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Pennsylvania Workers' Compensation Bulletin

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IRE: A Glance at Recent Developments

By Daniel J. Margonari, Esquire

In recent years, there has been a considerable uptick in the volume of case law which has been handed down regarding Impairment Rating Evaluations (IREs).

Under Section 306(a.2) of the Workers' Compensation Act, 77 P.S. § 511.2, after receiving 104 weeks of total disability benefits, at the employer's request, a claimant must submit to a medical evaluation (i.e., an IRE) to determine the percentage of impairment. If the IRE rating is equal to or greater than 50 percent, claimant shall be presumed to be totally disabled. If the total impairment rating is less than fifty percent, claimant may be considered to be partially disabled. To seek a unilateral modification from total to partial disability, the request for an IRE must be made within 60 days from the date that the claimant receives 104 weeks of total disability benefits. An employer may still seek modification of benefits from total to partial based on the IRE after the 60 day window, but the normal administrative process for obtaining a modification of benefits applies.

This section of the Act further states that the percentage of impairment shall be determined "pursuant to the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment," which, at the time of enactment, was the Fourth Edition.

The following is a survey of the recent case law interpreting this section of the Act:

Logue v. WCAB (2015) – The Commonwealth Court held that an employer does not have to seek agreement from the employee as to an IRE physician before requesting designation by the Bureau.

Protz v. WCAB (2015) – The Commonwealth Court determined that language requiring use of "the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment" was unconstitutional. As such, the percentage of impairment was to be evaluated according to the Fourth Edition of the Guides. NOTE: This case has been appealed and is presently pending before the Pennsylvania Supreme Court.

IA Constr. Corp. v. WCAB (2015) – A WCJ may not reject the opinions of an IRE physician on the basis that the injuries are not within the physician's specialty. Further, in order to determine an IRE to be insufficient, there must be supportive, contradictory evidence in the record.

Neff v. WCAB (2015) – Whether an employee has reached maximum medical improvement is a medical determination which must be determined by medical testimony. The possibility of a potential surgery does not preclude a finding that an employee has reached maximum medical improvement.

Verizon Pa., Inc. v. WCAB (2015) – The employer sought to modify a total disability determination after the 60 day window and obtained an IRE. The Commonwealth Court held that the WCJ did not err in denying the employer's modification

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Commonwealth Court Case Reviews

Curtiss R. Justus v. Workers' Compensation Appeal Board (Bay Valley Foods), No. 1556 C.D. 2015, Filed August 10, 2016, Reported November 22, 2016.

(Fatal Claim—Where medical evidence is sufficient to prove within a reasonable degree of medical certainty that the conditions of the workplace resulted in a significant delay of proper medical treatment, *prima facie* evidence of a fatal claim petition is established.)

Claimant's husband died on July 20, 2012 as a result of a subarachnoid hemorrhage (SAH) that occurred while he was in the course and scope of his employment as a mechanic with employer.

Employer produced salad dressings and barbeque sauce. About 50-100 feet outside the main plant building, there was a water-cooling/treatment shed that housed an evaporative cooling system used to cool a cooking process inside the plant. Decedent was assigned to maintain the water quality in the system, which entailed testing for PH level and adding an anti-microbial additive if necessary. The shed was kept locked. In addition to decedent, keys to the shed were held by employer's lead mechanic. A third key was kept in a key locker in the maintenance storeroom. Various chemicals were stored in the shed, including a pool chlorinator and an acidic baseline solution for calibrating the PH meter. The door to the shed would typically be left open when the water-cooling system was checked.

On July 18, 2012, the maintenance supervisor noticed that decedent had not been seen for about 45 minutes. The facility was searched. The cooling shed was locked from the inside. The maintenance supervisor called the lead mechanic to find a key and open the shed. The decedent was found slumped in a corner. 911 was then called. The maintenance supervisor estimated that approximately 10 minutes elapsed between the time he had been notified that decedent was missing and the time that decedent was found.

Decedent was found face down, still breathing, with vomit on the floor. Decedent was transported to a hospital by paramedics. A Criminal Investigative Officer with the State Police called in the HazMat team due to the size of the shed, the fact that decedent was found with vomit coming from his mouth, and the presence of chemicals in the shed.

