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Reflections and proposals for the improvement of technical expertise within the Labor Justice

Reflexões e propostas para melhoria das perícias médicas na Justiça do Trabalho

Reflexiones y propuestas para mejorar las pericias médicas em la Justicia del Trabajo

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ABSTRACT

The purpose of this article is to offer suggestions about improvement of the technical expertise carried out within the Labor Justice, considering that the activity is essential to the preservation and promotion of a healthy and safe working environment and for obtaining fair legal decisions in cases involving the issue of occupational accidents. Through a critical analysis, it is observed that the appointment of private experts constitutes a risk that compromises their own impartiality, being indicated alternatives for the recruitment of technical experts. In addition, guidelines for the expert's activity are listed, as well as the Judges' possibilities of action towards the technical reports made by the experts, since the Magistrate may choose to appoint new experts and even hear the experts to form their convincement. Based on these data and on the analysis of legal decisions, it is concluded that such measures would make it difficult for cases of corruption in expert activities to happen, increasing the technical quality of expert opinions and giving greater credibility to this important jurisdictional function, which has also been compromised by changes brought about by the Labor Reform (Law 13467/2017).

Keywords: Work accident. Labour. Medical expertise. Labour Justice.

RESUMO

O artigo tem como objetivo propor sugestões de melhoria para as perícias técnicas realizadas no âmbito da Justiça do Trabalho, considerando-se que a atividade é essencial para a preservação e promoção do meio ambiente de trabalho sadio e seguro e também para a obtenção de provimentos jurisdicionais justos em casos que envolvam a temática dos acidentes de trabalho. Por meio de análise crítica, é observado que a nomeação particular de peritos constitui risco de comprometimento da imparcialidade dos *experts*, indicando-se alternativas para o recrutamento de peritos técnicos. Além disso, ainda são elencadas diretrizes para o próprio desempenho da atividade pericial, versando-se, ainda, sobre as possibilidades de atuação do Juízo em face dos laudos elaborados, uma vez que o Magistrado poderá optar por designar novas perícias e até mesmo demandar a oitiva dos especialistas para a formação do seu convencimento. Observados estes dados, e também por meio da análise de jurisprudência, chega-se à conclusão de que tais medidas teriam o condão de dificultar o tráfico de influências nas atividades periciais, aumentando a qualidade técnica dos pareceres e dando maior credibilidade a esta importante função jurisdicional, que também restou prejudicada por alterações trazidas pela Reforma Trabalhista (Lei 13.467/2017).

PALAVRAS-CHAVE: Acidente. Trabalho. Perícia médica. Justiça do Trabalho.

RESUMEN

El artículo tiene como objetivo proponer sugerencias de mejora para las pericias técnicas realizadas en el ámbito de la Justicia del Trabajo, considerando que la actividad es esencial para la preservación y promoción del medio ambiente de trabajo sano y seguro y también para la obtención de pruebas jurisdiccionales justas en casos que involucren la temática de los accidentes de trabajo. Por medio de análisis crítico, se observa que la indicación particular de los expertos constituye un riesgo de comprometimiento de su imparcialidad y, por ello, son indicadas alternativas para el proceso de selección de los expertos técnicos. Además, están listadas directrices para el desarrollo de la actividad pericial, sugiriéndose posibilidades de actuación del Juez frente a los laudos elaborados, una vez que el Magistrado podrá designar nuevas pericias e incluso demandar nuevas pericias o escuchar otros especialistas para la formación de su convencimiento. Observados estos datos y también por medio de análisis de jurisprudencia se concluye que tales medidas tendrían como objetivo dificultar el tráfico de influencias en las actividades periciales, aumentándose la calidad técnica de los pareceres y dándose mayor credibilidad a esta importante función jurisdiccional que también se quedó perjudicada por cambios traídos por la Reforma Laboral (Ley 13.467 / 2017).

PALABRAS-CLAVE: Accidente. Trabajo. Pericia médica. Justicia del Trabajo.

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INTRODUCTION

It is worth noting that the topic of medical expertise in the Labor Court involves issues related to the work environment and workers' health and, therefore, it is a matter of public order, with constitutional status (CF, arts. 7 and subsections XXII and VIII, 196 and 225, among others), involving public and private actors with a view to preventing and eliminating encumbrances to the health of workers from the world of work.

In spite of the efforts made by public and private institutions, due to circumstances related to the execution of work in business establishments, many workers have been victims of occupational accidents and occupational diseases in increasing numbers, placing Brazil in the world ranking as a record holder in accidents and occupational diseases.

According to the International Labor Organization (ILO):

> "Occupational diseases continue to be the main causes of work-related deaths. According to ILO estimates, out of a total of 2.34 million fatal work accidents each year, only 321,000 are due to accidents. The remaining 2.02 million deaths are caused by various types of work-related illnesses, which is equivalent to a daily average of more than 5,500 deaths. This is an unacceptable shortfall in Decent Work. The absence of adequate prevention of occupational diseases has profound negative effects not only on workers and their families, but also on society due to the enormous cost generated, particularly regarding the loss of productivity and the overload of social security systems. Prevention is more effective and costs less than treatment and rehabilitation. All countries can take concrete actions now to improve their ability to prevent occupational or work-related illnesses "[1].

[1] INTERNATIONAL LABOR ORGANIZATION. **Doenças profissionais são principais causas de mortes no trabalho.** Available at: <http://www.oitbrasil.org.br/content/doencas-profissionais-sao-principais-causas-de-mortes-no-trabalho>. Access on: 14 Apr. 2017.

Before the Labor Judiciary, in most of the lawsuits the objective is to repair the damages suffered by the workers (aesthetic, material and moral) and the guarantee of employment of injured workers dismissed, assured in art. 118 of Law no. 8.213/91 and collective labor rules achieved by workers through their professional unions, which ensure the stability of employment for victims of occupational accidents and diseases.

It is known that in judicial litigations involving accidents and work-related diseases, to assess the causal link and incapacity for work, the Judiciary uses expert technical evidence, at which time private professionals not invested in public office or employment are appointed for the performance of expertise and assistance to the Court.

The judicial expert has an important role as an assistant to Justice and, therefore, should enjoy the confidence of the Judge who appoints him to assist him in technical matters that are not known to the Magistrate. Thus, to make a correct judgment of certain issues, the judge needs the support of this professional, whose conclusion, although not binding the judge, is of great importance for the decision of the matter before the Judiciary and for the due justice, which is the role of the judge.

The result of the expert's work, expressed in the expert's report, has the potential to decisively influence the Magistrate in the formation of his conviction. For this reason, expertise is one of the most sensitive evidence in civil proceedings, worthy of due attention by the Judiciary, starting with the expert's selection criteria, which must necessarily be an expert in the topic which is subject to technical or scientific elucidation.

