

AMA Guides Contrary to Law?

January, 1998

Chief Administrative Law Judge, Robert J. Smith, of the State of West Virginia Office of Judges, has found that the use of the DRE Model as required in the Fourth Edition of the AMA Guides is contrary to the West Virginia workers' compensation statute.

The case is Cottrell v. W.C. Division, Claim No. 92-66811 (d/o/i 7/7/91). Due to the importance of this decision, we have reproduced key portions of the decision. Judge Smith held:

The issue in this claim is the extent of permanent partial disability suffered by the claimant as a consequence of the compensable injury which occurred July 7, 1991. Furthermore, this claim is unusual and important because it involves a contention by the claimant that a key component of the Guides to the Evaluation of Permanent Impairment, Fourth Edition, is contrary to the West Virginia Workers' Compensation statute. Specifically, counsel for the claimant argues that the diagnosis related estimated (DRE) model, the preferred methodology in the Guides for determining impairment involving spinal injuries, is inconsistent with West Virginia law. I agree and for the reasons hereinafter set forth, I find and conclude that the DRE is contrary to the West Virginia Workers' Compensation laws. Accordingly, any report prepared pursuant to the DRE is unreliable as a matter of law.

The primary usage of the Guides in workers' compensation cases has been for musculoskeletal injuries. The first Guides edition established the methodology for determining musculoskeletal impairment. That methodology, the core of which has remained constant for more than 25 years, is the range of motion model. As the Guides became more accepted, the use of the range of motion model to determine musculoskeletal impairment similarly became more frequent. While the use of the Guides was not mandated by regulation or formal policy statement until 1996, based upon cases before the Office of Judges it is clear that for at least the past 10 years the majority of disability evaluators in musculoskeletal cases included a range of motion examination. While the range of motion model has some critics, it has for many years provided a reasonably consistent method for determining impairment. More importantly, its use was, and is, consistent with the statutory construct for determining permanent partial disability in West Virginia.

The fourth edition of the Guides, first published in 1993, continued the use of range of motion for musculoskeletal injuries of the upper and lower extremities. However, for injuries relating to the spine, the fourth edition mandated the use of a new rating model - the diagnosis related estimate model (DRE).

The DRE differs in several important respects from the range of motion model (ROM). First, even though examinations in both models are conducted only after maximum medical improvement has been attained, the impairment rating using the DRE, sometimes referred to as the injury model, is not necessarily based on the worker's condition at the time of evaluation. The Guides provides as follows at page 100:

With the Injury Model, surgery to treat an impairment does not modify the original impairment estimate, which remains the same in spite of any changes in signs or symptoms that may follow the surgery and irrespective of whether the patient has a favorable or unfavorable response to treatment. (emphasis added)

The fact that a worker's condition has improved or worsened since the time of injury are not to be taken into account in the impairment rating using the DRE. Using the ROM, the impairment rating is based on the worker's condition at the time of the examination.

Second, the DRE does not take into account so-called developmental findings such as osteoarthritis or herniated disc without radiculopathy, either of which may be aggravated by the injury and in some cases caused by the injury. Impairment caused by those conditions, and they certainly can cause impairment, are taken into account in examinations using ROM.

Third, the rating structure established for use with the DRE rates a specific injury. It is not structured and cannot be utilized in cases where there are sequential injuries to the same body part. For example, the claimant in this case suffered a low back injury in 1985. The injury at issue herein is also to her lower back. The DRE was not designed for and does not take into account the prior injury. Dr. Mukkamala's report and conclusion in this case illustrate the point. Based on his examination under the DRE, he concluded the claimant had a 5 percent impairment based on what he labeled unverified radiculopathy she suffered in connection with her 1991 injury. He then concluded that the claimant's total impairment was 5 percent notwithstanding the prior award of 4 percent. The conclusion that claimant's impairment has only increased by 1 percent is untenable and is directly attributable to the use of the DRE. The ROM, on the other hand, permits the evaluator to consider the prior injury. If the claimant's range of motion is worse, the evaluator can see that. If neurological findings are different, the evaluator can account for that.

