

## Can a Timely Impairment Rating Evaluation and Change of Disability Status Be Invalidated by Establishing New or Additional Injuries?

An employer requested designation of an Impairment Rating Evaluation (IRE) physician within the 60 day window following the payment of 104 weeks of total disability. The IRE resulted in a six percent impairment rating and the employer filed a Notice of Change of Workers' Compensation Disability Status Form changing the injured worker's disability status to partial. Of course, this means the disability rate is not changed but the duration of the claim is now limited to the 500 week statutory maximum for partial disability. The injured worker, within 60 days of receipt of the Notice of Change, filed a Petition for Review asserting that the IRE was invalid and later alleged that there were additional injuries not considered by the IRE physician.

Before the Workers' Compensation Judge (WCJ) the injured worker was successful in having Post Traumatic Stress Disorder and Adjustment Disorder added to the description of the injury. Because the already performed IRE did not consider the new diagnoses the WCJ found the IRE was invalid. Therefore the WCJ reinstated total disability status. The employer appealed the decision and the Workers' Compensation Appeal Board reversed the WCJ holding that the IRE was still valid despite the subsequent addition of new injuries. The Board reasoned that when the IRE was conducted in June 2011, the physician considered all the injuries acknowledged on the Notice of Compensation Payable (NCP) at that time. Although the injured worker was aware of the psychological diagnosis since August of 2010, he did not seek to add it as a compensable injury until December 2011, long after the IRE was conducted and the results duly reported.

The Commonwealth Court in *Duffy v. WCAB (Trola-Dyne, Inc.)*, No. 1840 C.D. 2014, Filed: June 26, 2015, agreed with the Board and affirmed the determination that the IRE was valid holding that an otherwise valid IRE may not be nullified by claims of new or additional injuries that were not yet determined to be work-related injuries at the time of the IRE. The court expressed concern that injured workers may delay attempts to add new injuries until after an IRE is performed as a strategy to invalidate the IRE and allowing this would not serve the legislative goals of reducing costs or improving the efficiency of the workers' compensation system.

The court noted that within 60 days after receipt of a Notice of Change of Workers' Compensation Disability Status an injured worker may challenge the validity of an IRE. However, these challenges are limited. They include challenges to: the qualifications of the IRE physician, the methodology used to determine the degree of impairment, the consideration of all currently accepted injuries and the use of the correct edition of the American Medical Association's (AMA) impairment guidelines. After that 60 day period the injured worker may seek reinstatement of total disability status only by producing a new Impairment Rating of 50 percent or more using the AMA Guides.

**Comment:** The court suggested that injured workers, when they are aware of additional injuries not previously accepted or determined to be compensable by a WCJ's decision, should seek to have these injuries added by filing the appropriate Review Petition before the expiration of 104 weeks of total disability payments whenever possible, or risk not having those conditions not considered by the IRE physician.

For more information, please contact Peter J. Weber at [pweber@wglaw.com](mailto:pweber@wglaw.com) or 215.972.7901.