In the Labor Court, there are many issues in which the Judge needs the help of an expert, such as in actions that have as their object extra payment for health, safety, and laboriousness, about litigation for reintegration in employment of injured persons and, after Constitutional Amendment n. 45/2004, all actions involving accidental repairs for material, moral, aesthetic damages, and loss of a chance and collective actions on the work environment of because of employers.

It has not been easy for the Labor Court to manage the issues involving the performance of the experts and their technical assistants, especially after the accident

actions were referred to their competence and formed an important volume of demands. These issues involve, from the lack of experts in certain regions, to the distrust of some professionals, who do not honor the important role as an assistant to Justice.

It is known that the current board of medical experts is composed, to a large extent, of professionals with a strong connection with the business sector. Some even comprise the Specialized Service in Safety Engineering and Occupational Medicine (SESMT), as service providers of companies commonly demanded, and even being appointed as technical assistants of these companies in judicial expertise.

In addition to this uncomfortable and compromising situation for the unbiased and exempt result of the experts, it is a public and notorious fact, published by the media on 05/31/2016, that the Federal Public Ministry and the Federal Police started **Operação Hipócritas** (Operation Hypocrites), serving preventive arrest, coercive conduct and search and seizure warrants in Campinas and in several other cities of the State of São Paulo, against the investigated practice of crimes in labor lawsuits, which involve judicial expertise, as reported by the press and appearing on the website of the Federal Public Ministry (MPF) in Sao Paulo. As reported by the MPF[2], many medical professionals, experts, and technical assistants, in a highly promiscuous relationship, were acting against workers claiming to be victims of work accidents and diseases and other issues involving the work environment, developing negative expertise.

As a result of these false and criminal expert conclusions, these professionals signed reports contrary to the real situation of the workers, who, due to the fraudulent result of the investigations, had their lawsuits dismissed before the Labor Court. That is, the claimants who passed through the hands of these rogue medical professionals, who had been denied the fair suits by the Specialized Justice, felt wronged, because they know that they were harmed maliciously and, because of

[2] MINISTÉRIO PÚBLICO FEDERAL. Operação Hipócritas: MPF revela fraudes em perícias médicas em Campinas e São Paulo. **MPF Notícias**, 31st May 2016. Available at: <http://www.mpf.mp.br/sp/sala-de-imprensa/noticias-sp/operacao-hipocritas-mpf-revela-fraudes-em-pericias-medicas-em-campinas-e-sao-paulo>. Access on: 29th Jan. 2017.

this, they end up discrediting the Judicial Labor Power, the Magistrates of which are being duped by fraudulent expertise.

In the operation of the Federal Public Ministry and the Federal Police, a huge scheme of corruption, payment of bribes and fraud in expert reports of the Labor Court was revealed. According to the MPF, through lawyers and technical assistants, companies paid bribes for experts to handle medical reports to their benefit and against the workers. One of those being investigated is suspected of having rigged at least 100 expertise reports and if *Operação Hipócritas* proves this, this suspect alone can be sentenced to more than 200 years in prison.

As it turns out, the main victims of the criminal scheme in the expertise involving some dishonest professionals are the workers, who lose the lawsuits of insalubrity, dangerousness, reintegration in employment and accidental indemnifications.

The Labor Judiciary also loses, as its image becomes improperly stained, because those judging the proceedings are not the experts, but the Judges of labor, based on the results of the expertise, which, if false, tarnish the judgments and deceive the judges, who trusted their "trustworthy expert."

When the expert does not comply with the minimum assumptions regarding the suitability of the technical evidence, it is produced in such a way as to rob the Magistrate of his fair decision-making power, which indelibly deters the impartiality of the Judiciary in the view of the court, reason why it is in the Labor Justice's great interest the adoption of measures in its scope of administrative action, to restrain criminal practices of experts that are said to be trustworthy by the judge, but that, in fact, act to stain the name of the honest professional experts and the Judiciary.

The fact is that many injured workers with work-related diseases (physical and mental illnesses) are dismissed by companies that refuse to issue CAT (Occupational Accident Communication), sub-notify the INSS about occupational injuries and, finally, when the inevitable labor lawsuits are filed, they submit to a real procedural fraud in order not to shoulder their legal responsibilities.

Alongside this situation, with serious consequences for the victims of

occupational accidents and diseases, for the image of the Labor Justice and for society, this work proposes the discussion of aspects involving the expertise in the Labor Court and the presentation of suggestions and solutions from an administrative and procedural point of view.

Therefore, once the problems that have involved medical examinations in the Labor Court have been reported and the facts that involve them and the problems faced by the incorrect performance of the experts have been analyzed, suggestions and proposals to solve these problems will be discussed and presented, all in the form of the civil procedural law and of Resolution n. 233/2016 of the National Council of Justice - CNJ.

1 PROPOSALS FOR IMPROVING EXPERTISE IN THE LABOR JUSTICE

1.1 Creation of its own framework of experts in the Labor Court

In accordance with the Brazilian Code of Civil Procedure, the expertise is one of the means of proof, along with the documentary, testimonial and other evidentiary evidence admitted in our law. The expert evidence consists of an examination, inspection, or evaluation (CPC, art. 464) and will be approved by the judge when the fact depends on the special knowledge of a technician, is necessary for the clarification of the conflict and if it proves to be practicable in the species.

In view of the importance of expert evidence as an auxiliary and indispensable means in certain cases for the judicial performance of Judges, the Labor Court must have its own set of experts selected by public tender of evidence and titles, just like any other public servant. This seems to be the most appropriate and safe solution to avoid corruption of the experts, because those who make public tenders have greater responsibility, join the public service, make a career and, as a rule, do not participate in a criminal scheme in their functions.

It is certain that this solution will not be implemented in isolation by a Region, but by the Labor Court as a whole, from the Superior Labor Court. However, the bad

experiences that many Judges are facing, with problems that they will still face, will certainly serve as a reason and a basis for the conviction of C. TST, who is responsible for presenting the respective vacancy creation Project for judicial experts.

One idea would be for the regional courts to promote the discussion on the subject and submit it to the School of Presidents and Inspectors of the Regional Labor Courts (COLEPRECOR), to, if convinced of this idea, present and discuss the implementation of this and other solutions, because as it is known, many other problems involving judicial expertise exist in the regions of Labor Justice throughout Brazil. The way to defend this solution will be laborious and many difficulties will be presented, but this seems to be a safer solution to avoid the corruption of experts, whose experiences in other branches of the Brazilian Judiciary may be observed by those interested in solving the problem.

1.2 Expert registration

If the proper framework of experts has not been created, it is advisable and necessary for the Labor Court to draw up a register of experts in each Region to make it difficult to influence them and their corruption.

In the form of art. 156 and §§ of the NCPC, it will be a condition for appointing these professionals their registration in a registry kept by the court, which, by the principles of publicity and impersonality, the preparation of such a register must be preceded by public consultation, through dissemination on the internet or in newspapers of great circulation, besides direct consultation to universities and class councils, under the terms of § 2 of the mentioned art. 156.