The ER physician thought that decedent had sustained some type of burns to his lungs and had the decedent transported by helicopter to UPMC Mercy in Pittsburgh. There, decedent would not wake up. A CT scan of his head was performed, but decedent "coded" enroute to the testing. Claimant was told that her husband was still alive, but it was not clear that he would survive through the evening.

He did survive and, the next day, claimant was told that decedent would be treated for a heart attack. Claimant, who was an ICU nurse, became angry and told the physicians that decedent's symptoms indicated that he had sustained a brain injury. Another CT scan of the head was performed, which revealed a global bleed affecting his brain stem. Decedent was brain dead. He died the following day.

The Workers' Compensation Judge dismissed claimant's Fatal Claim Petition for failure to provide prima facie evidence that decedent's death was work related. The Workers' Compensation Appeal Board affirmed and claimant sought review by the Commonwealth Court.

The Court noted that, here, there was no dispute that decedent died as a result of a SAH that was not causally related to his employment. Claimant argued, however, that decedent sustained an aggravation of his SAH as a result of employer's premises or the condition of his employment, which resulted in a delay in treatment and misdiagnosis of his condition, which substantially contributed to his death.

The Court agreed that the conditions of the workplace, in particular the existence of chemicals in the cooling shed that led first responders to provide erroneous information to the initial ER physician, could be found to have produced a significant delay in decedent's receipt of proper treatment following his SAH; however, the medical evidence presented was not sufficient to establish within a reasonable degree of medical certainty that this delay contributed substantially to decedent's tragic death and, for this reason, the WCJ did not err in dismissing the Fatal Claim Petition. Had claimant's medical expert testified that decedent would not have died as a result of the non-work related SAH but for the delay in diagnosis and proper treatment caused by decedent's work conditions, prima facie evidence of a compensable fatal claim would have been established. Because he did not do so, the Fatal Claim Petition was properly dismissed.

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Scott Grill v. Workers' Compensation Appeal Board (U.S. Airways), No. 1490 C.D. 2015, Filed September 21, 2016, Reported December 1, 2016.

(Course and Scope of Employment—An employee who is acting as a volunteer assisting another employee and/or beyond the scope of his original employment

WCAIS Alert: January 18, 2017. Workers' Compensation Appeal Board Secretary William Trusky has accepted the position of Director of the Department of Labor & Industry Legislative Affairs office. Steven Loux, Esq. is now the Acting Secretary of the Board.

duties when undertaking a task that furthers the employer's interest is acting within the course and scope of his employment.)

Claimant was employed as a catering agent to replenish catering carts on international flights. Claimant's coworker and friend, who worked as a warehouse agent in the warehouse's dock area, complained that the dock area's plastic locker was deteriorating. The dock area's plastic locker was used for storing brooms, chains, cleaning materials and other equipment used for loading and unloading trucks. Claimant offered his friend an unused steel locker stored at his residence. It is undisputed that employer was unaware that claimant was bringing his personal locker to the facility for use by his friend.

On December 16, 2012, claimant loaded his locker onto his personal pickup truck, drove to employer's facility and clocked into work. After his friend came in, claimant backed his pickup truck next to the loading dock. While claimant, his friend and another coworker unloaded the locker, claimant sustained significant injuries to his right hand.

Claimant filed a Claim Petition. At the time of his deposition, the locker was still being used at the warehouse to store employer's supplies. The Workers' Compensation Judge concluded, as a matter of law, that claimant was not engaged in the course and scope of his employment. The WCJ determined that claimant was not engaged in furthering employer's business but, instead, was a mere volunteer acting without his employer's knowledge. The Workers' Compensation Appeal Board affirmed.

On appeal to the Commonwealth Court, claimant argued that he was in the course and scope of his employment because he had clocked in, was on the employer's premises, and was acting in furtherance of employer's interest by replacing a deteriorating locker. Claimant asserted that there is no requirement that an individual receive a positive work order to perform a function that furthers the interest of his employer. The Court agreed.

