

LEGAL LINES

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MIND OVER MATTER: EVALUATING THE "MENTAL-MENTAL" Claim

By: John P. Fassola

As worker's compensation attorneys, we see injuries which are usually easily identified. However, the so called "mental-mental" claim can be a challenging change of pace for both the adjusters and the attorneys handling workers' compensation claims. Where we are used to seeing a distinct physical trauma—a blow with a hammer or a car accident—there are no actual physical mechanisms of injury in the mental-mental case. In addition, the usual physical manifestations and treatments are often missing in the mental-mental case. As a result, being presented with the mental-mental claim can require us to think outside of the box.

First, it is important to recognize what the "mental-mental" injury actually is. As the phrase suggests, a mental-mental injury is one in which both the mechanism of the injury and the manifestation are mental as opposed to physical. Unlike cases where a head trauma or other physical event results in psychological disturbances, in a mental-mental case the physical trauma is absent. Instead, non-physical factors such as job stress, harassment or fear are alleged to be the precipitating factor. In addition, the illness or manifestation is psychological rather than physiological in nature. Despite the difference, the Industrial Commission has been willing to recognize the ability to recover for psychological injuries caused from certain mental stresses that are job related.

Furthermore, the Illinois Supreme Court, in Pathfinder v. Industrial Commission confirmed the existence of the "mental-mental" case—at least in situations involving a sudden, shocking event. The Court's rationale was founded in part on the premise that since there is no dispute that psychological disabilities caused by a physical injury were compensable, it did not make sense to deny compensability for psychological disability caused by severe mental trauma.

However, unlike Pathfinder, the most frequently encountered cases do not involve a jarring emotional shock. Instead, the current framework in which most mental-mental cases arise is the area of stressful job conditions, job site harassment, and similar issues. The Pathfinder decision did not establish a useable framework under which alleged mental injuries caused by repeated stresses, rather than a one time shock, could be considered. The primary case law in this regard is provided by Runion v. Industrial Commission. In Runion, the claimant alleged that his mental illness was caused by repeated job place stresses over 38 years of work for the Respondent. Although the Petitioner's claim was eventually held to be non-compensable, the Runion decision set forth the criteria for determining the circumstances under which a mental-mental case is compensable.

According to the Runion Court, where mental trauma was alleged from factors not related to a single shocking event, the alleged mental trauma must be extraordinary, the conditions must exist from an objective standpoint, and the conditions must be the major contributing cause of the mental disorder. By "extraordinary" the Runion Court explained that the mental disorder must arise in a situation of greater dimension than the day-to-day emotional strain and tension which all employees experience. Moreover, where employment and non-employment factors combine to result in a psychological injury or illness, the employment conditions, when compared with the non-employment conditions, must be the major contributing cause of the mental disorder. Therefore, the Runion Court established a framework which, from a Respondent's viewpoint, was intended to create a very narrow set of circumstances under which the Petitioner could succeed on a mental-mental claim.

It is clear that the Runion framework is still in place. In a case recently handled by this office, the Industrial Commission issued an opinion reversing an Arbitrator's award for an alleged mental-mental injury. In a well reasoned and detailed opinion, the Commission ran the specific factors presented in the case through the Runion criteria to reach a conclusion in Respondent's favor.

In the case Perry v. Ford Motor Company, the claimant alleged that she suffered a mental disability as a result of harassment and confrontations at her work place. Although disputed by the Respondent, the Petitioner claimed that she was required to do jobs outside of specific physical restrictions and that she was confronted by superiors at work in an allegedly harsh manner because of her inability to perform her work activities. Petitioner alleged that the stresses of her work were causing disruptions such as nightmares in her sleep and eventually suicidal thoughts. She alleged that she had fainted during confrontations with her supervisors. She claimed an inability to work as a result of her mental status.

The Industrial Commission, in reaching its conclusions, first noted that Petitioner lacked credibility in her testimony. This factor highlights the importance of both a careful investigation of claims of this nature and a thorough cross-examination at Arbitration. Specifically, the Commission found the Petitioner not credible in her testimony regarding the episode of fainting at work and that her supervisors had confronted her with rough language and profanities. Finally, the Commission noted that the Petitioner's testimony conflicted with written accident reports and records from her treating physician

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*The Power Line***THE GOOD AND THE BAD**

By John F. Power, III

As is often the case, good and bad again surrounds the world of Workers' Compensation.