Those interested should present a curriculum with a history of professional activity and be interviewed by a committee of Labor Judges, who will choose them or not by exclusively objective criteria, and it is a good idea for managers of *Projeto Trabalho Seguro* of C. TST, in regional and Labor Courts to participate in this committee.

After that, the expert will have his work accompanied by the Judge who appoints him, with periodic evaluations and reevaluations, to maintain the register, considering the professional formation, the updating of his knowledge and the experience of the interested experts, as established in § 3 of Art. 156 of the NCPC.

Under no circumstances should the expert's choice be delegated to any other public servant other than the Magistrate, as he will be a trustworthy assistant of the Judge, who must hold routine meetings with his trusted experts to guide them in the expert's performance. The expert, as an important assistant to the Judge, cannot "be free." He must be accompanied and watched over by the Judge, because in a country like ours, where many believe in impunity, invitations to corruption are overflowing, especially involving accidental expertise in actions that can lead not only to conviction of companies in large amounts of money, as well as the recognition of job stability for workers who are victims of work-related accidents and diseases.

To regulate the subject of the expert registry, Resolution n. 233/2016 was made by the National Justice Council (CNJ), providing for the creation of a registry of professionals and technical or scientific bodies within the scope of the Brazilian courts of first and second degree.

Thus, art. 1 of this Resolution establishes that "The Brazilian courts shall establish Electronic Register of Experts and Technical or Scientific Organs (CPTEC), for the management and the choice of those interested in providing expert services or technical examination in judicial proceedings, pursuant to art. 156, § 1, of the Code of Civil Procedure."

To form the register, the courts must conduct a public consultation, through dissemination on the worldwide computer network or in large circulation newspapers, in addition to direct consultation with universities, entities, bodies and class councils, the Public Ministry, the Office of the Ombudsman and the Brazilian Bar Association, for the appointment of professionals or technical bodies interested.

The courts will keep available in their electronic websites the list of professionals and bodies whose records have been validated, and the personal information and the curriculum of the professionals will be made available, through

the CPTEC, to the interested parties, as established in § 2 of art. 157 of the CPC, and to the magistrates and servants of the respective court.

The courts may create provisional commissions for the analysis and validation of the documentation submitted by the experts and the courts will carry out periodic evaluations and reassessments for the maintenance of the register concerning the professional training, knowledge and experience of the registered experts and bodies.

Thus, in compliance with the legal determinations and guidelines established by the CNJ, there will be publicity and greater transparency on the experts appointed by the Labor Judges.

1.3 Agreements with Universities and other bodies and entities

The Labor Court may, until it establishes its own set of experts, to avoid or at least hinder the frauds and corruption of some private professionals, make agreements with public and private Universities and with other bodies and institutions, so that they may indicate professionals to carry out judicial expertise. For example, there is the Technological Research Institute (IPT), linked to the Secretariat of Economic Development, Science, Technology, and Innovation of the State of São Paulo, which for more than one hundred years has collaborated in the country's development process, which agrees with the Public Ministry of Labor of the 15th Region in the field of environmental expertise.

The experts appointed by these bodies may be appointed in a manner interspersed with individuals, especially in the expertise of large corporate processes with share demands, including for collective actions brought by the Labor Prosecutor's Office and professional trade unions.

2 PROCEDURAL ASPECTS OF EXPERT EVIDENCE

Regarding expert evidence in the Labor Court, especially regarding accidents and occupational diseases, the Consolidation of Labor Laws (CLT) does not address the issue. Only Law no. 5.584/70 says that:

> "The expert examinations shall be carried out by a single expert appointed by the Judge, who shall set the deadline for delivery of the report" (art. 3) and that "Each party shall be allowed to appoint an assistant, whose report must be presented in the same time period signed for the expert, under penalty of being disregarded from the records" (sole §).

Thus, by virtue of the provisions of art. 769 of the CLT, it should be applied to judicial investigations, including in those on accidents and occupational diseases, the Code of Civil Procedure, which in art. 464 and the following regulates the subject.

In the actions before the Labor Court involving labor accidents and occupational diseases the lawsuits are for civil liability indemnification (moral, material, and aesthetic damages and loss of a chance) and reintegration in employment, in the latter case, based on art. 118 of Law no. 8.213/1991 and in collective norms, which guarantee temporary stability in employment to workers injured or suffering from occupational diseases.

The object of the accident investigation involves verifying the causal or concausal relationship, the existence of damage and its extent, the incapacity of the victim, total or partial, temporary, or permanent for work and the possibility of re-adaptation in another function in the company.

Expertise is of great importance in the accidental actions to delimit the cause, although, as will be discussed later, expertise is not the only means of proof. The expertise, of course, will be made by a qualified professional who has technical knowledge that the Judge does not have. Therefore, the expert is an important assistant to the judge.

In art. 2 of Resolution n. 1.488/1998 of the Federal Council of Medicine was established the procedure that the medical expert should adopt, because there are usually several factors responsible for an accidental event, *in verbis*:

> In order to establish the causal link between health disorders and worker activities, in addition to clinical examination (physical and mental) and complementary examinations, when necessary, the physician should consider:
> I — the clinical and occupational history, decisive in any diagnosis and/or

> investigation of causal nexus.
>
> II — study of the workplace.
>
> III — study of the work organization.
>
> IV — epidemiological data.
>
> V— updated literature.
>
> VI — the occurrence of a clinical or subclinical condition in a worker exposed to aggressive conditions; VII — the identification of physical, chemical, biological, mechanical, stressful, and other risks.
>
> VIII — the testimony and the experience of the workers.
>
> IX — the knowledge and practices of other disciplines and their professionals, whether or not they are in the health area.

That is, it is not enough, for a correct and fair result of the situation of the victim, their clinical examination. In addition, in the case of an accident or work-related illness, it is the responsibility of the expert to perform clinical examinations (physical and mental), complementary examinations, when necessary, as well as to verify the clinical and occupational history of the victim, study of the workplace, organization of work, epidemiological data, identification of physical, chemical, biological, mechanical, stressful and other risks to which the victim was or is exposed, among other decisive factors for its conclusion and for the formation of the judge's conviction.

2.1 Appointment of an expert who has served as a technical assistant for companies or in SESMET

As an indication of *Operação Hipócritas*, it makes sense that professionals who act or have acted as technical assistants of companies or were part of their staff or SESMET have facilities to foster and execute influence and promiscuity on the final results of the expertise in favor of companies that hire them or pay them bribes. Thus, these professionals should not be appointed as experts of the Judge or should undergo a period of "quarantine" of at least three years, as occurs with members of the Judiciary and the Public Prosecutor who retire and return to practice law.