Section 301(c)(1) of the Act provides that an injury must occur in the course and scope of employment and be causally related thereto in order for the injury to be compensable. The courts have developed two tests that are used to determine if an injury was sustained in the course of employment. Under the first, the question is whether the employee was actually engaged in the furtherance of the employer's business or affairs, regardless of whether the employee was upon the employer's premises. Under the second test, the employee need not be engaged in the furtherance of the employer's business or affairs; however, the employee: (1) must be on the premises occupied by or under the control of the employer; (2) must be required by the nature of his employment to be on the premises; and (3) must sustain injuries caused by the condition of the premises or by operation of the employer's business thereon.

Here, claimant was not performing his typical job duties on the premises at the time of his injury and did not receive express permission from employer to install the locker, but this alone does not take him outside the scope of his employment. The Court noted that lack of employer knowledge and performance of unassigned tasks do not place an employee outside the course and scope of employment so long as there is nothing to show that he had abandoned the course of his employment or was engaged in something wholly foreign thereto. An employer may show abandonment or wholly foreign activity when the employer can credibly argue that the employee was on the premises but in essentially a non-employee or trespasser status.

Here, claimant's activities do not constitute conduct that is wholly foreign to his employment. Most importantly, claimant was not performing a task for his personal benefit or the benefit of his friend, but for the benefit of the employer. An employee who honestly attempts to serve the employer's interests by some act outside the employee's fixed duties should not do so on pain of losing compensation benefits for any injuries thereby sustained.

The Court concluded that claimant's actions at the time of injury were within the course and scope of his employment and were not so removed from his job duties to constitute an abandonment of employment. As such, claimant is entitled to benefits.

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Vincent Beasley v. Workers' Compensation Appeal Board (Peco Energy Company), No. 634 C.D. 2016, Filed December 22, 2016.

(Impairment Rating Evaluation—NCP and the initial Request for Designation of IRE Physician may establish that IRE Request was made within 60 days of claimant's receipt of 104 weeks of benefits.)

(Impairment Rating Evaluation—Absent evidence that Department's approval of IRE physician was improper, IRE physician is competent to render an opinion as to MMI.)

(Impairment Rating Evaluation—Where IRE physician's diagnosis and impairment rating are accepted by WCJ and not contrary evidence has been offered, IRE physician's testimony may be competent even though IRE physician did not have claimant's complete medical records.)

Claimant sustained an injury on April 3, 2009. On April 23, 2009, employer issued a Notice of Compensation Payable (NCP), accepting the injury as a cervical strain/sprain, later amended to include chronic neck pain syndrome due to aggravation of multi-level injuries at C5, C6 and C7, and radiculopathy at C5-6 and C6-7. The NCP states that claimant began receiving total disability benefits on April 15, 2009,

but the first check was not mailed until April 23, 2009.

On April 15, 2011, employer filed a Request for Designation of a Physician to Perform an Impairment Rating Evaluation (IRE Request). The Department ultimately designated Dr. Rodriguez, who performed the IRE on October 23, 2012. Dr. Rodriguez concluded that claimant had reached maximum medical improvement (MMI) with an impairment rating under the Sixth Edition of the AMA Guides of 28 percent. Regarding the claimant reaching MMI, Dr. Rodriguez explained that she arrived at her determination by comparing claimant's medical records with her clinical findings, as well as claimant's responses on two different in-take forms. Dr. Rodriguez acknowledged that the most recent medical records that she had dated back only 12 months prior to her evaluation. The claimant presented no evidence or testimony.

The Workers' Compensation Judge denied employer's Modification Petition because she found that employer's IRE Request was premature. The WCJ noted that employer presented no evidence to establish that claimant had received 104 weeks of temporary total disability benefits. The WCJ also found Dr. Rodriguez' testimony to be incompetent and incredible regarding her finding of MMI inasmuch as Dr. Rodriguez failed to demonstrate that she fulfilled the training requirements set forth in the Regulations to be an approved IRE physician.

