



Case Litigation: Direct & Cross Examination of IME Doc

Chairperson: Phyllis Phillips, Esq.
Mediation Works, LLC
Williston, VT

Interactive Workshop
Monday, March 23rd, 2020
12:55-1:35pm



DIRECT EXAMINATION OF THE IME PHYSICIAN

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INTOXICATION-THE MASSACHUSETTS PERSPECTIVE

Intoxication is NOT a defense in Massachusetts Workers' Compensation Claims

- To bar recovery the insurer must prove the employee committed serious and willful misconduct.
- An injury is not the result of the employee's serious and willful misconduct just because he was intoxicated at the time of injury.
- However, if the evidence proves that the employee's intoxication caused his fall then compensation would be barred.
- In Massachusetts, the serious and willful misconduct of the employee shall not bar compensation to his dependents if the injury results in his death.



2022

**Work Related Injuries
Workshop**

DIRECT EXAMINATION OF DR. DRE

Elements to prove to bar compensation in Vermont

- That the injury was caused by or during Mr. Goldman's intoxication.
- That the intoxication played a role in causing the accident.



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DIRECT EXAMINATION OF DR. DRE

Qualifying the expert

- Education
- Training
- Experience
- Licenses and Certifications
- Publications/Research

DIRECT EXAMINATION OF DR. DRE

Methodology and Reliability

What is the role of toxicology in emergency medical treatment?

How is marijuana measured in toxicology studies?

Is the Delta 9/THC level in a blood test recognized and accepted within the relevant medical community?

Is the Delta 9/THC level in blood a test that is reliable and valid?

What role does time and metabolism play in the determination of Delta 9/THC testing?

DIRECT EXAMINATION OF DR. DRE

Fact Specific Questioning

- Was toxicology performed in this case?
- What were the findings?
- What does a level of 3.6 ng/ml indicate given the time of measurement and metabolism rate?
- Do you have an opinion, more medically probable than not, as to whether the levels of Delta 9/THC in this case indicate that Mr. Goldman was under the influence of marijuana at the time of the accident?
- Do you have an opinion whether the toxicology findings reflect a level of intoxication that would affect Mr. Goldman's perception and cognitive abilities?
- Do you have an opinion, to a reasonable degree of medical certainty, to a degree that is medically more probable than not that the intoxication of Mr. Goldman played a role in causing the accident resulting in his death?



Cross Exam of the IME Physician

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Goals of the Cross-Exam

- Develop information that can be used to assist the Employee's doctor's testimony
- Buttress the testimony of the Employee's physician
- Discredit the doctor—bias, background, knowledge of the subject area, areas of practice
- Discredit the building blocks of the IME doctor's testimony
- You are aiming for singles, not homeruns.
 - Homeruns are rare but gratefully accepted!

Qualifications

- In almost all cases, the IME is a qualified board certified physician
- The real areas of inquiry surround
 - Bias
 - The number of IME's performed per year
 - The percentage of practice devoted to seeing patients versus examinations on behalf of insurers
 - The percentage of income derived from IME examinations
 - Articles or research demonstrating a bias with regard to the subject matter
 - Example—articles written arguing that use of marijuana demonstrates a character defect

Qualifications

- Expertise in the Subject Matter
 - What are the academic or practice credentials of the IME physician in the medical practice area
 - What knowledge does the IME have regarding marijuana and its potential effect on a person
 - What research or articles has the IME reviewed in the field of marijuana and potential effect on perception and cognitive abilities
 - What research or articles has the IME reviewed on absorption of marijuana (at what levels and time periods) and impairment

Cross Examination of Dr. Dre

- Doctor, my understanding of your testimony is that the Employee demonstrated a Delta 9 THC level of 3.6 ng/mL and therefore Mr. Goldman was under the influence of marijuana
- It is also my understanding that this level of THC led you to believe that he smoked marijuana within two hours of beginning work
- And this level of THC affected his perception and cognitive abilities
 - You would agree that you never engaged in any conversation with Mr. Goldman
 - You would also agree that there are no records available for review that would provide evidence of his level of functioning either prior to the incident or immediately after the incident
 - You never spoke with any witnesses who stated that his level of functioning was impaired
 - Did you go to the worksite
 - Your opinion that the marijuana contributed to his death is solely based on the levels of marijuana taken from a blood sample

Cross Exam of Dr. Dre continued

- Would you agree that THC is absorbed into the body very differently than alcohol
- You would agree that alcohol consumption at particular levels has a direct correlation with behavior, attention, cognition and judgement
- Are you familiar with the studies demonstrating that absorption, distribution and elimination of marijuana along with the behavioral and cognitive effects of marijuana are very different from those found with alcohol
- Alcohol is water soluble and is found in the blood stream

Cross of Dr. Dre continued

- THC is fat soluble and therefore stored in the fatty tissue rather than the blood
- You would agree that THC can be detected in the body up to 30 days post ingestion
- You would agree that there are currently no definitive studies regarding impairment, the levels of impairment and ingestion of marijuana
- Is there a difference between intoxication and impairment
- Are you familiar with the NHTSA study presented to Congress stating that “peak impairment does not occur when THC concentration in the blood is at or near peak levels. Peak THC level can occur when low impairment is measured, and high impairment can be measured when THC level is low”

Cross-Exam of Dr. Dre continued

- In fact, that report to Congress concluded that “someone can show little or no impairment at a THC level at which someone else may show a greater degree of impairment.”
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