



MOORE INGRAM JOHNSON & STEELE
A LIMITED LIABILITY PARTNERSHIP

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TN Attorneys:

W. Troy Hart
Nick J. Peterson
Jennifer S. White
Cole B. Stinson
Charles E. Pierce
Phillip G. Gombar
Aspen S. Rains
S. Nikol Richardson
Gregory H. Fuller

Tennessee Office:

408 N. Cedar Bluff Road
Suite 500
Knoxville, TN 37923
(865) 692-9039
Fax (865) 692-9071

Email:
WTH@MIJS.COM

Website:
www.mijs.com

A Look in the MIR



When it comes to the art of practicing medicine, beauty can often be found in the eye of the beholder. The concept of a second opinion is as old as medicine itself, and many times two similar practitioners offer very different opinions. In 2005, the Tennessee Department of Labor launched a program for obtaining a third opinion to definitively resolve disputes between impairment ratings in workers' compensation cases.

The Medical Impairment Rating Registry (MIR) allows either party to request an impairment rating evaluation by an independent physician when two or more ratings exist. This independent rating is presumed accurate and serves as the official rating unless a dissatisfied party offers "clear and convincing" evidence otherwise.

In these situations, the question is what constitutes "clear and convincing" evidence. Claimants who go to the trouble of obtaining inflated IME ratings are rarely content with the presumed accuracy of an MIR rating and often challenge the result by litigating MIR physician's methodology.

This issue was tackled in a recent decision where the Special Workers' Compensation Appeals Panel took a hard look at Tennessee's MIR program. In *Beeler v. Lennox Hearth*, the 'clear and convincing' standard was used to uphold an MIR physician's rating.

Willie Beeler drove trucks for a living. One chilly day in late 2006, Willie slipped while exiting his tractor trailer, catching his foot in a ladder.

Willie managed to avoid hitting the ground by quickly clutching onto a nearby door handle. But Willie's deft maneuvering, was not enough to prevent a partial meniscus tear.

After performing an arthroscopy, the ATP, Dr. David Johnson, gave a 2% permanent impairment rating. Willie was not satisfied. His attorney sent him for an IME with Dr. Samuel Chung who concluded that Willie had suffered 7% permanent impairment based on pre-existing conditions. As a result, Willie was seen by an MIR doctor who rendered a 3% rating. Willie remained unsatisfied and challenged the presumed accuracy of the MIR rating at trial. His attorney argued that the 3% rating did not take Willie's previous knee problems into account, even though the MIR physician used the same methodology as Willie's second IME doctor.

The Court held that "clear and convincing" means evidence which raises "serious and substantial doubt." Willie's IME doctors had ignored the AMA Guide's requirement for actual trauma in this type of injury. Based on this discrepancy the Court ruled that Willie had cast insufficient doubt on MIR opinion and accepted the 3% rating.

This decision strengthens the MIR system by reinforcing its tie-breaking purpose. In the right circumstances, the MIR can reduce the bargaining power of inflated ratings. When considering the MIR option, the text of the AMA Guides is crucial. When an IME rating clearly distorts these medical guidelines, a third opinion could prove invaluable.

By: Gregory H. Fuller

New Regulation Mandates Impairment Ratings

A recently adopted Department of Labor regulation requires authorized treating physicians to issue a permanent impairment rating within 21 calendar days of maximum medical improvement. Under the new rule, authorized providers must enter the impairment rating into the medical records.

In addition, the provider must submit a C30A form to the Department of Labor as well as the parties. Failure to do so constitutes a violation of Department regulations and subjects the provider to civil penalties.

The rule also limits the charge for filling out the C30A at \$250. As word of this new requirement spreads, employers can expect some providers to institute policies requiring a \$250 fee for completing necessary paperwork. The rule does not compel IME physicians to file a C30A and only applies to claimants who reach maximum medical improvement after January 8, 2009.

In light of this potential new fee, in disputed claims employers should consider asking record custodians to certify all relevant medical notes with affidavit.

Department of Labor Revises Utilization Review Rules

On May 5, 2009, the Tennessee Department of Labor will conduct a rulemaking hearing on proposed utilization review regulations. The new regulations will replace existing rules and require the submission of several new forms in claims involving utilization review.

The process of utilization review offers employers & carriers the opportunity to objectively review the appropriateness of medical procedures ordered by authorized treating physicians. These determinations are limited to the medical necessity of in-patient and out-patient treatments and do not address causation issues. Review will be required whenever the parties dispute the necessity of a recommended treatment

Under the proposed regime, initial approvals may be issued by licensed registered nurses. Nurse case managers may not simultaneously serve as utilization review agents. Denials must be issued by a licensed physician trained in the same specialty as the authorized treating physician. Any denial must be accompanied by a detailed written report and an appeal

form. Utilization review agents may contact all parties including the claimant and the authorized treating physician.