Employer appealed to the Workers' Compensation Appeal Board, which reversed. The WCAB found the IRE Request to be timely because the NCP and the initial Request for Designation of an IRE physician provided ample evidence that the request was timely. The WCAB also determined that Dr. Rodriguez was competent to testify about claimant's MMI. Before the WCAB, claimant argued for the first time that, given the Commonwealth Court's decision in *Protz v WCAB (Derry Area School District), 124 A.2d 406 (Pa.Cmwlth. 2015*), Dr. Rodriguez' testimony was incompetent because she used the 6th Edition of the AMA Guides. The WCAB refused to hear that argument because claimant had not filed an appeal from the WCJ's decision, and had not previously challenged the constitutionality of §306(a.2) of the Act. Claimant then sought review by the Commonwealth Court.

First, the Court agreed with the WCAB that the dates contained in the NCP and the IRE Request, when viewed together, establish a prima facie showing that the IRE Request was made 104 weeks after the initial date that benefits began to accrue.

Second, the Court noted that the Department designated Dr. Rodriguez as the IRE physician. Thus, the Department determined that she met all of the requirements of the Regulation and was "approved" to conduct IREs. Absent evidence from claimant regarding any impropriety of the Department's approval, the WCAB did not err in determining that Dr. Rodriquez fulfilled the requirements of the Regulation and was thus competent to testify.

Third, the Court rejected claimant's argument that Dr. Rodriguez was not competent or credible because she only had claimant's medical records that went back 12 months. Claimant never challenged Dr. Rodriguez' clinical findings based on her examination. Dr. Rodriguez explained that her finding of MMI was based on a comparison of those records with claimant's statements, as well as her findings on exam. Because no contrary evidence was offered by claimant, there was no need for Dr. Rodriguez to have records beyond the previous 12 months.

Finally, claimant argued that the WCAB erred in not applying *Protz* because Dr. Rodriguez used the 6th Edition and not the 4th. The Court agreed. Normally, in order for an issue to be preserved for appellate review, that issue must be preserved at all stages of the adjudication. The Court noted, though, that there are exceptions. This matter began before *Protz* was decided. Claimant raised the issue at the first opportunity to do so. Hence, the decision of the WCAB was vacated and the matter was remanded to the WCAB and WCJ to determine if the 4th and 6th Editions are different with respect to the injuries at issue and, if so, to receive testimony as to the impairment rating based on the 4th Edition.

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Susan Riley v. Workers' Compensation Appeal Board, No. 238 C.D. 2016, Filed December 8, 2016, Reported January 24, 2017.

(Impairment Rating Evaluation—Claimants have 60 days under §306(a.2)(2) of the Act to appeal a reduction in disability status following a Notice of Change in Status based on an IRE prior to the reduction becoming final.)

Claimant suffered work-related injuries on August 7, 2000. As a result, she received compensation pursuant to a Notice of Compensation Payable (NCP), which recognized her injuries as: "contusion/herniation and fractures in her nose, face, head, and neck."

Claimant underwent an IRE by Dr. Schnall on April 28, 2003. Using the 5th Edition of the AMA Guides, Dr. Schnall assigned claimant a 21% impairment rating. A Notice of Change of Workers' Compensation Disability Status was issued on May 5, 2003. Subsequently, claimant received partial disability benefits for 500 weeks.

On August 28, 2012, claimant filed a Review Petition seeking to amend the NCP to include additional injuries. On the same day, she filed another petition, alleging that Dr. Schnall failed to consider the full extent of her injuries.

The Workers' Compensation Judge denied both of claimant's petitions, finding Dr. Schnall's testimony to be more credible than the

testimony of claimant's medical expert, such that claimant failed to establish that the NCP was incorrect. Additionally, she failed to prove that she had a work-related impairment rating equal to or greater than 50%.

