The legal aspects involving repetitive strain injuries (RSI)

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ABSTRACT

In order to have a good patient-physician relationship, besides practicing a fair and updated technical medicine, the physician is obligated to have knowledge of and follow the laws, rules and regulations, which grant specific rights to some and delegate obligations to others. The physician is responsible for writing legal statements based on information from medical records. These declarations will serve as important documents, upon which public or private entities will base their decision on granting rights or delegating obligations. This article stresses the importance of adequate physician decision making capacity when it comes to access the patient's needs within the working environment. It also emphasizes the seriousness of reaching an optimal treatment plan, in order to prevent expected complications. Our objective is to promote the practice of medicine within the current law, giving directions to the reader on where to obtain this information. Physicians have to keep themselves updated not only regarding the technical aspects of the profession. The current knowledge of local, state and national laws, rules, and regulations is also of paramount importance.

OBJECTIVE

The objective of this article is to highlight the ethical and legal elements that guide the work of professional colleagues, to bring attention to the discipline in the practice of medical acts, and to help avoiding conflicts between the different fields of expertise involved in law suits.

UPDATE

Civil act, 3rd article: "No one is excused for not obeying the law, claiming not to know it."

Recognizing that repetitive strain injuries (RSI) and work-related musculoskeletal disorder (WRMD) are not diagnosis, but situations that may lead to injury, that this kind of injury is referred in sections 186 and 927 of the Civil Rights Code,[1] and that these diagnosis may create rights and obligations, the doctor who assists a patient with musculoskeletal diseases should have knowledge of the laws and regulations in our Civil Rights Code, Criminal Code, Ministry of Labor, Class Collective Convention, Medical Ethics Code, and the Ministry of Social Security.[2] It is necessary that these laws and regulations are both known and practiced, in order to formulate a medical record and issue any report, without prejudice of good medical practice.

The medical record should be formulated for each individual patient. The record belongs to the patient, and the doctor is responsible for keeping it for 20 years. Until this moment, there are no regulations for the electronic medical records, which cannot be altered, or prepared after the examination or procedure. So far, not all programs for their implementation are completely reliable and safe.

The Federal Council of Medicine (CFM) consultation lawsuit nº 1.201/2002 concludes that once an electronic record is made, it cannot be discarded, it should be preserved for a whole life, in optical or magnetic storage.[3]Furthermore, the Law 8.159/91 provides a national policy of public and private files, and creates the National Council of Files (CONARQ), responsible for defining a national policy on files.[4]This agency produced the Ordinance nº 50, of April 9, 2001 (therefore, with legal status), which created the Labor Group of Medical Files (GTAM), to "conduct studies, propose guidelines and regulations regarding the organization, keeping, preservation, destination and access to documents in files of the medical-

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hospital field". According to GTAM of CONARQ (with law enforcement), the new studies of electronic records should be kept permanently. The GTAM only creates a discussion somewhat dubious as to the conversion of old records into paper and its posterior preservation, but that is regulated by another law, nº 5.433, of May 8, 1968, by the Decree nº 1.799, of January 30, 1996.

In the medical record, the doctor should describe, in legible and chronological form, all reports and acts performed with the patient, so that, at any time, he can provide information based on the diseases, occupational or otherwise, which affect the patient in the course of life.

The doctor should give a copy of the medical record or information, totally or partially, about the patient, when solicited. No information can be given without previous consent of the patient, even when solicited by law, except in cases where the failure of information can be prejudicial to the physical integrity of others. This information can be given to other professionals that also practice under activities governed by professional confidentiality. The doctor cannot give the medical record to police authority (deputy, policemen etc.), but he will be obliged by law to give copies of the record or part of it, if solicited by a judicial warrant.

In many situations, the patient can ask to verify the dates and chronology of their problems, for social security, companies providing health care (preexisting disease), insurance etc. This information can be given by the assistant doctor, based on the information on the medical record. The failure to formulate the medical record for each patient disrespects the article 69 of the Medical Ethics Code (CEM).[5]

Currently, few medical visits prescind from the provision of medical certificates, the majority being for the request of a benefit. In preparing the medical certificate, the assistant doctor should only testify what was verified and can be certified**.** This statement should not be "created" to bring benefit or prejudice to the patient. The physician should also not act as an examiner, securing diagnosis, attesting to incapacity and defining what type or how long the benefit should be given. This attribution is particular to the medical adjuster of the institution giving the benefit.

There is a line of legal communication between the adjuster and the assistant physicians of the INSS (National Social Security Institute), named SIMA (Solicitation of Information of Assistant Physicians), in which the adjuster solicits information to the physician that assists the patient, about a disease, treatment, prognosis, among others, in order to give a foundation to the technical report. In these conditions, the physician should give the requested information, always with knowledge and consent of the patient. No information that can alter the technical report of the appointed adjuster of the organ conceding the benefit should be omitted or created.

The medical certificate is part of the medical act, according to the single paragraph article 112 of the CEM. By formulating inadequately or not formulating the medical statement requested by the patient, the physician is disobeying the CEM.

The medical certification can generate rights and obligations, especially in work and social security related issues, when there is acknowledgement of occupational disease, which includes the entities labeled as work-related musculoskeletal disorder (WRMD), so frequently diagnosed in the last years.

