

Sample Summary and Analysis for client:

Dear Ms. XXX: the following is my summary of the deposition of Dr. Rosenberg taken on 1/31/2012.

Dr. Rosenberg confirmed he was contacted to examine as applicant's QME and made one examination in January 2010 and has written 3 reports.

I questioned him on his apportionment determinations (80% indust and 20% non-indust) as contrasted with those of PTP Dr. Lehrich, Dr. Subotnick and Dr. Ross. I asked him about whether he considered various factors in his apportionment determination.

Obesity: he questioned Dr. Subotnick's apportionment of 75% on the lower extremity to obesity and deconditioning. He has never seen 75% apportioned to obesity. If this was so, then why were there not symptoms on the other foot? He said applicant had a repetitive CT not particularly related to obesity. He would apportion 20% to obesity.

Diabetes: When asked, he said he had not considered apportionment to diabetes, and said he should do so if she had it. **He says he has not seen evidence of diabetes.**

Osteo arthritis (OA): this condition would not contribute to tarsal tunnel and is not a basis for apportionment.

Arthritis: he would not apportion to osteo-arthritis; then he said some OA is non-industrial. His recollection is that the surgical procedures and injuries were related to soft tissues, and OA affects bone. He asked if anyone attributed part of her disability to OA and whether there were xrays in the Kaiser records. **He would have to go through the records again to see.**

Rheumatoid Arthritis (RA): he would apportion to it if she had it. He said the real test to show RA is an RA Factor blood test. **He does not think this was in her records.**

Prior Stipulations: I told him about the 23.5% Stip right knee DOI 2/27/1990 and 13.75% stip left ankle DOI 1995. He was not aware of any prior stips. **He would have to look at the medical records on which the stips were based to make an opinion on this.**

Regarding the 7/2000 thumb injury, I pointed out that Dr. Cabayan had recognized pre-existing degenerative disease prior to injury. He said he wanted to look at those records again. Some of the degenerative condition was due to cumulative trauma. I asked him to apportion between the CT and the specific injury. He wanted to review which surgeries were due to the CT vs. the specific. He was referring to a CT ending prior to the 7/2000 injury. He needs to see the Cabayan and occupational treatment records to separate them out. (Note, applicant has not pled a CT claim for either upper or lower extremities).

Regarding the 2007 injury/fall on the exercise machine: his understanding is that the claim was for injury to the right shoulder, right hip, neck and low back. I asked his opinion on what injuries occurred due to this incident. He said he believes her pain level increased subsequent to the fall.

This led to a discussion on Chronic Pain Disorder. He said in his reports that much of her disability stems from this as opposed to the orthopedic injuries/ratings. I asked why he only considered psych as a possible non-industrial factor for this diagnosis. He says the chronic pain portion of his report was meant to show that, whatever her orthopedic level of disability was, it should be increased by an additional amount due to the pain disorder. That extra amount should be apportioned by possible non-industrial psych factors. The percentage should be determined according to the psych QME's. (I gave him Dr. Shaffer's 12/24/2010 report, which he asked for in one of his reports). Dr. Scott says all psych is industrial; Dr. Shaffer says only 30% is industrial.

Rosenberg says the trier of fact will have to determine which report is correct, and apply that percentage.

He wants to go back and review and make his apportionment clear and answer the question why he does not consider non-industrial factors other than psych as to the chronic pain condition.

He wonders if Dr. Subotnick has a medical article that shows deconditioning plays a role as to the foot condition.

Detoxification of applicant: I showed him Dr. Behravan's current treatment reports, which show that applicant has recently become detoxed from opiates, and asked if this new fact changes his PD assessment. First, he said that the Suboxone drug prescribed by Behravan is very expensive, and applicant could do just as well on buprenorphine. He said becoming detoxed does not necessarily substantially improve her function. He wants to review Behravan's records, but his quick review does not show he comments on improved function.

Dr. Rosenberg does not need to reexamine applicant. He commented that for the pain disorder, he may not be able to apportion between dates of injuries. He can apportion between the upper and lower extremities. I asked him to apportion between the specific and the CT injuries and he said he would do so if the records were adequate. Applicant's attorney asked if he is specifying a third DOI as a CT claim, and he said no. He wants to see if Cabayan's records comment on pre-existing pathology related to a preceding CT injury and see which surgical procedures related to the thumb and which related to something else. He wants to see if she had an MRI back then.

This concludes the summary of testimony.

Attorney Comments:

With your agreement, I will send Dr. Rosenberg the Kaiser, Cabayan's records and other early treatment records for the thumb and ankle, and Dr. Shaffer's reports. I will specifically ask him to revise his apportionment determinations, apportion between the specific and CT injuries.

As applicant has never pled a CT injury, theoretically defendant can say it is not liable for anything apportioned to a CT. In response, applicant can move to amend the pleadings according to proof and defendant would have a statute of limitations argument.

Overall, I thought the deposition was worthwhile because it at least will require Rosenberg to reassess his opinions after review of the records, and hopefully will attribute more of applicant's disability to non-industrial factors. I will probably want to send his testimony and report to Dr. Roth for comment.

You may want to send the Suboxone prescription to UR to determine if she can take the other less expensive drug to equal effect.

I look forward to your response and comments. Thank you.

Lila Abdul-Rahim
YYYY & ASSOCIATES, PC