Claimant appealed to the Workers' Compensation Appeal Board. While the appeal was pending, on October 15, 2015, claimant filed with the WCAB a motion to vacate the 2003 IRE in light of the Commonwealth Court's decision in *Protz v. WCAB (Derry Area School District), 124 A.3d 406 (Pa.Cmwlth. 2015).* Denying the appeal and the motion to vacate, the WCAB adopted the WCJ's findings of fact and conclusions of law. Additionally, the WCAB found that under *Johnson v. WCAB (Sealy Components Group), 982 A.2d 1253 (Pa.Cmwlth. 2009)*, claimant could no longer challenge the 2003 IRE determination because she had failed to do so within the necessary 60-day period set forth in §306(a.2)(2) of the Act and did not present evidence of a new impairment rating of more than 50%. Claimant also failed to challenge the constitutionality of the IRE until her October 15, 2015 motion to vacate. As a result, the WCAB found that claimant was precluded from raising those issues before the WCAB.

On appeal to the Commonwealth Court, claimant argued, inter alia, that the WCAB erred when it determined that the physician properly evaluated her level of impairment using the 5th Edition of the AMA Guides in light of the *Protz* decision. The Court did not agree. The Court noted that the WCAB correctly determined that the opinion in *Protz* does not invalidate claimant's 2003 IRE rating.

This case is not controlled by the holding in *Protz*. In *Protz*, the claimant appealed the IRE within 60 days of the Notice. In this case, it took claimant nearly 10 years after the Notice to challenge the use of the 5th Edition of the AMA Guides in the 2003 IRE. Section 306(a.2)(2) of the Act provides claimant with 60 days to challenge determination made in an IRE. In Johnson, the Court determined that claimant's failure to challenge within 60 days was critical. Here, claimant underwent an IRE in 2003, and that determination went unchallenged by claimant until the Court issued its decision in *Protz*. But, *Protz* does not give claimant a second chance to appeal her 2003 IRE.

Accordingly, the Court affirmed the decision of the WCAB.

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Wayne Merrell v. Workers' Compensation Appeal Board (Commonwealth of Pennsylvania Department of Corrections), No. 493 C.D. 2016, Filed February 6, 2017.

(Heart & Lung Act—Collateral Estoppel—Arbitrator's decision in Heart & Lung proceeding does not have collateral estoppel effect in workers' compensation proceeding.)

On October 12, 2013, claimant, a corrections officer trainee, bent his knee in an awkward way while carrying food trays down a flight of steps, causing immediate pain.

He filed a claim for benefits under the Heart & Lung Act, which was denied by employer. Claimant filed a grievance of the denial of benefits, and an arbitrator was assigned under the terms of the applicable collective bargaining agreement (CBA). An arbitrator was assigned and a hearing was held, at which both claimant and employer presented evidence in the form of depositions and exhibits. The arbitrator subsequently issued an award granting the claimant Heart & Lung benefits.

In the interim, claimant filed a claim petition under the Workers' Compensation Act. At the hearing before the Workers' Compensation Judge, claimant moved for an award of disability compensation based upon the arbitrator's award of Heart & Lung benefits. Claimant argued that the arbitrator's award was binding on the WCJ under the doctrine of collateral estoppel. Claimant offered the arbitrator's award and his own deposition testimony, but did not offer any medical evidence. The WCJ denied the claim, holding that she was not collaterally estopped by the arbitration award.

Claimant appealed to the Workers' Compensation Appeal Board, arguing that the arbitration award resolved the issue of his disability and was thus binding in the workers' compensation proceeding. The WCAB rejected this argument, noting that the workers' compensation case dealt with a potentially indefinite period of disability and was a more formal proceeding than the Heart & Lung arbitration,

On appeal to the Commonwealth Court, claimant again argued that the arbitrator's finding that he was disabled precluded the WCJ from finding otherwise. Collateral estoppel will foreclose litigation of issues of fact or law in subsequent actions where the following criteria are met: (1) the issue in the prior adjudication is identical to the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; (4) the party against whom collateral estoppel is asserted has had a full and fair opportunity to litigate the issue in the prior action; and (5) the determination in the prior proceeding was essential to the judgment.

The Court noted that to employ the precept of collateral estoppel in a workers' compensation proceeding, there must be a two-part inquiry into (1) the amount at risk and (2) the governing procedure.

Beginning with the amount of benefits at stake, claimant argued that the Heart & Lung Act and the Workers' Compensation Act are substantially similar. Employer disagreed, arguing that the duration of benefits under the Heart & Lung Act are "temporary," whereas workers' compensation benefits cover

permanent injuries that can last a lifetime. The Court determined that the temporary nature of Heart & Lung benefits as opposed to potential lifetime benefits under the Workers' Compensation Act renders the amount in controversy between the two schemes incomparable.

