years. In Estate of Amos v. Vanderbilt University, 62 S.W.3d 133, 138 (Tenn. 2001), the Court held that a hospital had a duty to the public to warn the patient of her possible exposure to human immunodeficiency virus. In Osborne v. United States, 567 S.E.2d 677, 684-85 (W. Va. 2002) the Court held that a third party could bring action against a health care provider for foreseeable injuries caused by negligent treatment of a patient. Similarly, in Turner v. Jordan, 957 S.W.2d 815, 820 (Tenn. 1997), the Court found that a psychiatrist owed a duty of care to a third person for violent acts of a mentally ill patient.

Liability can arise for a DOT examiner in the context of a truck collision resulting in injuries, death and/or property damage. While the laws vary from state-to-state, the crux of the claim is that the examiner owes a duty to the public to properly perform DOT physicals. If a driver is on the road driving when she/he should not have been due to a poor DOT examination and causes a wreck which kills or injures someone, or causes damages to property, a claim may exist. In Wharton Transport Corp. v. Bridges, 606 S.W.2d 521 (Tenn. 1980), the plaintiff employed the truck driver and brought suit against the examining DOT physician seeking to recoup approximately $400,000 it paid to settle claims resulting from the driver leaving the highway and colliding with a parked car containing a family. The crash killed one child and caused severe injuries to other family members. The driver had a number of medical conditions which, prior to the collision, had been found to result in the driver being one hundred percent (100%) disabled. The DOT examiner did not identify the disabling conditions and certified the driver to operate a truck. The Court found that the accident was a reasonably foreseeable consequence of the DOT examiner failing to properly perform the examination. An interesting side note was that the examiner earned a large portion of his income from certifying DOT examinations.

Liability may also be claimed in connection with employment situations. An example of a case brought to recover workers' compensation payments on account of a deficient DOT examination is Hollywood Trucking, Inc. v. Watters, 385 Ill. App. 3d 237, 895 N.E.2d 3, 324 Ill. Dec. 3 (5th Dist.2008). In Hollywood, the trucking company sued the physician who performed a DOT examination of a driver it employed. The suit alleged negligence, fraud and fraudulent misrepresentation relating to the DOT examination and demanded to be reimbursed for workers' compensation benefits paid to the driver for conditions which it claimed pre-existed the employment. The Appellate Court ruled that part of the dispute had to be adjudicated in the Workers' Compensation Commission because of its exclusive jurisdiction.

Another example of an employment related claim is Pittsman v. Perrone and Redi-Care Medical Center, Lackawanna County, Ohio Case No. 11 CV 1235. The plaintiff was a long-haul trucker who applied for a job as a truck driver with Bolus Freight. He was sent to Redi-Care Medical Center for a DOT physical at the request of
Bolus. Pittman claimed that before completing the physical, Dr. Perrone called Bolus and refused to certify Mr. Pittman as able to drive a commercial vehicle without a "skill performance evaluation." Plaintiff was not hired and later accepted employment elsewhere, incurring lost income, moving expenses, etc. The suit claimed that Dr. Perrone "wrongly interfered" with his potential employment relationship with Bolus Freight through "scandalous, defamatory and libelous statements." The case was eventually dismissed based on the statute of limitations running prior to the action being commenced, but illustrates the potential for claims from a denial of DOT certification.

For another example of an employment related claim arising out of a DOT examination witness *EEOC v. Texas Bus Lines*, 923 F.Supp. 965 (S.D. Tex. 1996), where a driver sued under the Americans with Disabilities Act after failing a DOT exam due to morbid obesity, (without doing any agility testing). Without a DOT certification, the driver was not hired and a lawsuit was filed. The medical evaluation was not consistent with DOT regulations. The court concluded that the bus company had notice that the DOT examination was not compliant and the driver should have been given a second examination. A similar claim was brought in *Dept. of Civil Rights v. A & C Carriers*, 403 N.W.2d 586 (Mich. App. 1987), where a truck driver made a disability claim against the employer. The trucker alleged that the doctor performing the DOT exam and another doctor who reviewed the records both agreed the driver's spine problems prevented DOT certification. The claim was not successful because the physical problems were directly related to the driver's ability to perform the job based on DOT standards.