Being free to appoint these professionals, the system could contribute to fostering networks of promiscuity and corruption, which took over some experts who

work before the Labor Court, given the possibility that a professional who acts as a judicial expert can act as a technical assistant appointed by one party, provided that in different judicial bodies and proceedings. The Attorney Fausto Kozo Kosaka, who coordinates the aforementioned investigation, says: “This situation creates a certain relationship of promiscuity among such professionals, who sometimes alternate the functions of expert and technical assistant in different proceedings. This 'mix' of tasks facilitates the corruption scheme and jeopardizes the impartiality of the expert”[3].

2.2 Expert specialty

The appointment of a non-specialized expert in the subject matter of the expertise has caused many problems in the final result, with damages to the parties, especially the workers. In the labor field there are situations of greater complexity, for example, in accidental actions. These actions may involve multiple aspects, such as musculoskeletal disorders and mental disorders, and a specialized professional should be appointed for each problem, as established by law (art. 475 do NCPC). No professional other than a psychiatrist can conclude on the causal nexus of a mental illness, as has been the case in practice, and as a rule, with the denial of the causal link with working conditions. This causes irreparable damage to the outcome of the proceedings and of a fair trial for workers who are ill due to aggressive working conditions.

2.3 Clinical and workplace expertise

Not infrequently, in the Labor Courts, accident experts do not recognize the causal or concausal link of the accident to working conditions or say that there is no incapacity of the victim for work, sometimes only based on clinical examination,

[3] MINISTÉRIO PÚBLICO FEDERAL. Operação Hipócritas: MPF revela fraudes em perícias médicas em Campinas e São Paulo. **MPF Notícias**, 31st May 2016. Available at: <http://www.mpf.mp.br/sp/sala-de-imprensa/noticias-sp/operacao-hipocritas-mpf-revela-fraudes-em-pericias-medicas-em-campinas-e-sao-paulo>. Access on: 29th Jan. 2017.

when they should make the opposite conclusion. This seems to have been the exit found by experts investigated in *Operação Hipócritas* to favor companies and harm the workers, according to partial results of the investigation hitherto undertaken by the Federal Public Ministry.

In fact, in the form of art. 2 of Resolution n. 1.488/1998 of the Federal Council of Medicine, the expert medical practitioner must adopt in the expert procedure, to establish the causal or concausal nexus between the health disorders and the activities of the worker, besides the clinical evaluation (physical and mental), complementary examinations and the study of the place and organization of work, the identification of physical, chemical, biological, mechanical, stressful and other risks and to take the testimony and experience of other workers, which is only possible by carrying out diligences in the company accompanied by the worker, his technical assistants and lawyer, in a parity of arms, because the companies put forward agents to accompany him. Without these measures the result of the expertise is already born under suspicion.

As in other branches of the Brazilian Judiciary, being possible and having physical space, the clinical examinations can be done even in the labor forum, but, without prejudice to the inspection at the workplace, as indicated above.

In any case, whoever the expert is, the Labor Court must create a system of control and intelligence on judicial expertise, because it depends on the Judges to fulfill their role in the application of law and justice. False expertise greatly jeopardizes judicial action and undermines the good name of the Labor Court, which fought so much for the accident jurisdiction and is now facing serious charges against its important auxiliaries, judicial experts and, because of this and in a deceptive way, its members end up in some cases offering injurious legal advice to injured workers, who are often victims: of companies, which do not provide them with safe working environments, of accidents at work and some corrupt experts.

2.4 Technical assistant indication

In the form of the civil procedural law, the parties are given the appointment of a technical assistant and the presentation of questions, which may help in the correct result of the expertise. Although the technical assistant is trusted by the party that indicated it, being a doctor, should act according to medical ethics, and should not, as some do, only bother to give a favorable opinion to his client, even when he is not right. An award rendered by a technical assistant, when well done and substantial, may influence the judge in the trial of the case, even failing to apply the judicial expert's conclusion.

Paragraph 2 of art. 421 of the previous CPC said that "When the nature of the fact allows, the investigation may consist only of the examination by the judge of the expert and the assistants, at the hearing of the investigation and judgment of the things that they have informally examined or evaluated."

I see it as of great importance and convenience to hear the expert witness and the technical assistants in situations of serious contradictions between them, because it is one thing to write on paper, another to say before the judge, "eye to eye", because the expert not always scrupulously complies with his role in the form of art. 466 of the CPC.

2.5 Suspension and replacement of expert

According to art. 467 of the CPC "The expert may excuse himself or be refused for impediment or suspicion". It is clear from this legal command and from others that, for example, the INSS doctor cannot act as a judicial expert, since there are antagonistic interests between the parties involved in an accident action and the social security body, of course, being able to characterize for the expert administrative improbity.

Art. 468 of the CPC reads that "The expert may be replaced when: I - they lack technical or scientific knowledge; II - without a legitimate reason, fail to fulfill the charge within the term that was assigned."

It is a common fact in the Labor Court that experts do not meet the deadline for delivery of the report because they act in many actions, which compromises not only compliance with the deadline for submission of the work, but also its quality. In this situation, judges do not always act, while the parties, especially the victims of work-related accidents, suffer great damage from the delay. Even though there are difficulties in some Labor Courts on the appointment of trustworthy experts, judges should act in an exemplary manner so as not to accustom such professionals in this practice, which compromises the trust that the courts have in Labor Justice.

It is up to the parties to require expertise, and it is the responsibility of the judge to designate it, and may dismiss it when there are technical opinions, documents, or other elements in the reports that they consider sufficient to form their conviction. Thus, if there is any suspicion or distrust in relation to the expert appointed, the judge should substitute it with another professional.

2.6 Use of the means necessary to subsidize the expertise

In the form of art. 473, § 3 of the CPC and the guidance of the Federal Council of Medicine (CFM), as noted above, the expert and technical assistants may use all the necessary means to subsidize their work, listening to witnesses, obtaining information, requesting documents in the possession of the parties, third parties or in public offices, maps, plans, drawings, photographs, or other elements necessary to clarify the object of the investigation.

In this way, companies cannot, as often happens in practice, wish to prohibit the expert and technical assistants from using photographic equipment to record the victim's workplaces, such as machines, equipment, etc., which may be of extreme necessity and importance to solve the object of the expertise.

2.7 Awareness of date and location of expertise and follow-up by the parties

Art. 474 of the CPC establishes that "The parties shall be aware of the date and place designated by the judge or indicated by the expert to begin production of

the test.

Such a legal command is of great importance and utility, since the parties have the right to monitor the expertise not only in the doctor's office, but especially in the workplace. The company, of course, is always present at the inspection of the expert, sometimes with more than one representative, so that not allowing the plaintiff and his lawyer to accompany this diligence represents a curtail to the defense and offense to due process (CF, art. 5, inc. LV). The refusal and/or denial by the company or by anyone who is monitoring the expertise by the victim and their lawyer, when an opportunity challenged by the interested party, characterizes defense, and justifies the annulment of the process for the cure of the addiction.

Thus, the judge must ensure the follow-up of inspections in the workplace by the

victim and by the lawyers of the parties, except for the medical acts that may expose the intimacy of the victim, according to Opinion n. 9/2006 of the CFM. Medical assistants, of course, can participate in all medical-expert acts.

