How Not To Go Crazy Just Because Your Employee Did

Presented by:
Robert Cutbirth – Tucker Ellis LLP
Dr. David C. Hall, Ph.D.
Marc Leibowitz – Laughlin, Falbo, Levy & Moresi LLP

Moderated by:
John Riggs – Disneyland
What is a Psychological Injury?

- Emotional Conditions or Disabilities Resulting From Real or Imagined:
  - Physical Injuries
  - Verbal Assaultive or Demeaning Behavior
  - Organic Changes Derivative from Injury/illness

They can Include: Anxiety, Depression, Over/Under-Emotionality, Improper Behavioral Response, Sleeplessness, Lack of Attention, Anger
Why are Psychiatric Claims Difficult?

- There Are Often No Objective “Physical” External Signs
  - We Don’t “See” The Claimed Injury

- Stigma/Discomfort/Proof
  - Employees Don’t Want To Talk About Them
  - We Don’t Want To Ask About Them
  - Other Employees Are Skeptical They Exist

- Difficult To Value
  - Very Subjective – “Egg Shell” vs. “Hard Core” Claimants

- Often Lead To Other Problems/Costs
  - Improper Handling Creates Other Claims
  - Improper Handling Can Increase Defense Costs
The Workers’ Compensation Rules

- **Purely Psychiatric - Mental - Emotional Injuries Can be Recognized If**
  - They are the predominant cause of the Employee’s Claim, and
  - They do not arise from a "good faith personnel action" (there often is deference to employer’s action absent outrageous/illega conduct)

- Psychiatric injuries can also result from a specific, traumatic event
  - Event Triggering PTSD (armed robbery/shooting/death of another)

- There is a serious physical disability and the worker has been on the job for at least six months.
Compensability under the Labor Code

- Labor Code 4660.1 (DOI on or after 1-1-13)
  - There can be no increase in impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder arising from a compensable physical injury, although the Employee can obtain compensable medical care for such psychiatric conditions;

  **unless**

  - The Employee has been the victim of a violent act or direct exposure to a significant violent act, or has been involved in a **catastrophic injury**, such as a loss of a limb, paralysis, severe burn, or severe head injury.
Applicant Is Arguably Entitled To TD Benefits As Result Of Both Mental-Mental And Mental-physical Claims

- But, LC §4660 1(c), stating there shall be no increase in impairment ratings, does not expressly restrict TD for temporary psychological disability benefits.

Applicant May Be Entitled To Future Medical Even In The Case Of Mental-Physical Claims

But, what constitutes a “catastrophic injury”

- Do we look to the AMA/WPI ratings?
- Do we look to situations like “chronic pain,” where the CCR Treatment Guidelines (9792.20 – 9792.26) recommend psychological evaluations and cognitive-based treatment
In W/C – What are the Triggers of Investigation?

- Not Every Claim Triggers a “Psych Claim” Despite “Check the Box” Forms
  - Difference in Geography
  - Difference in Underlying Events
    - Election of Remedies
    - Interaction with Continuing Physical Injuries

- Discovery Responses
Evaluating Psychological Claims in W/C

Five of the Most Common Claims for Which Professional Evaluation is Often Needed:

- “Garden-variety” stress
- Personnel Action stress
- Post-Traumatic Stress Disorder (PTSD)
- Severe Injury with Psych Consequences
- Neuropsychological Cases
How We Diagnose – Pick the Right Team

Psychological Evaluation

- Psychologist/Psychiatrist – What are the Right Tests?

Neurologic Evaluation

- Neurologist/Medical Doctor – What are the Right Tests?

<table>
<thead>
<tr>
<th>Pre-Event History</th>
<th>Post-Event History</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Pre-Event History</strong></td>
<td><strong>Post-Event History/Change or Increase in Care</strong></td>
</tr>
<tr>
<td>Medical Records Review</td>
<td></td>
</tr>
<tr>
<td><strong>Family/Friend Interviews or Depositions</strong></td>
<td><strong>Reactions/Interactions with Friends and Co-Workers</strong></td>
</tr>
<tr>
<td><strong>Social Media</strong></td>
<td><strong>Social Media</strong></td>
</tr>
</tbody>
</table>
The Diagnosis/Diagnostic Report

- Write what we know
- Write what we don’t know (and why)
- Identify how an absence of documents/records/diagnostic evaluations impacts conclusions
- Recognize that 51% (or any amount) in a W/C report still harms Civil
- Consider impact on ongoing employment situations (findings can relate to “fitness for duty”)
- “Good Faith Personnel Action” is still one of the best defenses – Does it Fit the “Diagnosis”
QMEs Are Supposed To Conclude Cases …

- Financial Incentives May Prolong Case
- There Is A Scarcity Of Qualified/Capable Psychological Injury Evaluators/Treater