Other highlights of the new regulations include:

-UR shall be initiated within 3 days of the recommended treatment.

-The employer shall notify all parties including the workers' compensation specialist of UR or face civil penalties.

-UR determinations must be rendered within 7 days of their submission.

-Within 3 days of receiving a UR denial, an employer must notify the employee, specialist and ATP in writing of its decision whether to authorize the treatment.

-Employees and ATPs shall have 30 days to appeal a denial with the Workers' Comp Division.

The new regulations will clarify the existing rules regarding the UR timeframe. However, the proposed rules allow specialists to assess \$1,000 civil penalties for violations. As such, employers and carriers should take compliance seriously.

By: Gregory H. Fuller

Eliminating Exposure Part I: Returning to Work

There are numerous ways in which employers can contribute to managing the cost of workers' compensation claims. It is important to be pro-active and aggressive with each claim in order to keep costs at a minimum.

In this three part series we'll take a look at the top ways an employer can reduce their exposure in a typical workers' compensation claim.

The Joy of Light Duty

The most effective tool available to employers in reducing exposure for workers' compensation disability benefits is capping the claim by returning the injured employee to light duty. If an employee makes a meaningful return to work with their employer the ultimate compensation is limited to 1.5 the medical impairment rating.

This strategy also applies in the context of temporary benefits. When the authorized treating physician gives an injured employee modified duty restrictions, employers should explore all available options for getting a claimant back to work. In these situations, documentation pays.

Employees who are released to light duty should be offered modified duty via certified mail. By sending the job offer by certified mail, the employer develops a clear record of accommodation. Once an offer is made, the ball's in the claimant's court to explain why he can't do what his doctor says he's capable of doing.

Many times, a claimant will reject such offers without a good reason. If these rejections are well-documented, an employer may be able to cap a claim regardless of whether the employee ever returns to work. The important thing is to shift the burden onto the claimant by making accommodations.

The employer should create light duty jobs for the injured employees any time it is practical to do so. If the employer is unsure as to what job duties are appropriate, the employer may want to consider having a job analysis prepared by a vocational rehabilitation counselor.

Alternatively, the ATP may have the employee undergo a Functional Capacities Evaluation or FCE which will more clearly spell out what job duties the employee is capable of performing. Both of these can be used by the employer to fashion a light duty job. Any light duty position should be reduced to writing demonstrating conformity with the ATP's restrictions.

Cantankerous Claimants

Often an injured employee will be difficult to deal with. This is especially true when the claimant rushes to obtain counsel. The most crucial decision in workers' comp claims is whether or not to continue the employment relationship. This determination should be made as soon as possible so appropriate steps may be taken in the event the employee is no longer welcome to return to work.

Even when light duty is not reasonable, employers should keep lines of communication open until the employee gets an attorney. Frequently, its the lack of communication which leads an employee to seek representation.

If the employment relationship is over, employers should consider taking recorded statements of the claimant to freeze their description of the incident as well as their symptoms. Honing in on specific complaints can reap dividends by preventing a disgruntled employee's attorney from tacking on unrelated injuries in order to gain bargaining power. In any case, employers and carriers should address the light duty issue early on in a claim. In doing so, they can ensure the right strategies for reducing exposure are implemented.

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Suite 500
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(865) 692-9039

FAX:
(865) 692-9071

E-MAIL:
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Online
www.mijs.com



Department of Labor Educational Conference

On April 28 & 29, the Tennessee Department of Labor will host its workers' compensation educational conference in Nashville. MIJS encourages employers and carriers to participate in this unique seminar.

The forum seeks to bring various stakeholders together to learn about updates in workers compensation law and discuss their points of view.

Topics will include:

- Anatomy & Mechanics of injury
- Defusing the Angry Employee
- Chiropractic Care

MIJS attorneys will be attending the conference. We hope to take advantage of this opportunity to exchange ideas and learn more about your workers' comp goals. If you would like to attend, please contact our office to get signed up.

About Moore Ingram Johnson & Steele...

MIJS is a value oriented law firm focused on providing customized solutions for our clients. Based in Marietta, GA, MIJS offers a full spectrum of legal services ranging from general liability to transactional tax planning.

Our Knoxville office specializes in workers' compensation defense

allowing us to aggressively minimize the overall expenses of claims. By leveraging the experience of nine comp attorneys, we help employers and insurers navigate Tennessee's workers' compensation system with an eye towards cutting costs. Please contact Troy Hart to see how MIJS can help you meet your workers' comp goals.