The Court next compared the procedures governing the benefit schemes. While there are some similarities, there are significant differences. First, the CBA is devoid of standards regarding the foundation to a medical opinion on causation. More importantly, the Workers' Compensation Act requires the WCJ to issue a reasoned decision. In contrast, the CBA does not require the level of reasoning and explanation mandated in the Workers' Compensation Act.

Because the arbitration proceeding is more ad hoc and informal than a proceeding governed by the Workers' Compensation Act, the arbitrator's award of Heart & Lung benefits did not collaterally estop the WCJ from making her own determination as to claimant's disability. The decision of the WCAB was affirmed.

Supreme Court Case Reviews

Michael C. Duffey v. Workers' Compensation Appeal Board (Trola-Dyne, Inc.), No. 4 MAP 2016, Decided January 19, 2017.

(Impairment Rating Evaluation—Physician-examiners must exercise independent professional judgment to make a whole-body assessment of "the degree of impairment due to the compensable injury," which need not be limited to the injuries set forth on the NCP; the NCP does not necessarily set forth the range of health-related conditions to be considered in IREs.)

Claimant sustained injuries to his hands when he picked up electrified wires while repairing a machine for employer. A Notice of Compensation Payable (NCP) was issued, which indicated that the body parts affected were "bilateral hands;" the type of injury was "electrical burn;" and the description of injury was "stripping some electrical wire."

After claimant received total disability benefits for 104 weeks, employer requested an impairment rating evaluation (IRE). In its request for designation of a physician to perform the evaluation, employer described the injury as "bilateral hands—nerve and joint pain."

A few months later, claimant submitted to an IRE by Dr. Sicilia, a specialist in physical medicine and rehabilitation, who assigned a whole-body impairment rating of 6%. Employer issued a notice informing claimant that his disability status would change from total to partial, thereby limiting claimant's receipt of benefits to a 500-week period.

Claimant filed a review petition attacking the validity of the IRE on the basis that Dr. Sicilia failed to rate the full range of work-related injuries inasmuch as claimant suffered from adjustment disorder with depressed mood and chronic post-traumatic stress disorder as a result of his work injury.

In support of his petition, claimant presented testimony from his family physician, who had diagnosed and treated claimant for the adjustment disorder with depressed mood and chronic post-traumatic stress disorder. Claimant also presented testimony from a neurologist who attested that claimant's injury had evolved into a disabling, chronic neuropathic pain syndrome attended by emotional and cognitive changes.

In response, employer presented Dr. Sicilia's testimony supporting the rating evaluation that he conducted. Dr. Sicilia explained that, in addition to accounting for claimant's physical condition, he also considered claimant's complaints of pain, encompassing "work-related chronic neuropathic pain syndrome." Dr. Sicilia did not, however, account for the asserted work-related adjustment disorder or post traumatic stress syndrome.

The Workers' Compensation Judge accepted claimant's evidence as more credible and convincing, directed that claimant's psychological conditions should be added to the NCP, and determined that the IRE was invalid because Dr. Sicilia had not addressed those conditions.

The Workers' Compensation Appeal Board reversed, reasoning that an IRE physician may properly limit the examination to the accepted injuries as reflected in the NCP. The WCAB observed that claimant had not sought to amend the NCP to include additional injuries in a timely fashion but, instead, waited to do so until almost 6 months after the IRE was performed.

The Commonwealth Court affirmed the WCAB's order, emphasizing that §306(a.2) requires a determination of the degree of impairment "due to the compensable injury." Because the NCP establishes the description of the work injury, the focus in determining the validity of an impairment rating is on the state of the claimant and the compensable injury as described in the NCP at the time the IRE is performed.

Claimant then sought review by the Supreme Court. The Court reversed, noting that an IRE physician must consider and determine causality in terms of whether a particular impairment is "due to" the compensable injury. Moreover, the required evaluation is of "the percentage of permanent impairment of the whole body resulting from the compensable injury."

