

**INSURER PERSPECTIVE ON DIA LITIGATION RE EXPERT**  
**MEDICAL OPINIONS UNDER DAUBERT-LANIGAN CANAVAN**  
**AND PATTERSON**

---

Edward M. Moriarty, Jr.  
MORIARTY & ASSOCIATES, P.C.  
Edgewater Office Park  
301 Edgewater Place, Suite 330  
Wakefield, MA 01880  
(781) 246-8011  
[edwardm@moriartyw.com](mailto:edwardm@moriartyw.com)  
moriartywc.com  
BBO No. 655900

Dated: October 29, 2013

**I. INTRODUCTION:**

- (a). Daubert-Lanigan Canivan Patterson apply to Massachusetts workers' compensation litigation relative to the admissibility of medical expert opinion.
- (b). The admissibility of expert medical opinion is the heart of the litigated Mass workers' compensation case.
- (c). At the core of every litigated Mass workers' compensation case is the medical opinion relative to the diagnosed condition and the causal relationship, if any, between the diagnosed condition and event or series of events at work or the workplace environment in general.
- (d). It is therefore important for the Mass workers' comp litigator to understand what Daubert-Lanigan Canavan Patterson standards are.
- (e). How do the standards apply?
- (f). When do the standards apply?
- (g). What are the results of the application of the standards of Daubert-Lanigan in the litigated Mass workers' compensation case involving submission of expert medical opinion?
- (h). What is the future of the Daubert-Lanigan standard at the DIA?

**II. DAUBERT-LANIGAN CANAVAN PATTERSON STANDARDS:**

- (a). See the article in the printed materials, attached, authored by Attorney Matthew Welco reprinted from the MCLE Mass Workers' Comp Second Addition, 2010, Chapter 14, for an excellent tutorial on the genesis, purposes, standards, and application of Daubert-Lanigan at the Massachusetts' Department of Industrial Accidents.

**III. EXPERT MEDICAL OPINION RELATIVE TO DIAGNOSIS AND CAUSAL RELATIONSHIP ARE SUBJECT TO THE DAUBERT-LANIGAN ANALYSIS:**

- (a). Canavan's Case establishes the principle that not only is expert medical opinion necessary to establish diagnosis and causal relationship in the disputed workers' compensation case involving medical issues, but that Daubert-Lanigan also applies relative to issues of foundation, reliability, and methodology of the medical science behind, and utilization of the scientific principles and testing applied to the facts in dispute.

**IV. DAUBERT-LANIGAN CANAVAN ISSUES IN MASS WORKERS' COMP INVOLVING MEDICAL OPINION ARE MULTI-FACTORAL:**

- (a). Reliability or general acceptance of the medical theory in the relevant medical community.
- (b). Has been and/or is subject to testing.
- (c). Subject to Peer Review and scientific/medical publications.
- (d). Governed by recognized and accepted medical standards in the relevant medical community.
- (e) No known high rate of error or inaccuracy.

**V. DIFFERENTIAL DIAGNOSIS IS A RELIABLE SCIENTIFIC MEDICAL METHODOLOGY OF ESTABLISHING DIAGNOSIS AND CAUSAL RELATIONSHIP IN LITIGATED MASS WORKERS' COMP CASES:**

- (a). Differential expert medical diagnosis is a reliable method of proof of causation between employment, diagnosis, and causation.
- (b). It is as a reliable way to determine causal relationship rather than simple sequence of events.
- (c). It is, and, or must be within the expert's error of expertise.
- (d). It must be based on an adequate factual foundation.
- (e). It must rely on applicable recognized differential diagnostic methodology, in general, and apply the accepted methodology, to the particular facts of the case in dispute.
- (f). A differential diagnosis considers all possible/probable causes; this methodology then scientifically rules out all possible or probable causes; and then determines whether the workplace cause was a major cause and the proximate cause of the diagnosed condition in issue.
- (g). See Young's Case where Hepatitis C was contracted by the employee and the medical expert determined that, despite multiple known causes for Hepatitis-C, the major or proximate cause of Hepatitis-C was employee coming in contact with an infected workplace instrumentality.

- (h). See Hick's Case where the major cause of employee's blindness was determined to be as a result of a mandatory employment flu shot as opposed to all the other known possible causes for blindness other than the industrially required flu shot.

**VI. HOW DO YOU USE DAUBERT-LANIGAN AT DIA PROCEEDINGS?**

- (a). Motion to Strike
- (b). Motion in Limine.
- (c). Hypothetical Questions.
- (d). Objections at Hearing and at any and all depositions.
- (e). Any and every means of effectively challenging the admission of expert medical evidence in any and every form, oral or written, before the evidence is offered regarding diagnosis and causal relationship based on scientific reliability and methodology, or more precisely, lack of acceptance or recognized principles and methods in the relevant medical community.

**VII. THE BASIS OF A DAUBERT-LANIGAN CHALLENGE:**

- (a). The scientific or medical validity of the diagnosed condition is questioned.
- (b). The reliability of the methodology to establish causal relationship between the diagnosed condition and the industrial injury is challenged.
- (c). The scientific or medical theory behind the diagnosed condition itself is challenged at its very foundation or core.
- (d). To effectively challenge the medical or scientific methodology in dispute, it is the best to break down the challenge by attacking:
  - (1). The theory;
  - (2). The methodology, and;
  - (3). The applicability of the methodology to the facts of the case.
- (e). Challenge the expert as a faux expert.