The follow-up of a patient with suspicion of having WRMD should be done by a physician familiar with the diseases of the musculoskeletal system, for example, tendinitis, bursitis, compressive neuropathies, and especially discopathies. The physician should have knowledge of anatomy, physiology, biomechanics, physiopathology of the locomotor system and ergonomics, as well as knowledge of the type of work done by the patient. The work environment should be studied and its organization observed, so that a relation can be made between the injury diagnosed in the physical examination and the work done in the company, being careful as to remove any other etiological possibilities (hormonal, metabolic or immunological disorders, injury secondary to work done at home, sport activities, recreational, among others). Therefore, the terms RSI and WRMD should not be used as diagnosis without a careful study of the patient's work environment, which disrespects the Resolution 76034/97 of the CREMESP, the OS 606 (items 2.3 and 2.5) of the Ministry of Social Security and the resolution 1488/98 of the Medical Federal Council, in addition to not following the reasoning found in literature.[6-20]

For a precise diagnosis, the assisting physician should collect information in the clinical examination (history and physical examination) and know how to interpret the findings in complementary exams, which will not always be related to the complaints and the semiological findings.

In case the physician that assists the worker does not have this aptitude and competence and comes to giving an improper diagnosis, treatment, and/or documentation of the case, the physician can be considered as inadequate; if affirming a diagnosis without evidence and if the diagnosis cannot be confirmed by another professional (before the resolution of the case), in a way that it can be contested, the physician can be considered as imprudent; and furthermore, if it is associated with and anatomical amendment to the work done without having studied the work environment he/or she can be considered

negligent. Therefore, formulating the report or certificate without full knowledge of its cause can lead to medical mistake, making the physician appear as inadequate, imprudent or negligent, alone, or be seen in a combination of these adjectives.

Determining one thing and writing another, reporting what was not seen, or omitting what was seen, trying to create obligations or rights and altering the truth about a judicially relevant fact, disobeys article 299 of the Criminal Code[21] that deals with false documents. Also, the Criminal Code, article 302, deals with false medical certificates, and article 304 with the use of these false certificates (which is documentation forgery – such as producing or passing on false money). An attempt of using these false documents to generate earnings is in article 171 (fraud).

The physician appointed by the company that suspects of WRMD should search for a precise diagnosis and inform the patient in accordance to articles 40 and 41 of the CEM, guiding the company to emit the CAT (Communication of Work Related Accident) and other procedures, as it is standardized in the NR-5 and NR-7 of the Ministry of Labor,[22]and in the decree and referenced instructions of Social Security.[23,24]

In the position of medical adjuster of entities that concede benefits, the physician that receives a certificate claiming WRMD should consult with the emitter of the certificate whether the work place was visited or not, in order to conclude the diagnosis. If it fails to be done, the physician can be considered inadequate or negligent, and he is also considered as disobeying the article 69 of the CEM, by concealing medical errors.

Since February 12, 2007, the Decree nº 6.042 is enforced, which established the NTEP (Technical Epidemiological Pension Nexus) wich[25] relates the CID of incapacitating diseases of workers to the CNAE (National Code of Economical Activities).

For the associated risks, it is not necessary for the insured to prove whether the accident or occupational disease happened in the exercise of work activity. The simple fact of being a worker in a line of assembly, for example, already justifies the benefit of supposed occupational disease (in this case, WRMD) for the insured. It is the company's job to prove that the labor was not responsible for the alleged disease, and it has 15 days after the communication of the conceded benefit by the INSS to contest the casual link. This will be evaluated by the INSS adjuster. If the contention is accepted, the insured will also have 15 days to exert his right of self-defense. This study does not intend to discuss whether there is or not merits regarding NTEP, but to clarify that the onus of proof was inverted, although in our country there is no epidemiological study of the injuries diagnosed in this context. The company is responsible for proving that the injury diagnosed by the physician is not work related; if the company does not succeed in doing that, it will have increased its contribution to the INSS, to bear the expenses of the occupational disease acquired in the company; in this case, a work-related musculoskeletal disease (WRMD). The currently insured workers, with the International Disease Code (CID) related to the risk of the activity, will have their benefits altered from work related disease-aid to work related accident-aid.

Lastly, it is imperative to highlight that the CFM Resolution (Federal Medical Council) nº 1,851, recently published, altered article 3rd of the CFM Resolution nº 1,658, of February 13, 2002, which standardizes the emission of medical certificates and provides other benefits. The need for such resolution is the importance of the medical certificate in the generation of rights, which sometimes go against legal terms and creates expectations for the patients, as well as conflicts, when they are not met. The resolution separates the role of the medical certificates, especially in two situations: 1) the medical certificate to be used in companies or in other places; and 2) the certificate for medical adjuster purposes.

When the certificate is for medical adjustment, the attending physician cannot decide on retirement, definitive incapacity, readapting (except when solicited by an adjuster or a judge), leaving the decision to the medical adjuster. The certificate will be complementary to the adjuster's opinion that is legally responsible for the conclusion of the type of benefit to be granted.[26]

CONCLUSION

Whatever the situation of the doctor involved in the consultation or council of a possible RSI/WRMD patient is, as an attendant physician, institutional adjuster, judicial adjuster, consultant to the company, consultant to the plaintiff (worker in litigation) or of the class union, he should act within ethics, morality and law, as well as have other consultants in specialized areas (orthopedics, rheumatologists, neurologists etc.). A specific diagnosis, which explains the clinical manifestations, not in a generic term officially considered polemic by medical entities or literature, should be concluded. The medical attendant cannot become involved as an expert or technical assistant of the complainant, the union or the company.

Thus, by respecting the limits of performance, developing a medical practice in the specialized science, and complying with the rules and laws that govern the work-related injury doctor, the physician will be practicing the activity with ethics and within the law, avoiding common daily distress in the medical practice.

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