The Legal Intelligencer

Expanded Role of IREs OK'd in Pa. Workers' Comp Claims That Carry Appropriate Exposure

The nature of a work-related injury “accepted” as compensable under Pennsylvania workers’ compensation with appropriate formwork has been sacrosanct for decades. It’s not that the injury description cannot be changed, but as written, the description drives employer and insurer obligations concerning not only bene t payments but also evidentiary obligations.

By Paul M. Fires and James R. Bucilla II | July 07, 2022

Paul M. Fires, left, and James R. Bucilla II, right, of Weber Gallagher Simpson Stapleton Fires & Newby. Courtesy photos

The nature of a work-related injury "accepted" as compensable under Pennsylvania workers' compensation with appropriate formwork has been sacrosanct for decades. It's not that the injury description cannot be changed, but as written, the description drives employer and insurer obligations concerning not only bene t payments but also evidentiary obligations. Of equal importance, issues previously addressed through litigation through a nal decision have been also, for decades, set in stone establishing the judiciary's primacy over such topics. But now, there is an opening in this process for interpretation and court-imposed change.

An impairment rating evaluation (IRE) is one of the statutory mechanisms utilized by employers and Pennsylvania workers' compensation insurers to cap injured workers' disability bene t entitlements to a set 500-week period. An IRE does not address the actual weekly wage loss rate nor does it address medical bene ts. The Pennsylvania Commonwealth Court has recently held that an IRE based only upon all "accepted" work-related diagnoses is nonetheless subject to being found invalid. In this case, the IRE physician relied upon the bureau controlling document and a Judge-approved stipulation. But the Commonwealth Court ruled that where the evidence as a whole shows the degree of impairment "due to the compensable injury" reaches or exceeds 35%, nonrecognized, additional injuries must be considered. See *Sicilia v. API Roofers Advantage Program (WCAB),* No. 747 C.D. 2021, led June 7, 2022 (Pa. Commw. 2022).

The *Sicilia* case involves a complicated history of an older injury dating from 1999. The notice of compensation payable accepted a lumbar strain and knee contusion. Following extensive litigation and a WCJ decision, the description of injury was expanded to include chronic pain and psychological conditions. In 2011, a WCJ held that back surgeries were also related to the work injury. However, the technical injury description remained "lumbar strain, left knee contusion, chronic pain syndrome, and chronic adjustment disorder with anxiety and depression," referencing the earlier stipulated decision. Thereafter, an August 2019, IRE performed by Daisy Rodriguez, offered three critical opinions resulting in the employer ling a modification petition seeking to change the claimant's disability status from total to partial disability bene ts and to enforce the 500-week indemnity benefits cap.

First, Rodriguez gave the claimant a 23-25% impairment rating, based upon the accepted injury description of "lumbar strain, left knee contusion, chronic pain syndrome, and chronic adjustment disorder with anxiety and depression." Second, Rodriguez opined that the conditions of lumbar disc protrusion or spondylolisthesis with lumbar radiculopathy were, in fact, attributable to the work-related injuries, though not included within the NCP as expanded through prior litigation. Third, and at the employer's request for an addendum, Rodriguez opined that the whole person impairment reached 43-45%, including calculations accounting for the lumbar protrusion or spondylolisthesis with radiculopathy. This third opinion is the key, having brought the impairment rating to or in excess of the 35%.

In granting the employer's modification petition converting benefits from total to a capped partial disability status, the WCJ found Rodriguez partly credible and accepted the opinion of a whole person impairment rating of 25%, while rejecting the opinion the work-related injuries included additional diagnoses as not "credible" based upon the description of injuries included in the decisions of prior WCJs and the Workers' Compensation Appeal Board (WCAB). Then, the WCAB affirmed reasoning that the rendering of credibility determinations was within a WCJ's domain.

In a reported opinion containing a strong dissent, the Commonwealth Court has now reversed the WCAB, in e ect reinstating the claimant to a total disability status, while holding it was error for the WCJ to constrain the IRE review solely to the accepted injury description. The court wrote of "a misapprehension of the discretion accorded to an IRE physician-evaluator." In doing so, the court cited a pre-Act 111 case, *Du ey v. WCAB (Trola-Dyne)*, 152 A.3d 984 (Pa. 2017), decided shortly before the Pennsylvania Supreme Court declared the IRE process as having been unconstitutional as under Act 111's predecessor (the constitutional defect since recti ed by the legislature).

