

THE  HARTWELL
LAW OFFICES, LLP

WORKERS' COMPENSATION CASE LAW UPDATE

SUPREME COURT OF PENNSYLVANIA

Duffey v. W.C.A.B. (Trola-Dyne, Inc.), No. 4 MAP 2016 (Pa. 2016)¹

Impairment Rating Evaluations (“IREs”) have faced a surge of criticism in the Pennsylvania Worker’s Compensation arena throughout the last year and a half. In 2015, the Pennsylvania Commonwealth Court determined that physicians could not use the Sixth Edition of the AMA Guidelines because such use was unconstitutional. The Supreme Court of Pennsylvania is currently reviewing that issue.

Now comes a different attack on IREs: must an IRE physician consider only the injury written on a Notice of Compensation Payable (“NCP”) or must that physician also consider any injury caused by that accepted injury? In Duffey v. W.C.A.B. (Trola-Dyne, Inc.), No. 4 MAP 2016 (Pa. 2016), the Supreme Court of Pennsylvania determined that a physician conducting an IRE must consider all injuries caused by the accepted injury when determining the extent of a claimant’s impairment. The physician may determine that an injury is unrelated to the accepted injury and refuse to factor that into the total impairment. However, the physician may not simply ignore any other injuries arising out of the accepted injury.

In Duffey, the claimant suffered an injury while picking up electrified wires while repairing a machine for his employer. The employer accepted the injury and filed an NCP indicating that “bilateral hands electrical burns” was the injury for which the claimant could receive workers’ compensation benefits. The employer began paying the claimant temporary total disability benefits based on the injury noted on the NCP.

The employer paid 104 weeks of temporary total disability benefits before requesting an IRE to determine what percentage of the claimant’s body was impaired by his injury. During his IRE, the claimant informed the physician that he suffered from psychological symptoms in addition to his electrical burns. The IRE physician did not evaluate the psychological symptoms for two reasons: (1) the employer did not mention any psychological disorder as an

¹ Both the majority opinion and the dissenting opinion by Justice Wecht cite the treatise on Pennsylvania Workers’ Compensation Law authored and edited, in part, by Andrew E. Greenberg, a partner at and founding member of the Chartwell Law Offices. Mr. Greenberg’s treatise has been cited in Pennsylvania Supreme Court and Commonwealth Court opinions at least two dozen times in the last two decades.

accepted injury and (2) the physician was not a mental health expert. Using the Sixth Edition of the AMA Guidelines, the IRE physician determined that the claimant suffered impairment to six percent (6%) of his body because of his burn injuries.

The employer notified the claimant that his workers' compensation benefits would be modified from temporary total disability to temporary partial disability because claimant's whole body impairment rating was less than 50%. Temporary partial disability benefits do not decrease the amount of money paid to a claimant per week. Instead, temporary partial disability benefits limit the time period in which a claimant may receive payments. Based on the employer's notice, the claimant would only receive disability benefits for 500 weeks following the modification from total to partial indemnity benefits.

In response, the claimant filed a review petition, asking the court to assess the validity of the IRE. According to the claimant, the IRE must be invalid because the physician did not consider his psychological symptoms. The claimant's family physician testified that she diagnosed the claimant with post-traumatic stress disorder ("PTSD") and adjustment disorder, which developed because of the electrical burns the claimant sustained. A neurologist also testified that the claimant developed a disabling, ongoing pain disorder as a result of his electrical burns. A psychiatrist testified for the employer, saying that, based on his own examination of the claimant, the claimant had recovered from his psychological disorders.

The Workers' Compensation Judge ("WCJ") agreed with the claimant that the IRE physician should have addressed the psychological disorders and ruled that the IRE was invalid because the physician failed to take those symptoms into account.

The employer filed an appeal to the Workers' Compensation Appeal Board ("WCAB"). The WCAB agreed with the employer and reversed the decision of the WCJ. The claimant filed an appeal with the Commonwealth Court, which agreed with the WCAB. Eventually, the claimant filed an appeal to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania determined that the IRE was not valid because the physician only considered the electrical burns when determining impairment, as opposed to the electrical burns and the PTSD.

The Court found that while the NCP may only accept a specific injury, the IRE physician needed to determine how any injuries stemming from the accepted injury might affect the claimant's total impairment. Here, the psychological symptoms were caused by the accepted injury. Therefore, the IRE needed to address claimant's psychological condition.

This Opinion highlights the importance of accurately describing a work injury in the first NCP, and continuously reviewing the NCP for accuracy over time.

An IRE physician may avoid invalidation by the courts by addressing the accepted injury or injuries and addressing any injuries a claimant reports before or during the IRE. The IRE physician is not required to find that the "new" injuries are related to the accepted injury.

Going forward, employers and insurers, may face potential problems with IRE physicians and causation. Typically, issues of injury causation must be settled by the WCJ. The Court's decision allows IRE physicians to effectively expand the accepted injury at the heart of a case to include any injuries the claimant brings up in an IRE.

The Supreme Court of Pennsylvania also made several comments that may hint at what the future may hold for IREs.

The Court suggests that IREs may be effectively invalidated in their entirety. The Court commented that IREs for psychological conditions may be impossible to enforce under the Fourth Edition of the AMA Guidelines. This could open the door to the end of IREs, as any claimant could complain of psychological conditions caused by their accepted injuries. In that case, any IRE could be invalidated. The Court, though, noted that other states allow impairment rating evaluations of psychological conditions under the Fourth Edition AMA Guidelines. Pennsylvania may choose to do the same.

The Supreme Court of Pennsylvania is currently reviewing whether IRE physicians must use the Fourth Edition of the AMA Guidelines or the Sixth Edition of the AMA Guidelines. The Commonwealth Court recently held that the Fourth Edition of the AMA Guidelines must be used because the Pennsylvania legislature approved that edition's use for IREs. Until the Supreme Court of Pennsylvania issues a ruling about which AMA Guidelines must be used, Chartwell has advised its clients to have IRE physicians conduct the IREs according to both the Fourth and Sixth Editions of the AMA Guidelines.

Additionally, the Supreme Court of Pennsylvania hinted that in the future it may require claimants challenging a modification of his disability benefits based on their employer's IRE to provide their own IRE showing an impairment rating of fifty percent (50%) or greater.

At the moment, the Supreme Court of Pennsylvania has not yet had the chance to rule on this issue. The current governing precedent is from the Commonwealth Court, which has held that the claimant must provide proof of impairment greater than or equal to fifty percent (50%) if he wants to challenge a modification of his disability status after the sixty day notice period; currently, the Court does not require claimants to provide their own IRE within the 60 day notice window. However, the Supreme Court of Pennsylvania suggested that this could be changed in the future.

For more information, the author, Barak Kassutto of the Chartwell Law Offices, can be contacted at 610-666-7700 or via email at bkassutto@chartwelllaw.com.