2.8 Complex expertise and the appointment of more than one expert

In the form of art. 475 from CPC, "In the case of complex expertise involving more than one area of specialized knowledge, the judge may appoint more than one expert and the party may nominate more than one technical assistant."

The legal provision above is logical, because there are cases where the complexity of the matter is so great that common sense requires that more than one professional be indicated to clarify the judge. Thus, for example, in a matter of mental illness, in addition to an occupational physician, who should also assess the workplace, a psychiatrist should be appointed. In a matter involving musculoskeletal diseases a physiotherapist may be indicated.

2.9 Linkage of the judge to the report

According to art. 156 of the CPC the prerogative of the appointment of the

expert is of the judge, although, in the form of art. 479 of the same procedural document he is not attached to the expert report, and must assess the expert evidence in accordance with the provisions of art. 371, indicating in the judgment the reasons which led him to consider or to discontinue the conclusions of the report, taking into account the method used by the expert.

That is to say, the judge can form his conviction with other elements or facts proven in the records, failing to consider the conclusion of the expert report, if he does so in a reasoned manner.

On this subject, it is of note Orozimbo Nonato's warning that "The judge is not strictly bound to arbitration, which is the piece of instruction, an enlightening element, a precious subsidy to the conviction of the judge, but does not provide the sentence and does not mark it in mandatory way to the guidelines and conclusion. It always keeps the nature of an opinion "(STF – 1944 - vote of Min. Orozimbo Nonato - Jurisp. STF 26/120), which is said in other words by Gildo dos Santos in stating that "If the judge were attached to the report, the expert, so to speak, would be, in that expert matter, in the position of judge, and the latter of subordinate, therefore, to the former"[4].

This is one of the most important legal provisions pertaining to expertise, which is an important means of proof, but not the only one. Therefore, the judge is not bound by the expert's conclusion, and can decide the cause, added to other factors collected in the records, using the prudence and logic of the reasonable, as illustrated in the following decision, so that the true and expected justice is given to the parties involved in the dispute. The following decision is illustrative of this understanding:

> **NOTATION:** "MORAL DAMAGES. OCCUPATIONAL DISEASE. CARPAL TUNNEL SYNDROME (CTS). The existence of damage to the health of the claimant, who has Carpal Tunnel Syndrome (CTS), was clear. It is not always easy to establish whether the illness has appeared because of work or not. It appears that the claimant worked throughout the labor contract in the preparation of salads by making repetitive movements, since she spent

[4] DOS SANTOS, Gildo. A prova no Processo Civil. Saraiva, 1975, p. 63.

about four hours in a row washing, peeling, and chopping vegetables. It was clear from the records that the author only started to present the condition of tendinitis in 2002, after two years of work on the claimant, according to the medical reports of sheets 25/30 and expert reports of sheets 211/217 and 319/327. Considering the daily work time of the claimant in the same function and the fact that the judge has to be attentive to the facts, indications, presumptions, and the observation of what usually happens, it is verified that there is a causal link between the labor performed by the worker and the acquired occupational disease. The appeal is hereby granted, upon reform of the sentence, to order the defendant to pay the plaintiff compensation for moral damages "(AC 01757.2005.009.17.00.8 RO — 17th REGION — Jugde José Carlos Rizk — Rapporteur. DJ/ES of 5.8.2007).

2.10 Appointment of new expertise

Art. 480 of CPC establishes that "The judge shall determine, ex officio or at the request of the party, the performance of a new expertise when the matter is not sufficiently clarified."

The object of the second expertise are the same facts as the first and is intended to correct any omission or inaccuracy of the results to which it has led (§ 1), which will not replace the first, and it is up to the judge to assess the value of one and the other.

There are many cases in the day to day of the Labor Court in which the expert does not adequately and satisfactorily clarify the subject matter of the, being necessary and of good judicial policy, in search of the actual truth, that the ex officio judge or at the request of the parties, appoint another expert and at the end assess the two expert opinions to decide on the matter. The second expert does not substitute the first one, of course, but it may bring new elements and subsidies for the judge to freely assess the value of one and the other and decide the matter, and he may, in extreme situations of doubt, appoint a third expert.

Not only because of the provocation of the parties and the Public Ministry, but also ex officio, the Judge can and should appoint another expert when the first

investigation is not satisfactory and enlightening on the matter examined. Not only the Judge of first instance, but also the judges of the Regional Labor Courts may, at the request of the parties and of the Public Prosecutor's Office or of ex officio, determine the return of the records to the source to carry out a new expertise in charge of another expert, when this provision is deemed necessary for the correct clarification of the dispute.

2.11 Expert witness and technical assistant

Upon first suspicion of the expert, the Judge must "light" the lantern and, among other measures, hear him in audience with the presence of the parties and their lawyers, as required by law (art. 477, § 3 of the NCPC) and not hesitate, as the case may be, to appoint a second expert (art. 480 of the NCPC), these measures are not common in the day-to-day of the Judiciary but are important in inhibiting corruption in the expertise.

2.12 Causal nexus

A matter of great interest in medical expertise on accidents and, especially on occupational diseases, concerns the causal or concausal nexus, which is a presupposition of the employer's civil liability.

In the case of accidental social security benefits, Law no. 8.213/91 is less rigid on the subject, because the concept of causal nexus has been made more flexible to allow the realization of the principle of integral reparation for the benefit of victims of occupational diseases.

If there is disagreement as to the causal or concausal nexus of the disease with the work performed by the victim in the company in question, especially when the defendant denies it, the expert appointed by the judge is required to give his opinion, which is not always conclusive because of the few evidence or because medicine is not an exact science. That is why according to the Resolution of the Federal Council of Medicine n. 1.488/98, the medical expert must take into account, among other factors,

the clinical-occupational history of the worker, examination of the place and organization of work, identification of physical, chemical, biological, mechanical and stress risks, the testimony, and the experience of the other workers in similar conditions and the updated literature on the subject.

But there are cases in which the evidence collected is inconclusive with regard to the origin of the disease or, by medical criteria, the expert, although offering subsidies in his work, does not issue a conclusive opinion affirming the nexus of the disease with working conditions.

In these situations, it is up to the judge, faced with the elements of the file and his experience as a judge on what usually happens, to form his conviction, recognizing or not the duty to repair the damage. In this sense affirms Sebastião Geraldo de Oliveira (Indemnities for work accident or occupational disease. 2. ed., p. 132. São Paulo: LTr, 2006) that "evidence must not be evaluated mechanically with rigor and the coldness of a precision instrument, but with the rationality of an attentive judge who combines facts, indications, presumptions and observation of what ordinarily happens to form his conviction."

Often the medical expert's report is flawed because it does not even observe the technical epidemiological nexus (NTEP) arising from the intersection of the CNAE of the claimed company with the diseases that most affect its employees, simply saying that the disease is degenerative and has no causal link with the work, not even evaluating the possibility of concause.