- Payments To Treaters Are Restricted
- Future Medical Can Be Provided Without Treatment Being “Completed” So Case Can Settle
How Civil Claims Differ (DFEH)

- No Requirement of Physical Injury
  - “Negligent” and “Intentional” Infliction of Emotional Distress
  - Emotional Distress as a Result of Illegal Workplace Conduct (Discrimination/Retaliation/Harassment)

- No Requirement of Predominant Injury
  - Requires only “Serious” Emotional Distress
How the W/C Claim can Hurt a Civil Claim

- Focusing on the 51% Rule can harm the Civil Case
  - Can confirm the existence of legally viable damages claim by a defense-related expert
    - (i.e., a 33% rating still fulfills civil damages standard)
  - Can confirm a causal link between employment-related activities and the employee’s Injury

Can you find the mistake? 1 2 3 4 5 6 7 8 9
Can lead to knowledge of a separate obligation to accommodate within the workplace ADA/FEHA

- Return to Work Issues May not involve just “Physical” Issues
- Return to Work Failing to Take Into Account Psychological/Emotional “Disabilities”
- “Considered” as “Disabled”

We – as Employers – Have Knowledge
- Direct – What we Learn from the Employee
- Indirect – “Hearsay”
Differing Medical Evaluations – DFEH v. Civil?

- Theoretically – The Evaluations Should be the Same

  **BUT**

- The “Claim” Issues can/will be framed differently
  - Because not all “Psychiatric” Claims are covered by W/C, you can have different/multiple “Psychiatric” issues in a “dual” Claim, requiring different evaluations
  - Timing – Civil can often “lag” W/C, so the “timing” of the Claims can affect scope/purpose/intent of the Evaluations
Pulling this Together - “Hypothetical” – Part I

- Employee suffers non-confirmed “cardiac” problems (most likely “stress”) – tells fellow employees (heard by supervisor) about his concerns

- Employer Knows of Multiple Known Visits to Doctors – Multiple Absences, but no express reason given to employer - receives attendance disciplinary warnings

- After 4-Day Hospitalization, he’s fired (for not calling in:
  - Wrongful Termination/Disability Discrimination
  - Workers’ Compensation/Stress-Psychiatric
Where Did Employer #1 Go Wrong

- Knowledge of “Something,” but took no action to investigate potential FMLA/Disability Issues
- No Medical Evaluations/Expert Opinions
- Treating Everything as “Disciplinary” Issue
- Action Taken at the “Wrong” Time; Without Explanation; No Remedial Response

So What Happens:

1. Loses Civil Action
2. Loses WCAB Action
3. Forced Rehire

** Lots of Money/Costs
Hypothetical – Part 2

- Reintegrating Employee Back into the Workplace
  - Management of “Stress”
  - Management of how other Employees View/Interact with Him
  - Management of Actual Productivity/Workplace Absences/”Mistakes”

- And then, he’s laid off as part of broader corporate RIF (They learned; this was done right)
Then the **New** Employer Comes Along

- No Employee Disclosures of Prior Events
- Pre-Employment Medical Evaluation - Clear
- “Egg Shell” Employee –
  - Knowledge of Ongoing Initial Workers’ Compensation Medical Appointment
  - Called in – Gone to Hospital
  - Mental Breakdown – Separation from Wife
  - Fired 11 weeks into position; separation made after 3 day absence
SO, WHAT DID HE GET THIS TIME?

- Six Figures .... But no Reemployment
- A Mediator Who Was Sympathetic but said “You Get What You Get … and You’re Screwed”

WHY

- No Medical Evaluation of Substance
- No objective Personnel File Information on Failure of Work Performance (but is was the probation period)
- Prior Issues not Relevant to “Current” Workplace
Tips for Valuing and Reserving

- **Early Determination: Physical or Psychological**
  - Will they actually pursue/support the claim?
  - What medical support exists – Pro & Con?
  - Do you have a civil claim pending/threatened?
  - What are the actual skills/impairments (just “distress” or actual impairments)
  - “I’m a Plaintiff” syndrome/External Influences
  - Workplace Dynamics ....
Tips for Settling/Defending

- The “Presentation” of the Dirty Details
  - Polarizing Presentation vs. Successful Presentation
  - Right Medical Evaluator/Presenter – Make the Claimant concerned

- Have the right Mediator and Counsel
  - Fewer Mediators Willing to Work on Certain Cases
  - Common “Complaints” on “Delayed” Mediations
Rob Cutbirth, Esq.
135 Main Street, Suite 700
San Francisco, CA  94105
415-617-2235
RAC@TuckerEllis.com

David C. Hall, Ph.D
715 E. Grand Blvd.
Corona, CA  92879
800-660-7757
drworkcare@aol.com

Marc Leibowitz, Esq.
600 B Street, Suite #2300
San Diego, CA 92101
619-233-9898
mkl@lfim.com