**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:**
**JANUARY 2016 AT A GLANCE**
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## IRE

- Pennsylvania Supreme Court grants claimant's Petition for Allowance of Appeal to address the issue:

> *Did the Commonwealth Court err in concluding that an Impairment Rating Evaluation (IRE), which is designed to rate the percentage of disability two years out from a work injury, was valid where the IRE 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 Commonwealth decision, that was the subject matter of the granted Petition for Allowance of Appeal, had held that an IRE only considered the claimant's work injury as it was defined and existed at the time the IRE was performed was valid notwithstanding an after-the-fact expansion of the scope of a claimant's work-related injury.

  This meant, pursuant to the underlying Commonwealth decision, that the claim of new injuries and/or the granting of a Petition to Review that added new injuries following the performance of an IRE would not invalidate the results of an IRE that was premised upon the injuries that were accepted at the time that it was performed.

  The Commonwealth Court had reasoned its holding was based upon the statutory language of Section 306(a.2), that requires the focus upon determining the validity of an IRE is on the state of the claimant and the compensable injury, as described in the NCP, at the time the IRE was performed. .

*Duffey v. (Trola-Dyne, Inc.), No. 568 MAL 2015 (PER CURIAM, February 3, 2016) 2/16*

## SPECIFIC LOSS/ MEDICAL TESTIMONY/ATTORNEY FEES

- Pursuant to 413(a) of the Act where the WCJ recognized a work-related injury, but suspends benefits based on a conclusion that such injury did not cause a loss

of earning power, the WCJ maintained the authority to reinstate benefits or modify an award upon proof that an injury has worsened and resolved into a disability.

Although the WCJ was bound by a prior decision to accept that the Claimant suffered a trigeminal nerve injury that caused headaches as a result of his compensable injury the WCJ was not bound to find this constitutes an injury separate and apart from the claimant's specific loss of the eye since the trigeminal nerve injury was non disabling it did not result in wage loss. As such, it did not constitute an injury separate and apart from the claimant's specific loss to the eye.

This is because that the terms "injury" and "disability" are not synonymous in workers' compensation law.

The term "injury" relates to a physical impairment.

Conversely, for purposes of receiving workers' compensation, 'disability' is a term synonymous with loss of earning power; it does not refer to physical impairment.

The term "disability" in compensation law means loss of earning power.

For compensation for the specific losses enumerated under Section 306(c) the term, "disability," means the specific loss of the member, or eyesight, or hearing, or . . . a permanent disfiguring scar.

- A claimant who sustains a specific loss of a body part compensable under Section 306(c) of the Act, is not entitled to compensation beyond that specified in that section even though he may be totally disabled by the injury. This is because specific loss benefits are payable without regard to a claimant's earning capacity.

  Injuries, including those that result in a loss of earning power, that normally flow from the specific loss injuries are considered compensated under specific loss benefits. However, if a claimant suffers an injury that is separate and apart from a specific loss of a body part that results in a loss of earning power, the claimant may receive total disability under Section 306(a) of the Act or partial disability under Section 306(b) of the Act in addition to benefits for the specific loss of a body part.

  Such is also the case when a claimant suffers a specific loss injury and another disability arising from a single incident.

  A claimant seeking concurrent specific loss and disability benefits bears the burden to prove that he has a disability separate and apart from that which normally follows the specific loss injury. If a claimant fails to satisfy this burden,

other disability benefits are suspended and disability benefits previously received by a claimant related to the specific loss injury are credited to employer.

- The WCJ did not commit an error of law by finding a doctor credible who did not perform a complete physical examination of Claimant's face. Assessing the credibility of a medical expert that did not conduct a physical examination is within the exclusive providence of the WCJ.

- Under Section 440(a) of the Act,14 claimants who successfully litigate a contested case are entitled to an award of reasonable attorney's fees unless an employer presents a reasonable basis for the contest

  Claimant was entitled to award unreasonable contest attorney fees solely with regards to his successfully litigated Petition Seeking Review of a UR Determination where the Employer did not file an answer to Claimant's Petition or present any evidence challenging Claimant's UR Petition. While it was Employer's right under the Act to invoke the initial UR process without any medical evidence, Employer's decision to continue the contest in the absence of any medical evidence was unreasonable.

*Lindemuth v. WCAB(Strishock Coal Co.), No. 812 C.D. 2015 (Decision by Judge Cohn Jubelirer, February 24, 2016) 2/16*

**NOTICE/MEDICAL TESTIMONY/LOSS OF USE**

- Notice to a co-worker of an injury does not constitute notice to the employer where there is no evidence that the co-worker was authorized as Employer's "representative, to receive a report or notice" of Claimant's injury.

  Per Section 313 of the Act notice may be given to the immediate or other superior of the employee, to the employer, ***or any agent of the employer*** regularly employed at the place of employment of the injured employee.

  ***Any agent of the employer*** does not mean that information of an accident may be given to any other employee. Rather, "agent of the employer" means "a person 'whose position justifies the inference that authority has been delegated to him by the employer, as his representative, to receive a report or notice of such accidental injury.'

  In this matter the WCJ committed an error of law by finding claimant's notice was timely since he gave notice to his co-employee. A title is not dispositive of who a claimant should inform of a work injury. Giving notice to simply "any other employee" is not sufficient to meet the Act's notice requirement. Regardless of whether the co-worker was an "acting supervisor" Claimant

presented no evidence that the co-worker was authorized as Employer's "representative, to receive a report or notice" of Claimant's injury.

- Sliding an injury report under the locked door of the manager's office does not satisfy the notice requirement. The claimant must prove that his employer actually received notice of a work injury.

- Section 311 of the Act requires the claimant to inform his employer of a work injury within 120 days of its occurrence. If he fails to do so, he is ineligible for compensation. This deadline cannot be extended where the claimant asserts that he told a fellow employee of the injury.

  The claimant was not entitled to disfigurement benefits where the Court concluded that the claimant did not provide timely notice.

- Where there is no obvious causal connection between an injury and the alleged work-related cause, the claimant must offer competent medical evidence to prove that connection. The medical expert must opine that "in his professional opinion, the injury came from the related incident.

  A physician's assumption that an injury is caused by a recent event because of the temporal proximity is not a sufficiently competent opinion to establish a causal relationship.

  Claimant's medical experts testimony was not competent where he opined that Claimant must have been injured in the February 2011 fall because he later experienced symptoms. But neither he nor Claimant testified about the inception of those symptoms.

*Penske Logistics v. WCAB(Troxel) No. 713 C.D. 2014 (Decision by Judge Leavitt, June 17, 2015) 2/16*