THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:
JUNE 2015 AT A GLANCE
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IRE/WCJ

- The WCJ decision denying employer's Petition for Modification based upon an IRE of under 50% was supported by the competent testimony of claimant's expert's opinion found credible that the claimant's IRE was 56% where claimant expert made an independent/separate impairment rating for claimant's foot drop.

  The claimant's experts testimony found credible was in contrast to employer's expert, who was found not credible, who opined it was not necessary to make an independent/separate impairment rating for claimant's foot drop and lower extremity radiculopathy separately from the injury to Claimant's lumbar spine because, under Chapter 17 of the AMA Guides, the impairments for radiculopathy and left foot drop were already incorporated into the rating he used for Claimant's lumbar spine and therefore, there was no reason for him to refer to Chapter 16 of the AMA Guides, which deals with conditions of the lower extremity.

  This is because the claimant's expert may successfully challenge the reliability of the IRE by pinpointing errors of fact or errors in the IRE physician's application of the AMA Guides, which was credibly done in this matter by claimant's expert.

- Section 306(a.2)(1) of the Act provides employers with the right to require a claimant who has received total disability benefits for a period of 104 weeks to submit to an IRE. If an employer makes such a demand within 60 days after the 104-week period has elapsed, and the IRE indicates that the impairment is less than 50%, a WCJ may grant a modification based solely on the results of the IRE as a matter of course.

  However an employer requests a claimant to submit to an IRE after the 60-day window, an employer may still seek modification of benefits from total to partial based on the IRE, but the normal administrative process for obtaining a

modification of benefits applies. In this situation, the IRE merely serves as evidence that the employer may use at a hearing before a WCJ on the employer's modification petition to establish that the claimant's disability status should be changed from total to partial

Pursuant to this standard, the claimant's expert may successfully challenge the reliability of the IRE by pinpointing errors of fact or errors in the IRE physician's application of the AMA Guides. A WCJ must identify specific evidence of record (e.g., testimonial or documentary evidence or evidence elicited through cross-examination) to support a finding that an IRE is not reliable or credible on the basis that the physician did not properly interpret or apply the AMA Guides. A rebuttal IRE, proffering an impairment rating above 50 percent, may be evidence most persuasive to counter the IRE done at the employer's request. However, the claimant's expert may also successfully challenge the reliability of the IRE by pinpointing errors of fact or errors in the IRE physician's application of the AMA Guides.

- When a WCJ bases a credibility determination on an expert's superior qualifications, the WCJ has articulated a valid and objective reason under section 422(a) of the Act.

Verizon Pennsylvania Inc. v. WCAB (Mills) No. 744 C.D. 2014 (Decision by Judge McCullough, February 23, 2015) 6/15

IRE

- The Supreme Courts holding in Dowhower v. Workers' Compensation Appeal Board (Capco Contracting), 919 A.2d 913 (Pa. 2007) (holding that a request for the designation of an IRE physician is premature, which renders any IRE conducted on the claimant void, if filed before the claimant has reached 104 weeks of total disability) did not void the rights of the employer to obtain a timely IRE where, upon discovering its initial request was untimely the employer:

  - ✓ Wrote to the Bureau 18 days after the claimant had reached his 104th week of temporary total disability and, in an effort to resolve this litigation and secure a timely designation of an IRE physician within sixty days of Claimant's receipt of 104 weeks of total disability, Employer informally contacted the Bureau for guidance.
  - ✓ After being informally advised by the Bureau that the premature filing of Employer's Initial Request for Designation could not be corrected and that any subsequent request, although timely, would be denied,

Employer by letter dated December 16, 2009, formally informed the Bureau that its initial request to the Bureau to designate an IRE physician was premature.

- ✓ Employer also requested that the Bureau permit its December 16, 2009 Letter to serve as a formal request for the Bureau to designate a new IRE physician and attached the completed LIBC Form-766 it had prematurely filed on September 21, 2009.
- ✓ Employer also advised the Bureau that it was notifying Claimant's counsel of Employer's request by providing a copy of its December 16, 2009 Letter to the Bureau.

Although the requirement that a request to designate an IRE physician be made on Form LIBC-766 is not a statutory requirement, though it is required by the Bureau's regulations. However, based upon the facts of this case Employer's December 16, 2009 Letter, with attached completed Form LIBC-766, was filed within the required sixty-day time period for an automatic change in Claimant's disability status under Section 306(a.2) of the Act. To hold otherwise would be to put form over substance.

This was particularly true where the Bureau informally advised Employer that there was nothing that could be done to correct the miscalculation that resulted in Employer prematurely filing its Initial Request for Designation and that the Bureau would deny a timely filed second request.

- Pursuant to Section 306(a.2)(1), when the parties cannot agree on an IRE physician, the date the insurer requests that a physician be designated to perform an IRE by filing of Form LIBC-766, "Request for Designation of a Physician to Perform an IRE is the determinative date as to whether the IRE request is timely under Section 306(a.2)(1) of the Act and not the date the employer subsequently issues the filing of Form LIBC-765, IRE Appointment Form

Therefore, the WCAB erred by concluding that in order for an employer to obtain an automatic change in the claimant's disability status pursuant to Section 306(a.2)(1) of the Act, an employer's timely request that a claimant submit to an IRE requires: (a) the filing of Form LIBC-766, "Request for Designation of a Physician to Perform an IRE , (b) subsequent receipt of the Bureau's designation of an IRE physician, and (c) the filing of Form LIBC-765, IRE Appointment, all of which must occur within the sixty-day window following a claimant's receipt of 104 weeks of temporary total disability.