It is true that the NTEP constitutes a relative presumption about the causal or concausal nexus between the illnesses that affect the worker and the activities performed by him in his employer, but that is exactly why the expert should, if necessary, expressly remove this presumption, presenting technical and scientific reasons for its conclusion.

Also, it is not uncommon for court experts to apply only and exclusively art. 20, § 1, line a, of Law 8.213/91, considering indications of degeneracy of the disease to decharacterize the occupational disease. However, this way of proceeding does not reflect the best systematic and teleological interpretation on the normative and

principles set of Law n. 8.213/91, as the above mentioned concause may also establish the link between the disease (even if degenerative) and the activities carried out by the victim, according to art. 21, inc. I, of said Law n. 8.213/91.

As a result of the normative set in force in Brazil, the simple fact that the worker's illness is degenerative, so it does not prevent the finding that the poor working conditions have contributed to the anticipation of its appearance and aggravation, as evidenced by the best medical doctrine.

In this sense it has been the position of the C. TST, attentive to legal parameters, new social desires, and doctrinal evolution, affirming the possibility of the employer's responsibility even when faced with degenerative disease, as can be seen from the following notation:

> **NOTATION:** "WORSENING OF INSTRUMENT IN JOURNAL RESOURCE - MORAL AND MATERIAL DAMAGE - PROFESSIONAL DISEASE - CONCAUSAL NEXUS - COMPANY'S FAULT ON HARMFUL EVENT - ENVIRONMENT OF INADEQUATE WORK - NO LINK TO THE EXPERT REPORT. According to the theory of adequate causality, the preexisting concauses - previous pathology, the genetic predisposition of the worker or the degenerative character of the disease - do not eliminate the causality relation. If the work activities developed by the claimant have potentiated or aggravated the preexisting or degenerative disease, the acquired disease must be considered occupational, due to the concause originated in the work. In addition, under the terms of art. 157, I and II, of the CLT, the employer must provide salubrious working conditions to its employees and reduce the risks inherent to the service, as required by the norms of protection to health, hygiene, and safety at work, which did not occur in the case. In this sense, as provided in art. 436 of the CPC, the judge is not attached to the expert report, and may form his conviction based on other elements or facts proven in the case, which occurs in the hypothesis. Worsening of instrument devoid" (AIRR - 217300-09.2009.5.11.0013, Rel. Min. Luiz Philippe Vieira de Mello Filho, 7th Group, published on 10/11/2013).

On the context under consideration here, Statement n. 4 is important, approved by the virtual study group of ANAMATRA and the Superior Council of Labor

Justice, which provides important guidance for the preparation of expert reports on occupational diseases, in verbis:

> "Concausality. Multiplicity of Causes. Factors that trigger the reduction or loss of labor capacity. In the performance of the expert activities, the expert should analyze all the factors triggering the pathology, be they of a labor and/or non-occupational nature, in order to establish, even if it is in a relative way, the degree of contribution of the respective factors in triggering the pathology for possible establishment of concausality, according to art. 21, item I, of Law no. 8.213/91. It is recorded that the identification of non-occupational and/or degenerative diseases should not limit the investigation of the expert in the search for the existence of other concomitant factors of an occupational nature that may have contributed to the reduction or loss of work capacity. "

As the facts of life show, there is not always absolute certainty about the causal or concausal nexus, but on the other hand, there can be a high degree of probability about the configuration of this nexus with the victim's work, which must be considered by the judge. The judgments transcribed below illustrate this trend:

> **NOTATION:** "Accident at work - Benefit - Conversion - Retirement pension in accident - Illness - Spine Illness - Causal nexus - Evidence. The presence of the causal nexus is measured by reasonable probability, not by mathematical certainty, even though medical science is not exact. If it were, the calculators would be made to the doctors and they would be free from all charges and compensations for the mistakes they are always making. That is to say, it is the possible logical, not absolutely certain, that bases the conclusion by the presence of the causal and concausal nexus. It is possible to convert the pension due to social security disability in the same accident, even though both are calculated with a percentage of 100% of the benefit salary, so that, with the correct legal framework of the incapacity of the insured person, they can enjoy all the implications that follow, especially the indirect ones, among them the eventual generation of responsibility based on common law" (STACIVSP, 12th Chamber, Appeal No. 690.457/5, Rapporteur Judge Palma Bisson, 8.28.2003).
>
> Added to other factors collected in the records, the judge, using the prudence and logic of the reasonable will decide the case, whether or not

> accepting the causal or concausal nexus between the disease and working conditions. The following decision is illustrative and offers a pathway for the judge:
>
> **NOTATION:** "MORAL DAMAGES. OCCUPATIONAL DISEASE. CARPAL TUNNEL SYNDROME (CTS). The existence of damage to the health of the claimant, who has Carpal Tunnel Syndrome (CTS), was clear. It is not always easy to establish whether the illness has appeared because of work or not. It appears that the claimant worked throughout the labor contract in the preparation of salads by making repetitive movements, since she spent about four hours in a row washing, peeling, and chopping vegetables. It was clear from the records that the author only started to present the condition of tendinitis in 2002, after two years of work on the claimant, according to the medical reports of sheets 25/30 and expert reports of sheets 211/217 and 319/327. Considering the daily work time of the claimant in the same function and the fact that the judge has to be attentive to the facts, indications, presumptions, and the observation of what usually happens, it is verified that there is a causal link between the work performed by the worker and the acquired occupational disease. The appeal is hereby granted, upon reform of the sentence, to order the defendant to pay the plaintiff compensation for moral damages "(AC 01757.2005.009.17.00.8 RO — 17th REGION — Jugde José Carlos Rizk — Rapporteur. DJ/ES of 5.8.2007).

The subject of causal or concausal nexus in occupational accidents is complex and controversial, the case described below is an example, where, unlike what is often the case, when the expert does not recognize the causal or concausal nexus, in the Proceeding TRT/15 n. 0065800-37.2007.5.15.0082 a well-informed Expert Report was added, where the expert found that "CML (Chronic Myeloid Leukemia) is a disease that can be triggered by occupational exposure to benzene; whereas benzene is used in the production of rubber and in the production of tires; that the claimant labored exposed to benzene next to the defendant and at admission did not present the disease, having been diagnosed 2 years and 4 months after starting their activities with the defendant; that the claimant died in a blast (acute) crisis of Chronic Myeloid Leukemia, concluding that there was a causal nexus. In addition, in further information, the Expert confirmed the report, as well as its

conclusion by the causal nexus.

