

**BUILDING A WORKERS' COMPENSATION
DEFENSE ARSENAL IN A WORLD OF MISTRUST**

**By: Christian A. Davis, Esquire and Wendy S. Smith, Esquire of Weber Gallagher
Simpson Stapleton Fires & Newby LLP**

As a practicing defense counsel in the Pennsylvania Workers' Compensation bar, one might ask these days how can we build up a strong, stallworthy defense in a world where many of the defense tactics available are constantly under scrutiny. For instance on April 1, 2009, N.R. Kleinfield published an article in The New York Times pointing out the almost "abusive" nature of independent medical examinations in the New York workers' compensation system. The article pointed out that many independent medical examiners are performing dishonest examinations in order to maintain a business relationship with the insurance carrier. The article quoted an independent medical physician who apparently admitted he issued bogus reports. This physician stated in an interview that "If you did a truly pure report you'd be out on your ears and the insurers wouldn't pay for it. You have to give them what they want, or you're in Florida."

Although the article was scrutinizing the New York Workers' Compensation system, this article was heavily circulated in the Pennsylvania Workers' Compensation bar. This article has also left a question in attorneys, claimants, employers, insurers, and judges' minds as to the credibility and reliability of independent medical examinations, as these examinations are among the most disputed components of the Pennsylvania Workers' Compensation system too.

Another issue has been recently raised by David R. Cooper, M.D. of Wilkes Barre, Pennsylvania who recently published an article addressing the lack of scientific

proof of causation regarding aggravation of pre-existing injuries.¹ Dr. Cooper points out that the subjective complaints of a claimant to prove an aggravation of a pre-existing, unrelated condition such as arthritis often serves as the legal basis for a judge to award compensation. However, Dr. Cooper states that often judges ignore the lack of scientific etiology showing a basis for a work-related trauma.

When evaluating a defense to a claim petition, Workers' Compensation defense counsel have to see whether there is a factual, medical or legal defense to the claim. If the injury was accepted, then you have to look at means to reduce exposure. The independent medical examination is the basis for a defense in almost every Workers' Compensation case. However, if the independent medical examination is mistrusted, the defense is weakened. If judges find aggravation of a pre-existing degenerative condition without scientific evidence, the defense is weakened. Therefore, Workers' Compensation defense counsel have to start looking outside the box to build an arsenal of defense in conjunction with independent medical examinations, labor market surveys, utilization reviews.

1. A New Twist on the Infamous IRE

One tool defendants have is the Impairment Rating Evaluation ("IRE"). There has been so much litigation surrounding IREs; however, the defendants have maintained this weapon in their pocket with the help of the Commonwealth Court decisions in Gardner and Diehl. However, a recent decision came out on October 15, 2009, which provides another means to use the IRE in a defense. In Johnson v. W.C.A.B. (Sealy Components Group), No. 763 C.D. 2009 (Pa. Cmwlth. 2009), the Commonwealth Court addressed a claimant's challenge of an IRE finding, on the basis, in part, that the IRE

¹ Trauma, arthritis and lawyers: Does it make sense?, Orthopedics Today, September, 2009, pp. 5,8.

physician was not qualified to render an opinion as he was not qualified. The claimant had a pulmonary problem and the IRE physician was not a pulmonologist.²

This case is interesting as the Court did not get to this question; however, the Court found claimant was not in a position to challenge the IRE as she did not appeal the IRE determination within sixty (60) days as required under 306(a.2)(2) and Section 123.105(d)(5) of the regulations. Under this regulation the employer must wait 60 days before changing the claimant's benefits from a total disability status to a partial disability status. Therefore, claimant has a 60 window to challenge the effectiveness of the IRE.

If the claimant does not challenge the determination, then the claimant cannot challenge the findings in the IRE report. There is a warning to be issued with this useful tool though. If the employer/insurer does not file a timely IRE, all issues can be raised in a Petition for Modification to effectuate the change of status. The claimant could challenge the IRE determination on the physician's qualifications. Therefore, this tool becomes most effective when you obtain a *timely* IRE.