Finally, the DRE was designed for use in traumatic injuries. That is the apparent basis for excluding "developmental findings" from consideration in reaching an impairment rating. If all cases involving the spine were limited to one traumatic event to previously uninjured parts, the DRE tool may be appropriate. The fact is many back injuries, even those with a definable traumatic element, have an element which is the result of employment related wear and tear over time. See *Lilly v. Commissioner*, 225 S.E.2d 214 (1976). Because the impairment from such injuries is more developmental in nature, it cannot be properly evaluated by the DRE. The ROM has successfully rated such injuries for a number of years and captured the actual impairment at the time of evaluation.

However, in reality, the DRE does not rate a person's impairment at the time of the evaluation. Instead, the DRE requires that the claimant be rated not based on his condition at the time of the evaluation, but rather upon the claimant's condition at the time of injury. No matter how startling that assertion may appear, it is precisely what the DRE mandates. As noted above, whether a claimant's condition improves or degenerates has no impact on his impairment rating. See *Guides*, Fourth Edition, page 100. Moreover, in *The Guides Newsletter*, published by the American Medical Association, September/October 1996, Edition, Dr. Robert Haralson, III, one of the authors of the musculoskeletal portion of the Fourth Edition, states as follows, "In the spine, because the results of the injury are rated rather than results of the treatment, a patient with radiculopathy from a compensable ruptured disc can be rated within several days of the injury." Thus, a claimant who initially has verified radiculopathy would receive a 10 percent impairment even if the radiculopathy, as a result of treatment, were no longer present at the time of the examination for impairment rating. Under the West Virginia statute that result would not be appropriate since the claimant would not be rated based on his condition at the time of the examination. (This example reflects an over-compensation situation. Other examples, however, show under-compensation situations.) Accordingly, the DRE violates W. Va. Code Secs. 23A-4-6(i) and 23-4-7a because the claimant is not rated based on his condition after reaching his maximum degree of improvement at the time of the examination.

The DRE protocol also violates W. Va. Code Sec. 23-4-9b. That section provides that when rating a compensable injury, a preexisting impairment may be excluded, but only if the preexisting impairment is definitely ascertainable. As noted above, the DRE excludes from consideration developmental findings even though such findings may result from employment related wear and

tear. The Guides justify that process by implying that all developmental findings are the result of aging. That simply is not accurate in many cases. In Sec. 23-4-9b, the Legislature has attempted to avoid such sweeping assumptions by permitting a preexisting impairment be excluded only if definitely ascertained. The DRE circumvents that process and an evaluation which excludes the claimant's developmental aspects in clearly in violation of the law.

The DRE also is contrary to Sec. 23-4-16, the reopening provisions of the statute. Under the law a claim may be reopened if the claimant's condition has grown worse subsequent to receiving an award or if there exist facts not previously considered. Under the DRE no additional award appears to be possible. It is clear that the impairment rating remains the same irrespective of whether there is a favorable or unfavorable response to treatment. It would necessarily follow that the impairment rating would not change thereafter in the absence of a new injury. Indeed, the DRE protocol specifically provides that surgery for treatment of any injury does not change the original impairment rating. Under the law, surgery, after an impairment rating, would certainly fall within the category of facts not previously considered and warrant a reopening in accordance with Sec. 23-4-16. Under the DRE a petition for reopening would be futile. Accordingly, the DRE is contrary to W. Va. Code Sec. 23-4-16.

Based on the above, I conclude that the DRE is contrary to the West Virginia Statutes relating to permanent partial disability. The DRE is a part of the Guides. The Guides were adopted as a regulation by the Compensation Programs Performance Counsel to determine whole body medical impairment. It is well settled that a regulation which is in conflict with law cannot be enforced. *State v. West Virginia Board of Dental Examiners*, 128 S.E.2d 620 (1962). Accordingly, any report based on the DRE is contrary to law and therefore unreliable as a matter of law.

For additional information contact Attorney M. Jane Glauser at 304-233-1220.