Notwithstanding this, the first instance considered that the causal nexus of the disease with the working conditions had not been established, dismissing the claims for reparation in favor of the successors of the victim, which, however, was modified by the E. TRT of the 15th Region, the decision of which was as follows:

> **NOTATION.** EXPOSURE TO BENZENE PRESENT IN THE TIRES INDUSTRY. ACQUISITION, BY THE WORKER, OF ILLNESS THAT THE LEGISLATION RECOGNIZES AS A RESULT OF EXPOSURE TO THE CHEMICAL PRODUCT, KNOWINGLY, CHRONIC MYELLOID LEUKEMIA. DUTY OF INDEMNIFICATION. Benzene is listed in Law 8.213/91 as a pathogenic agent causing occupational disease, as established in Attachment I of art. 20 of Law 8.213/91, which indicates the activities where it is employed. In Attachment II of the same legal provision, benzene is indicated as a risk agent for the appearance of 16 occupational diseases, the first of the pathologies being leukemia. It was proved that the worker labored in inadequate conditions and was subjected to the gases emanated from tire production that not only inconvenienced the workers, but the local population and it was proven that the worker acquired Chronic Myeloid Leukemia in the course of the employment contract, it shows the employer's duty to repair the damage (Proc. TRT/15th REGION 0065800-37.2007.5.15.0082 RO; Rela. Juiza Maria Inês Corrêa de Cerqueira César Targa).

According to the case, in order to prove the causal or concausal nexus, the judge can reverse the burden of proof for the defendant, applying analogously the Code of Consumer Protection (art. 6th, inc. VIII), because the employer has the duty to adopt measures that are appropriate and necessary to protect the health and physical and mental integrity of the worker (art. 157 of CLT and art. 19 and § 1 of Law n. 8.213/91 8.213 / 91 - "The company is responsible for the adoption and use of collective and individual measures of protection and safety of the workers' health).

In this sense, Statement n. 41 in the I Journey of Law and Labor Procedure, promoted by ANAMATRA and TST was approved with the following content:

> “CIVIL RESPONSIBILITY. WORK ACCIDENT. BURDEN OF PROOF. It is

> appropriate the reversal of the burden of proof in favor of the victim in the actions for compensation for an accident at work. "

2.13 Concausal nexus

According to art. 21 of Law n. 8.213/91:

> "Also equivalent to the labor accident, for the purposes of this Law: I - the accident related to work which, although not the sole cause, has directly contributed to the death of the insured, for reduction or loss of his ability to work, or to produced injury requiring medical attention for his recovery. "

From this legal command it follows that, in addition to the causal nexus, the concausal nexus must be considered in certain situations, which are other causes that together with a principal cause corroborate for the final result of the accident or occupational disease. The concauses are preexisting (diabetes that causes major consequences in the injury resulting from an accident at work), supervenient (the victim of the accident, although rescued immediately and taken to the hospital, does not receive adequate treatment and passes away) or concomitant (deafness to a 50-year-old worker, aggravated by exposure to noise in the workplace).

Interpreting the aforementioned legal provision Sebastião Geraldo de Oliveira states:

> "The concausal nexus appears frequently in the examination of occupational diseases. The disease originated from multiple causes does not lose the framework as an occupational pathology, if there is at least one labor cause that contributes directly to its outbreak or aggravation, according to article 21, I, of Law 8213/91. As we have already emphasized previously, normative acceptance of multicausal etiology does not dispense with an efficient cause, arising from the work activity, which 'directly contributed' to the work-related accident or similar situation or, in other words, the concause does not dispense with the presence of the cause of occupational origin. In view of this legal prediction, the theory of equivalence of conditions or *conditio sine qua non*, as it happens in Criminal Law, is applied in the hypothesis, since everything that contributes for the sickness is considered cause, since no distinction must be made between cause and condition. There is no need to specify which of the causes was the one that actually generated the disease, as in the

application of the theory of adequate causality, since all conditions or causes have an equivalent value. **It is** only **necessary that the labor cause contributes directly to the disease**, but **not** that it contributes **decisively**" (underlined)[5].

2.14 Technical Epidemiological Social Security Nexus – NTEP

Regarding social security and labor benefits, art. 21-A to Law no.8.213/91 was added, creating the so-called Technical Epidemiological Social Security Nexus - NTEP, with the following wording:

> "The INSS medical examination will consider the accidental nature of the disability when it finds that there is an epidemiological technical nexus between the work and the injury, due to the relationship between the activity of the company and the morbid entity motivating the disability listed in the International Classification of Diseases - CID, in accordance with the provisions of the regulation."
>
> § 1. "The INSS medical expert will no longer apply the provisions of this article when it is demonstrated that there is no nexus, which is dealt with in the caput of this article."
>
> § 2. "The company may request the non-application of the epidemiological technical nexus, whose decision will be subject to appeal with suspensive effect, of the company or the insured, to the Council of Resources of Social Security."

With the new legal amendment, the Technical Epidemiological Nexus - NTEP for work-related diseases was instituted through a direct link between the economic activity of each of the branches of the companies and a list of possible diseases and accidents that may occur in that particular work environment. Thus, by doing this crossing, the Medical Expertise can automatically recognize the link between the illness or accident and the work performed by the worker.

Decree n. 3.048/99 establishes the connection between work and injury when there is an Epidemiological Technical Nexus - NTEP between the company's activity and the morbid entity motivating the disability, listed in the International Classification

[5] OLIVEIRA, Sebastião Geraldo de**. Indenizações por acidente de trabalho ou doença ocupacional**. 2. ed. São Paulo: LTr, 2006, p. 157.

of Diseases (ICD) in accordance with the provisions of List B of Attachment II of this Regulation (art. 337, paragraphs).

As can be inferred from the foregoing, the legal amendment has led to social security and labor repercussions and, as the case may be, can be applied analogously in the case of civil liability accidental actions against employers, if the connection between work and injury is established.

In this sense, Statement n. 42 in the I Journey of Law and Labor Procedure, promoted by ANAMATRA and TST was approved with the following content:

> "WORK ACCIDENT. EPIDEMIOLOGICAL TECHNICAL NEXUS. The occurrence of an occupational accident is presumed, even without the issuance of the CAT - Communication of Work Accident, when there is an epidemiological technical nexus according to art. 21-A of Law n. 8.213/91."

3 CHANGES IN WORK REFORM ON EXPERTISE IN WORK JUSTICE

The Labor Reform (Law 13467/17) approved by the National Congress, which entered into force on 11/11/2017, brought important changes on the Labor Court's expertise and on the procedure for actions on worker's health and safety.

The new art. 790-B of the CLT establishes that the responsibility for the payment of the expert's fees is of the succumbing party in the claim, which is the object of the expertise, although beneficiary of the gratuitous justice. This discourages the filing of lawsuits as a means of defending workers before the Labor Judiciary, since most of the injured and their families are poor people, who, with the current labor reform, will face difficulties and restrictions regarding the benefit of free justice, which has always existed as an important support and incentive to seek the violated rights.

However, I understand that this legal provision is unconstitutional in view of the provisions of the Magna Carta in art. 5 and inc. LXXIV, thus cast:

> "All are equal before the law, without distinction of any kind, guaranteeing Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security and property, as follows: ... **LXXIV** - the State shall provide **full and free legal assistance** to those who prove

insufficient resources (underlined)."