- (f). Challenge the factual foundation that is necessary for the expert opinion on diagnosis and causation as based on facts not in evidence or inadmissible facts.
- (g). Retain insurer expert to separate known from unknown, reliable from unreliable, speculative from demonstrable, in expert report.

**VIII. WHEN IS A DAUBERT-LANIGAN CHALLENGE MADE:**

- (a). At Conference;
- (b). At Hearing;
- (c). At the Review Board.
- (d). At Conference by a Motion to Strike;
- (e). At Hearing by a way of Hypothetical Questions to the Impartial.
- (f). By way of a Motion in Limine prior to Hearing challenging the methodology foundation and competency of the witness, theory, and opinion(s).
- (g). At the Review Board after all appeals have been preserved.
- (h). Object early and often.
- (i). Object on grounds of lack of Daubert-Lanigan foundation.
- (j). Object on specific grounds that the diagnosed condition is lacking a Daubert-Lanigan foundation.
- (k). Object on grounds that there is inadequate factual foundation regarding the diagnosed condition.
- (l). Object to the methodology utilized to establish the existence of the diagnosed condition.
- (m). Object on grounds challenging the causal relationship opinion between the diagnosed condition and the industrial injury or workplace exposure.
- (n). Always object on grounds of foundation, reliability, and methodology.

- (o). Objection should include not only objection to admissibility, but, where necessary, to exclude the witness, and/or the entire line of questioning, or the particular line of questioning, as it relates to diagnosis and/or causal relationship. Again the objection should relate to and be based upon all applicable Daubert-Lanigan standards, including reliability, fitness, and inadequate foundation.

**IX. DAUBERT-LANIGAN STANDARDS APPLY AND, IF MADE TIMELY AND WITH ADEQUATE EVIDENCIARY GROUNDS, CAN LIMIT AND/OR EXCLUDE EXPERT TESTIMONY OR PORTIONS OF EXPERT TESTIMONY INJURIOUS TO THE INSURER'S DEFENSES AND OCCASIONALLY EVEN TO EMPLOYEE'S ENTIRE CLAIM:**

- (a). Daubert-Lanigan can limit and exclude, in certain circumstances, scientific and medical evidence at the Department of Industrial Accidents.
- (b). Daubert-Lanigan teaches us that scientific evidence is admissible, but not without appropriate facts and circumstances, with carefully chosen and worded objections to reliability, reproducibility, and application of facts to the medical issue in dispute.
- (c). The grounds for objection are multiple, but may be covered by always uttering the words, "Daubert-Lanigan lack of foundation!"
- (d). Always question whether there is a scientific basis for the diagnosed condition.
- (e). Always question whether there is a scientific basis for methodology underlying the testing and measurement of the diagnosed condition.
- (f). Most importantly, determine if there is a proven methodology to causally relate the diagnosed condition to an industrial injury or to the workplace in general.
- (g). Was the science and methodology generally accepted in the relevant medical community and applied by a credible expert also properly applied to the facts in dispute.

**X. FUTURE DAUBERT-LANIGAN CHALLENGES TO EE CLAIM OF INDUSTRIAL INJURY:**

- (a). Multiple chemical sensitivity/MCS.
- (b). Fibromyalgia.
- (c). Heart attack, stroke, and stress:

- (1). Chronic;
  - (2). Acute;
  - (3). Industrial, and;
  - (4). Non-Industrial.
- (d). Hearing Loss:
- (1). Acute;
  - (2). Chronic, and;
  - (3). Carbon monoxide exposure.
- (e). Loss of Vision:
- (1). Traumatic, and;
  - (2). Secondary to flu shot.
- (f). Allergies:
- (1). Latex;
  - (2). Paint, and;
  - (3). Cleaning solvents/solutions.
- (g). PTSD/Post-Traumatic Stress Disorder:
- (1). Acute;
  - (2). Chronic;
  - (3). Violence;
  - (4). Threat of violence, and;
  - (5). Non-violence.

- (h). Sick-Building Syndrome:
  - (1). Acute;
  - (2). Chronic;
  - (3). Air-quality testing results;
  - (4). Mold/mildew testing results, and;
  - (5). Patterson: Does employee have reliable, admissible evidence of toxicity in work environment; if not, inadmissible.
  
- (i). Pre-existing Non-Industrial Cancer(s) Plus Industrial Trauma:
  - (1). Acceleration;
  - (2). Alter;
  - (3). Hastening;
  - (4). Change, and;
  - (5). Based on industrial events:
    - (i). Trauma, and;
    - (ii). Exposure.
  
- (j). Asbestos Exposure and GI/Gastrointestinal Cancer.
  
- (k). Asbestos Exposure and Esophageal Cancer.
  
- (l). COPD/Chronic Obstructive Pulmonary Disease in HVAC/Heating Ventilation and Air Conditioning and Power Plant Occupations:
  - (1). Non-smoker;
  - (2). Limited/former smoker, and;
  - (3). Chronic exposure to dirt, dust, ash, fly ash, and fossil-fuel power plant turbine by-products.

**XI. CONCLUSION:**

- (a). Use Daubert-Lanigan challenges early and often.

- (b). In appropriate cases.
- (c). To exclude employee claims.
- (d). To limit insurer exposure.