Duffey somewhat controversially held that physician-examiners must exercise independent professional judgment to make a whole-body assessment of "the degree of impairment due to the compensable injury," (quoting Section 306(a.2) of the Pennsylvania Workers' Compensation Act, since-stricken), or said—in other words—that the IRE evaluator must consider conditions raised by a claimant at time of the IRE even if not already included as part of the compensable injury description. Coincidentally, the IRE expert in *Duffey* was named Dr. "Sicilia" (as distinguished from the claimant in this case). The *Duffey* IRE was invalidated after Sicilia failed to evaluate whether an alleged psychological condition unnamed on the NCP should be included as part of the impairment rating.

Section 306(a.3) of the act, which replaced Section 306(a.2), continues to include the same language, "the degree of impairment due to the compensable injury." Despite the extensive, previous litigation, judges weighing in and stipulated conditions concerning the extent of the work injury, here, the Sicilia court did not limit the scope of the IRE to the specific wording on the NCP, as modified through prior litigation. An estoppel argument was not enough. When criticizing the WCJ's underlying reasoning, the majority in Sicilia also cited the reasoned-decision requirements of Section 422 of the act, adding that the "only reason proffered for discrediting the additional diagnoses was that they had not been previously found by other WCJs." Time will tell whether there is a Pennsylvania Supreme Court appeal.

As the law stands by way of Sicilia being a reported decision, IRE physicians and employers must consider conditions not included within either the controlling document or judicially determined injury description. Claimants can successfully challenge IRE ratings if this is not done.

Generally speaking, Sicilia is an example of how the courts will utilize pre-Act 111 case law pertaining to IREs, when addressing disputes arising from employers' e orts to modify bene ts through use of an IRE obtained since enactment of Act 111.

With this holding tracking *Duffey*, employers and adjusters are cautioned to ensure that the IRE evaluator considers and rates all conditions undisputedly related to the work injury, even if not explicitly named in the operative bureau document. The employer in *Sicilia* was not able to limit the scope of the impairment rating by arguing that the claimant had waived or was estopped from a rating of the additional conditions not described on the NCP but undisputedly related to the work injury by the IRE physician, the employer's expert. The outcome in *Sicilia*, which again, is reported law pending a successful appeal, was thus also a product of the evidence presented to the WCJ and of the viewpoint of the evaluating expert. The WCJ was bound to issue a decision based upon the evidence presented, which included an employer's expert opinion as a whole that the work injury included impairment from additional conditions though not on the NCP. An IRE evaluator can be assigned through the bureau and not selected by either party. While in theory an impartial assignment of an evaluator would lead to an unbiased opinion and rating, employers and insurers should diligently consider the track record of their anticipated expert's reputation before that physician decides what conditions—not accepted but potentially alleged—are work injury related.

The diagnoses at issue are unfortunately not always clear. If there is any question about the scope of the work injury and which conditions should be included as part of the rating, then alternative ratings may be obtained which include rating for additional unaccepted conditions. To the extent the whole person impairment rating reaches or exceeds 35%, a modification of benefits may not be available. However, a modification may be available if there is admissible medical evidence to explain why the conditions raising the impairment rating to or over the 35% threshold are not work injury-related. The *Sicilia* majority was not convinced such evidence existed considering Rodriguez' overall opinion and the WCJ's findings. Further, an IRE remains only one of multiple claims exposure management tools, with an IRE not cost-effective in many cases. The risk of an impairment rating evaluator expanding the compensable injury description on your NCP, even despite prior decisions addressing the issue, will have to be balanced with the potential benefits and alternative options.

Paul M. Fires *is the co-chair of Weber Gallagher Simpson Stapleton Fires & Newby's workers' compensation group. Contact him at p res@wglaw.com.* ***James R. Bucilla II*** *is an associate with the rm. He represents third-party administrators, self-insured employers, and global insurance carriers in Pennsylvania workers' compensation matters. Contact him at jbucilla@wglaw.com.*