2. Looking to Outside States' Trends – Californication of the Pennsylvania Workers' Compensation system.

Last Fall, the United States Supreme Court affirmed the Appellate Court finding that a 24-visit cap on chiropractic care, occupational therapy, and physical therapy for injured workers receiving Workers' Compensation benefits in California is constitutional. Pennsylvania employers and insurers should be looking closely as to whether they can bring about the same result; especially where the chiropractor is acting as the primary treating physician. The Court of Appeal of California affirmed that the California

² Jose Facundo-Guerro v. W.C.A.B. (Nurseymen's Exchange and Argonaut Insurance Co.), 163 Cal. App. 4th 640; 77 Cal. Rptr. 3d 731 (2008),

Constitution, Article XIV, § 4, neither restricts the Legislature's ability to limit the number of authorized chiropractic treatments nor expands an injured worker's constitutional rights to include an entitlement to receive unlimited treatments.

Claimant, Jose Facundo-Guerro received 76 chiropractic visits following a work-related incident. He filed a writ of review with the Court of Appeal of California after a Worker's Compensation Appeals Board (WCAB) decision determined that he was entitled to benefits covering only 24 chiropractic visits as specified under 4604.5 of the California Labor Code. Section 4604.5, subdivision (d) was enacted in 2003 as Senate Bill No. 228 and provided that, unless approved by an injured employee's employer, benefits for chiropractic treatments and physical therapy sessions were limited to no more than 24 visits per industrial industry, of the injury occurred after January 1, 2004.

Claimant contended that Section 4604.5 violated the California Constitution's mandate that Legislature has plenary power to create and enforce a "complete Worker's Compensation system that fully provides medical, surgical, hospital and other remedial treatment that will cure and relieve from the effects of such injury." Guerro, 163 Cal. App. 4th at 647. However, the Supreme court found that the California Constitution does not restrict Legislature's ability to limit the number of chiropractic treatments which are financed by the Workers' Compensation system, nor does the Constitution expand injured workers' constitutional rights to include an entitlement to unlimited treatments.

Under Pennsylvania law, defendants have the utilization review process which currently the exclusive means of determining the reasonableness and necessity of medical treatment when treatment is excessive. However, the Pennsylvania Constitution does not state that claimants are entitled to unlimited treatment and the defense legal bar should

look into petitioning a change in the law. The Pennsylvania Constitution provides under Section 18 – Compensation Laws Allowed to General Assembly:

The General Assembly may enact laws requiring the payment by employers, or employers and employees jointly, *of reasonable compensation for injuries* to employees arising in the course of their employment, and for occupational diseases of employees, whether or not such injuries or diseases result in death, and regardless of fault of employer or employee, and *fixing the basis of ascertainment of such compensation and the maximum and minimum limits thereof*, and providing special or general remedies for the collection thereof; but in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted. No act shall prescribe any limitations of time within which suits may be brought against corporations for injuries to persons or property, or for other causes different from those fixed by general laws regulating actions against natural persons, and such acts now existing are avoided.

N.R. Kleinfield, in his article about the mistrust of independent medical examinations, briefly touched upon the subject of injured workers' treating physicians who collaborate with workers or their attorneys to magnify or provide treatment for years without making the injured worker better. A law restricting the number of chiropractic and physical therapy sessions would prevent the abuse; especially where the chiropractor is the primary treating physician. Although this sounds abusive to injured workers, the law can be tailored as the California law was. Under Section 4604.5, the California legislation allows the employer to approve additional visits and the restricted number of visits does not apply for postsurgical physical medicine and postsurgical rehabilitation services.

3. Conclusion

With regard to defending claims, we still need independent medical examinations, labor market surveys, IREs, and utilization reviews. However, as the world changes, the

only way to bolster our defense arsenal is to keep thinking outside the box and looking for ways to make our laws better.