- Once a claimant receives 104 weeks of total disability benefits, the insurer has sixty days from that date during which it must request that the claimant submit to an IRE for the purposes of obtaining the automatic relief set forth in Section 306(a.2)(1).. Thus, under Section 306(a.2)(1) it is the date of the request to submit to the medical examination to determine the degree of impairment, not the date that the claimant actually attends the IRE, that is determinative as to the timeliness of the IRE request.

The Village at Palmerton Assisted Living v. WCAB (Kilgallon), No. 334 C.D. 2014 (Decision by Judge Cohn Jubelirer, June 12, 2015) 6/13

REINSTATEMENT/STATUTE OF LIMITATIONS

- Where the clamant was laid off for economic reasons in November 2004 the Claimant's Petition for Reinstatement for benefits filed on September 23, 2010 relating to his 1999 right shoulder injury was not time-barred under Section 413(a) of the Act, where the claimant suffered compensable injuries to his left shoulder in 1995 and a compensable injury to his right shoulder in 1999 and the clamant received indemnity for his left shoulder until he resolved the left shoulder claim by C&R on September 23, 2010. This is because the Petition for Reinstatement was filed within three years after the date of the last payment of compensation for his 1995 left shoulder injury, which Claimant received in lieu of compensation for the 1999 right shoulder injury.
  This is because where the claimant suffered two totally disabling injuries, either of which would have entitled him to total disability benefits, the claimant was not entitled to receive benefits for both at the same time. In essence, the workers' compensation system requires a claimant to "choose one injury" and receive compensation for that totally disabling injury in lieu of receiving compensation for the other totally disabling injury at that time.

  Where circumstances change, however, such that the loss in earning power from that injury for which a claimant is receiving benefits resolves or lessens the Claimant is permitted to seek reinstatement under Section 413(a) of the Act within three years after the date of the most recent payment of compensation received in lieu of compensation for the injury he was not receiving indemnity for and which has not resolved.

- The courts holding was made pursuant to the language of 413(a) that provides in pertinent part:

  Provided, That, . . . no notice of compensation payable, agreement or award shall be reviewed, or modified, or reinstated, unless a petition is filed with the department ***within three years after the date of the most recent payment of compensation*** *made prior to the filing of such petition*

  Following the claimant's economic lay off in November 2004 he would have been entitled to reinstatement of indemnity for the compensable 1995 left shoulder or the compensable 1999 right shoulder injury but he was not entitled to both. The claimant received indemnity related to his left shoulder injury in lieu of indemnity for his right shoulder injury until September 23, 2010 and he filed his Petition for Reinstatement related to his right shoulder injury within 3 years of the last payment of compensation for the left shoulder injury.

Kane v. WCAB (Glenshaw Glass), No. 1172 C.D. 2013 (Decision by Judge Brobson, June 25, 2015) 6/15

IMPAIRMENT RATING EVALUATION

- An IRE that considers a claimant's work injury, as it is defined and exists at the time the IRE is performed, is valid notwithstanding an after-the-fact expansion of the scope of a claimant's work-related injury.

  Put another way, a claim of new injuries and/or the granting of a Petition to Review that adds new injuries made following the performance of an IRE will not invalidate the results of an IRE that was premised upon the injuries that were accepted at the time that it was performed.

  This is because, pursuant to the statutory language of Section 306(a.2), the focus in 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.

  Pursuant to Section 306(a.2)(4), the claimant can still challenge his or her partial disability at any time during the five hundred-week period of partial disability if the claimant obtains an impairment rating of at least fifty percent using the AMA Guides.

- In dicta, the court comments that its holding encourages claimants to be proactive as the end of the 104-week period is approaching and determine

whether any work-related injuries should be added to the NCP so they are considered if or when an IRE is requested and performed.

- Section 306(a.2) (8) (i) defines "Impairment" as "an anatomic or functional abnormality or loss that results from the compensable injury and is reasonably presumed to be permanent."

  If the claimant is found to have an impairment equal to or greater than fifty percent, the claimant is presumed to be totally disabled and continues to receive total disability compensation benefits. However, if the impairment rating is less than fifty percent, then the claimant's status changes to one of partial disability, but no reduction shall be made until sixty days' notice of modification is given.

  If the impairment rating is less than fifty percent, the claimant's status changes to one of partial disability, but no reduction shall be made until sixty days' notice of modification is given.

  The scope of claimant's appeal is determined by whether it is filed during the sixty day period or after the sixty day period but prior the expiration of the five hundred week period.

  <u>During Sixty Day Period</u>- A claimant has the right to immediately appeal the reduction of his or her disability status before the reduction becomes effective during the sixty-day notice period. During this period, the claimant can challenge the IRE itself.

  <u>After the sixty-day</u> – once the immediate appeal period has passed, but before the expiration of the five hundred week-period, a claimant may attempt to reinstate total disability status by presenting an IRE showing an impairment rating of equal to or greater than fifty percent.

  <u>Duffey v. (Trola-Dyne, Inc.)</u>, No. 1840 C.D. 2014 (Judge Cohn Jubelirer, June 26, 2015) 6/15