Under §306(a.2) and the applicable impairment guidelines, the IRE physician must exercise professional judgment to render appropriate decisions concerning both causality and apportionment. Physicians must use their clinical knowledge, skills and abilities to arrive at

a specific diagnosis, define the pathology, and rate impairments based on the criteria set forth in the AMA Guides.

Here, it is apparent from the record that Dr. Sicilia neither applied his professional judgment to assess (or, per the applicable regulations, arrange for an assessment of) the psychological conditions identified by claimant during the IRE examination, nor determined whether such conditions as might have been diagnoses were fairly attributable to claimant's compensable injury. Instead, Dr. Sicilia assessed only the injuries he was instructed to rate by employer. An IRE physician is bound to take his guidance not from an employer, but from §306(a.2) and the AMA Guides.

Because Dr. Sicilia failed to exercise appropriate judgment based on a misunderstanding concerning the scope of his responsibilities, the WCJ did not err in invalidating the IRE. The order of the Commonwealth Court was reversed, and the matter was remanded for reinstatement of the finding of invalidity rendered by the WCJ.

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IRE: Recent Developments

petition on the ground that the employer failed to establish that the claimant's whole body impairment rating was less than 50 percent. The WCJ could properly consider and weigh the evidence of the treating physician.

Riley v. WCAB (2016) – Claimant filed a petition to amend the NCP to include additional injuries and asserted that the IRE physician failed to consider the full extent of claimant's injuries. The Commonwealth Court determined that the WCJ was within his fact-finding capacity in rejecting the testimony of the treating physician and in refusing to expand claimant's work injury. The Court also reiterated that claimants have 60 days to challenge a reduction in disability benefits, holding that *Protz* did not expand this window.

Beasley v. WCAB (2016) – An IRE was performed using the 6th Edition of the Guide. The Commonwealth Court remanded the case to the WCJ with an instruction to determine if the Fourth Edition and the Sixth Edition of the AMA Guides were different with respect to the injuries at issue and, if so, to receive testimony as to the impairment rating based on the Fourth Edition of the AMA Guides.

Duffey v. WCAB (2017) – The Pennsylvania Supreme Court was asked to examine whether an IRE was valid when it only considered the injuries listed on the Notice of Compensation Payable issued at the time of injury, and did not consider additional injuries that subsequently arose and were known at the time of the IRE, but not yet formally added to the description of injury. The Court held that the WCJ properly reached the determination that the IRE, which failed to consider subsequently asserted injuries, was not valid. The Court held that IRE physicians must exercise independent professional judgment to make a whole-body assessment of the degree of impairment due to the compensable injury. The assessment cannot be limited on the basis that the physician-examiner believes the undertaking is a more limited one. In other words, the IRE physician must exercise independent professional judgment and, therefore, consider all conditions that the physician believes are related to the worker's work-related injury, not just those that are designated in the NCP.

Overall, the recent case law has created some uncertainty regarding Section 306(a.2) of the Act. The two primary areas of concern include: 1) which Edition of the Guides to use in determining an IRE (*Protz*); and 2) the extent to which an IRE physician must consider potential conditions beyond those listed in the NCP (*Duffey*). As to the first point, it appears that IREs should be made based on the 4th Edition, but to shield against potential future developments, it is advisable to determine an IRE under both the 4th and 6th Editions.

As to the latter point, *Duffey* has seemingly expanded a claimant's ability to challenge an IRE by asserting that a condition was not considered by the IRE physician, even if it was not previously identified. Until there is further clarification from the Court, it would be advisable for an IRE physician to consider all of claimant's conditions, note whether they are related to the worker's work-related injury, and ensure that the IRE is based on all conditions that the physician believes are related to the worker's work-related injury, irrespective of whether any given condition is listed in the NCP.

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ATTENTION READERS: The editors of the Thomson, Rhodes & Cowie Pennsylvania Workers' Compensation Bulletin invite you to submit questions you may have dealing with workers' compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified workers' compensation attorney.

Send questions to: Harry W. Rosensteel, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219, hwr@trc-law.com.

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