First is the good! In the case of *Kierski v. The Industrial Commission (Hobbs Corporation)* in an unpublished decision, the Appellate Court Worker's Compensation Division has stated that the Commission may give greater weight to an examining physician's opinion than that accorded to the opinion of a treating physician. Note in the underlying Commission decision, the Commission found that the opinion of Dr. Armen Kelikian, the independent medical evaluator for the Respondent, was to be given greater weight than the treating physician on the issue of causal connection because of Dr. Kelikian's superior qualifications as an orthopedic surgeon in the area of foot surgery (tarsal tunnel) and having presented and published a study on tarsal tunnel.

As some of you know, there is an unwritten feeling that the Industrial Commission will always take the treating doctor's opinion over that of an independent medical evaluator. *Kierski* clearly stands for the proposition that an independent medical evaluation can be successfully used to refute the opinions of the treating physician. However, you must strategically use the doctor to fit the architecture of the individual case. Here the self-insured and the carrier TPA permitted our office to select and coordinate the independent medical evaluation process, which resulted in a denial of compensability on whether there existed a causal connection between the work activity and the Petitioner's condition of ill-being (operated tarsal tunnel and plantar fasciitis).

Now, is the bad! In *Hollowell v. Wilder Corporation*, the Respondent faced an injured employee with a back problem requiring hospitalization, a restricted

return to work, subsequent disablement from work, and a series of epidural injections into the back followed by a physical therapy work hardening program with a disablement until completion of same. After the epidural blocks and prior to the physical work hardening, (while the Petitioner's treating physician still disabled him from work) the Respondent employer, through its insurance carrier, gained an independent medical evaluation that allowed the Petitioner to return to work immediately.

The employer's manager went to the employee's house and told him that he must return to work immediately or face the consequences of being fired. The employee stated he could not return to work under his treating doctor's orders. The employee was subsequently terminated and a lawsuit was filed for retaliatory discharge under the Workers' Compensation Act (pursuant to the *Kelsay v. Motorola* doctrine which applies retaliatory discharge to Workers' Compensation under Section 4(h) of the Act).

At trial, testimony indicated the following:

1. The employer's manager did not believe the employees claim as to the severity of his back injury.
2. The employer's manager stated to others that he was skeptical as to the employee's injury.
3. The employer's manager used profanity towards the employee.
4. The employer's manager accused the employee of being lazy and trying to get a free ride at the expense of the employer.

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"...there is an unwritten feeling that the Industrial Commission will always take the treating doctor's opinion over that of an independent medical evaluator."

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More importantly, the Commission found that, even if it accepted the Petitioner's version of the events, she failed to prove that she sustained compensable accidental injuries under the Act. The Commission found that the alleged mental stress complained of by the Petitioner, that of being reprimanded harshly by her supervisors over work issues in a factory setting, is not of a greater dimension than the emotional strain suffered by all employees at Respondent's facility and in other similar manufacturing operations. The Commission then addressed the second prong of the Runion framework and found that the Petitioner's alleged harassment did not exist in reality from an objective standpoint. While the Petitioner may have subjectively viewed her work place environment as harassment, her skewed view of what was occurring did not match with an objective evaluation of the work place environment. Finally, the Industrial Commission found that the medical evidence did not support a finding that the Petitioner's mental status was related to the alleged work place harassment. Instead, the Commission noted other stress factors in her life including the death of family members, and marital and alcohol problems.

The work place environment was not the direct causative factor in her mental illness. In fact, a physician on behalf of the Respondent noted that the Petitioner's claims of disability seemed to be motivated by her desire for a secondary gain from her complaints.

The Industrial Commission's decision in the case, which is currently being appealed by the Petitioner, is illustrative in several respects. First, we should recognize that we will continue to see claims of "mental-mental" disability particularly in work place scenarios where stress is an everyday part of the job. However, we should never assume that all job stress is compensable. Instead, under the Runion framework as clearly underlined by the Industrial Commission in the Perry decision, claims of mental-mental disability should be viewed as an unusual, extraordinary event. While we are all subjected to a certain amount of stress in our occupations, it is only those stresses which are objectively greater than those experienced by similarly situated employees which can even begin to result in a mental-mental claim.

If you would like to review a copy of the Industrial Commission's decision in Perry or would like a copy of the precedential decisions of Pathfinder v. Industrial Commission or Runion v. Industrial Commission, please feel free to contact any attorney in our office.