As it can be seen, the Federal Constitution includes, among the rights and individual guarantees of Brazilian citizens and foreigners residing in the country, full and free legal assistance, which goes beyond mere legal aid.

This benefit assured to those in need as an instrument of substantial access to the Judiciary includes gratuitousness of all cases and expenses, judicial or otherwise, related to the acts necessary for the development of the process and the defense of the rights of its beneficiary in court. This constitutional benefit therefore covers not only the costs related to the procedural acts to be practiced, but also all expenses resulting from the effective participation of the citizen in the procedural relationship.

It is easy to see this is a fundamental right of the utmost importance to the needy, without which it would not be possible to enjoy another equally fundamental right, namely, substantial access to the Judiciary.

But the Brazilian national congress did not take constitutional aspects into account and approved this legal amendment. The objective of this legal amendment, as is easily presumed, was to inhibit the use of accidental actions and, therefore, to reduce them. But this goal is false, because instead of seeking to eliminate and reduce accidents at work and improve working environments, the representatives of the people chose the simple solution of creating difficulties for the filing of lawsuits.

Thus, since these measures are unconstitutional, it will be up to the Labor Judges to remove them and assure the citizen the free and substantial access to the Judiciary as one of the most important fundamental guarantees of the citizen.

The reflection made in the decision about the theme is appropriate, the grafts of which I quote below:

> **NOTATION: "FREE JUDICIAL ASSISTANCE. IMPROPER SETTLEMENT OF COSTS TO THE BENEFICIARY. INAPPROPRIATENESS OF ESTABLISHING THE PRESUMPTION OF ABUSIVE EXERCISE OF THE RIGHT TO ACT AS WAY TO DENY VALIDITY TO THE CONSTITUTIONAL GUARANTEE OF FREE JUSTICE.** Articles
>
> 790-B (*caput* and § 4), 791-A, § 4 and 844, § 2 of the CLT, with the wording

> given to them by Law n.
> 13.467/17 contradict the essence of the institute of free legal aid, breaking all the legal tradition developed on the subject, and, literally, affront item LXXIV of art. 5th of the CF. If, for the sake of citizenship, all without distinction are given the right of access to the Judiciary and if it is understood that with regard to the poor there is an obstacle that needs to be overcome by free legal aid, so that the isonomic principle is fulfilled, it is not possible to fix the payment of previous fees and legal fees to those who are the target of free legal aid because this is the same as denying these people access to justice, reducing their citizenship. The regular exercise of the right of action cannot cause loss of effectiveness of the constitutional guarantee of free legal aid. ..." (**Proc. n. TRT/15th REGION 0012715-89.2017.5.15.0146; Rel. Des. Jorge Luiz Souto Maior).**

Importantly, the legal changes on free legal aid in the Labor Court are under analysis in the STF in ADI n. 5766, the judgment of which was suspended by request for examination by the Supreme Court Ministers.

CONCLUSIONS

Having been denounced serious problems involving medical examinations in accident lawsuits at the Labor Court and the analysis of the facts that involve them, the problems faced by the incorrect and criminal behavior of some experts and technical assistants having been made, the following is the summary of some suggestions and proposals to solve these problems, all in the form of civil procedural law and Resolution n. 233/2016 of the National Council of Justice - CNJ, which are:

a) Creation of a proper framework of experts in the Labor Court, even if not for the elaboration of all the expertise, because there are many, but at least for public experts to supervise the performance of private experts;

b) Creation and revision of the Registry of Experts with the objective of offering to the Judiciary and to the society a list of qualified professionals who act as Judicial Experts, identifying them, to provide greater transparency in their appointment and speed to the action of the Judiciary, including

concerning the specialty of these professionals for appointment in the processes;

c) Signature by the Labor Justice of Agreements with Universities and other organs and entities, including public, to appoint professionals of its staff to be appointed by the Judges to do expertise in the processes;

d) Not appoint to act as a legal expert, a professional who has acted as technical assistant of companies or in their SESMET, because this can facilitate and influence the promiscuity on the final results of the expertise in favor of companies that hire or pay them bribes;

e) Appoint the experts considering their expertise to properly analyze the subject matter discussed in the process;

f) The Judge should determine, during the appointment of the expert, for clinical expertise and in the workplace of the victim to be carried out, requesting, as the case may be, complementary examinations and making a detailed study of the place and the work organization, identifying the physical, chemical, biological risks, workers in the same conditions as the victim, always allowing the employee, his technical assistant, and the lawyer to accompany the proceedings in the company;

g) Empower and encourage parties, especially victims, to appoint technical assistants in proceedings to follow the work of judicial experts;

h) The Judge should be attentive to any act of supposed suspicion of the expert, in order to, if necessary, make his immediate replacement by another serious and unsuspecting professional;

i) The Judge must express, in the act of designating the expert, that the expert and technical assistants may use all the necessary means to subsidize their work, hearing witnesses, obtaining information, requesting documents that are in the possession of the parties, third parties or in public offices, maps, plans, drawings, photographs or other elements necessary to clarify the object of the expertise;

j) The Judge must determine, in the appointment of the expertise, that the expert unequivocally notifies the parties of the date, time and place of the expertise, so that they can accompany it;

k) In the case of complex expertise, the Judge should appoint more than one expert, so that the matter may be well analyzed, under various pertinent approaches, such as the claim of mental illness, with the performance of a work doctor, with evaluation of the place of work, and a psychiatrist. In a matter involving musculoskeletal diseases a physiotherapist should also be appointed;

l) As the Judge is not bound by the outcome and conclusion of the expert's report, which is undoubtedly very important for his conviction, he should, where appropriate, dismiss the expert conclusions and decide the case considering other evidence in the reports, such as, for example, findings of the social security body and other medical opinions, including those obtained in other judicial processes;

m) Nor can the Judge forget to appoint a second expertise and even a third one, given the incongruence and divergences of previous expert conclusions, because the Judiciary's main objective is to seek the real truth and to do justice;

n) Likewise, the Judge should not forget to determine the expert's opinion and the technical assistant’s in hearing, with the presence of the parties and their attorneys, when necessary, because it is one thing for the expert to write on paper, another to speak before the judge, "eye-to-eye" and asked by the parties about aspects of the expertise. This is important because the expert does not always scrupulously fulfill the charge he was given in the form of art. 466 of the CPC, which will tarnish the result of the expertise and will harm one of the parties;

o) For a correct analysis of the causal or concausal nexus, the Judge must determine that the expert examines the Technical Epidemiological Social Security Nexus - NTEP, crossing the CNAE of the claimed company with the

diseases that most affect its employees, because, to avoid presumption about the causal or concausal nexus existing between the diseases that affect the worker for the activities performed, the expert must present technical-scientific reasons to substantiate its conclusion.

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