Cases against DOT examiners are not filed every day, but the above are examples of claims which have been made arising out of situations where physicians are involved with patients who later cause harm to third parties or drivers and demonstrate that performing DOT examinations has the potential to expose the examiner to liability. The responsibility DOT places on examiners is significant and the proper performance of the DOT examination is important, not just for the safety of the public and drivers, but also for the economic well-being of the company which employs her/him, and the customers which are served by the trucking industry. In order to minimize the risk of claims, examiners must meticulously follow the DOT's examination regulations, maintain thorough documentation, and follow examination procedures which assure consistency. While nothing can prevent a claim or action from being pursued, we have attempted below to outline an approach which will reduce the chances a DOT examiner will have a claim or lawsuit filed against him/her.

All commercial drivers whose medical certificates expire on or after May 21, 2014 are required to be examined by an examiner listed on the National Registry of Certified Medical Examiners. The medical certificate is not limited to the current employer, so examiners should not consider whether the driver is employed by a familiar company or unknown employer.

Examiners performing driver medical exams are expected to understand fully the medical standards of the Federal Motor Carrier Safety Regulations (FMCSR) and
related guidance. FMCSA must provide notification of certification before examiners are authorized to perform driver examinations. Examiners must now enroll, complete necessary training, and pass a certification test in order to be listed on the National Registry. To become a Certified Medical Examiner a practitioner must:

- Be licensed, certified, or registered in accordance with applicable state laws and regulations to perform physical examinations.
- Register on the National Registry and receive a unique identifier.
- Complete required training and pass the medical examiner certification test.
- Report results of driver exams performed every month via the National Registry system.
- Submit to periodic monitoring and audits.
- Maintain certification by completing additional training every five years and recertify by passing the certification exam every 10 years.

When performing a DOT examination, the examiner must follow the federal standards, comply with the advisory criteria, and consider other available guidance and reports. The doctor should only execute the medical certificate after completing all required steps to determine that the driver is able to perform all driving and work-related tasks. Frequently asked questions (FAQs) are provided to aid the examiner in making the certification determination and the FMSCA is reportedly developing an examiner handbook.

The FMCSR lists four (4) conditions that require denial of certification: insulin-treated diabetes mellitus, seizure disorders, significant vision deficits and significant hearing deficits. However, there are exemptions that can be applied for through FMCSR. Practitioners should be familiar with conditions like these that outright preclude driver certification and also be prepared to deal with those that may not, such as hypertension and some vision and hearing deficits. They also should be aware that any condition can be disqualifying if it is severe enough to affect a driver's ability to safely operate a vehicle.

DOT examiners should also be aware of any sleep problems a driver may have, including obstructive sleep apnea, which often goes undiagnosed.¹

There are Driver Exemption Programs available for patients with diabetes and vision problems under Sections 391.41(b)(3) and 391.41(b)(10).² Also, the FMCSA has a Skill Performance Evaluation certificate for drivers with missing or impaired limbs to drive CMVs across state lines if they have been fitted with (and are wearing) the right prosthetic device, and the driver can demonstrate the ability to drive the truck safely by completing on-and off-road activities.³

The U.S. Department of Transportation's Federal Motor Carrier Safety Administration developed a Medical Review Board to provide advice and recommendations for updates on the current physical qualification standards.⁴ Similarly, the FMCSA has a Medical Expert Panel which is a board of physicians,
clinicians, and scientists who reviews evidence about a topic or question and drafts reports of their recommendations for the Medical Review Board to review.⁵

The medical examiner makes the final determination as to whether the driver meets FMSCA standards. FMCSA encourages examiners to use whatever tools or additional assessments are necessary based on the patient’s medical history or findings from the physical examination. The Examiner should only execute the medical certificate after completing all required steps to determine that the driver is able to perform all driving and work-related tasks.

While cases may not often be pursued against examiners, practitioners must understand their potential liability and how to protect themselves. Regardless of the type of case, a doctor’s best defense to any claim is to perform these examinations within the strict guidelines provided by the DOT and use the best clinical practices possible. Readers are also recommended to two (2) good articles referenced below on the DOT assessment of commercial motor vehicle drivers.

References

Resources

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