"...claims of mental-mental disability should be viewed as an unusual, extraordinary event."

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5. The employer's manager did not want the employee's kind of "people" working for them. (Note: This was denied by the employer's manager who was the employee's brother).

The Appellate Court, in deciding for the employee, enunciated that: "An employer may not discharge an employee on the basis of a dispute about the extent or duration of a compensable injury. An employer that fails to heed this rule subjects himself to retaliatory discharger under *Kelsay*." The Court went on to indicate that: "When there is a dispute between an independent medical examiner and an employee's physician with no evidence of fraud, the employer cannot discharge the employee on the basis of suspected laziness or malingering. It is for the Industrial Commission to settle disputes such as this where there are conflicting medical opinions."

Further, in affirming the underlying award for compensatory damages (lost time) and the \$50,000.00 punitive damage award made by the lower courts, the

Appellate Court stated the following:

"In this case, Plaintiff presented factual allegations of harassment and verbal abuse by the employer's manager. Further, it violates the purpose of the Act if an employer can dismiss an employee on the grounds of being lazy and not working when said employee's personal physician has ordered the employee not to return to work until physical therapy is completed. This constitutes sufficient grounds to impose punitive damages so defendant does not take such actions in the future."

This case should give us all pause to situations where terminations are considered and there is a dispute between the employee and employer relative to return to work or other collateral issues in the context of Worker's Compensation or Occupational Disease.

BE CAREFUL OUT THERE!

What's My Line

The Move To Power & Cronin

By Daniel J. Artman

In March 1999, I was working at Pollina & Earl in Schaumburg, Illinois, but felt it was time to make a change. While out watching the 1999 NCAA college basketball championship game with family and friends, my cousin introduced me to Carol Cesaretti, who told me that Power & Cronin was looking to hire a new associate. I sent in my resume, and within two months was the new associate at Power & Cronin.

Upon graduating from law school and passing the bar exam in 1997, I continued to work as a house painter and carpenter until I began working at Pollina & Earl. Pollina & Earl was the in-house counsel for an automobile insurance company. Their practice involved primarily personal injury defense, but also included litigation of insurance coverage issues. The practice was very fast paced and I was able to sharpen my skills while practicing before the Circuit Court of Cook County and deposing numerous witnesses. I tried three civil jury cases and two bench trials to verdict. In each case, the verdict was less than the plaintiff's last demand. In addition I also tried in excess of 150 arbitration in the Cook County Circuit Mandatory Arbitration Program.

Due to the nature of that kind of practice, I frequently proceeded to arbitration without having taken the plaintiff's deposition. This, coupled with the fast paced nature of the Cook County Circuit Court system, enabled me to make a smooth transition to practicing before the Illinois Industrial Commission—which does not have formal discovery rules. I was trained to "think on my feet" without the benefit of knowing what the other party's testimony would be. These skills have been further developed in my more than

two years at Power & Cronin.

While I practiced personal injury defense in a fast-paced environment at Pollina & Earl (which I thought prepared me for anything), I quickly learned that nothing had prepared me for the "different world" that is Illinois Workers' Compensation. Even though I knew how to question claimants, witnesses and doctors, I had to learn a whole new area of law, which is replete with its own subtleties, nuances and rules, some of which appear strange to those who have not practiced before the Illinois Industrial Commission. With my transition, the training program at Power & Cronin was invaluable, as was the patience and willingness to help demonstrated by my coworkers. Through that training, hard work, and high expectations, my comfort level with clients has grown as well. I now feel that, based on relationships I have developed with some of our clients, I have become an asset to the firm.

The move to Power & Cronin in May 1999 was an excellent move both personally and professionally. I have matured as an attorney; however, I also understand that I certainly have room to grow. This is the right place to continue that process. In fact, I feel so strongly about that, that I recommended two of my former associates from Pollina & Earl—Bill Dewyer and Matt Sheriff—to John and Dan, and they have now joined me at Power & Cronin.

"The move to Power & Cronin in May 1999 was an excellent move both personally and professionally"

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At Power & Cronin, Ltd., we pride ourselves on expert legal representation and personal attention to details. We interact with our clients to assist in developing procedures to contain current losses and avoid losses in the future. Additionally, we provide aggressive and cost efficient representation in order to protect our clients' interests.

We thank you for considering our firm to represent you and we look forward to working with you in the future.

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Thank you!*