APRIL 2024 LOCAL MEETING

SPINAL PAIN MANAGEMENT HYPOTHETICALS

1. Petitioner suffers a compensable low back injury on January 20, 2018 and receives an Award of compensation on February 2020 for 40 percent permanent partial total, status post two compensable surgeries. The first is an L4 and L5 laminectomy/foraminotomy with discectomy at L4-5. There was no other evidence of MRI disc pathology at any time during MRI studies other than at the levels at L4-5 and L5-S1 (other than L5-S1 "minimal bulging disc"), where following the petitioner's failed spinal surgery, he underwent spinal cord stimulator implantation to address a chronic pain presentation. He was able to resume employment.

He then had a subsequent compensable accident on March 1, 2020, wherein it was determined that he suffered a non-displaced compression fracture of the L3 vertebrae, for which there was a 6 month period of physical therapy but no pain injection modalities. The petitioner then resumed employment and received a 10 percent increase of his overall disability [now 50 percent permanent partial disability] on June 1, 2021.

He was then involved in a non-compensable rear motor vehicle accident on May 1, 2021, where an uninsured intoxicated driver with no assets rear ended his vehicle, which in turn caused a traumatic injury to his low back where the spinal cord stimulator battery was located which trauma was deemed to have herniated the L3/L4 disc for which the petitioner required a significant course of treatment for multi-disciplinary lumbar management, including but not limited to physical therapy and consideration of potential multi-level instrumented fusion. Petitioner did not have adequate personal injury protection coverage for his treatment and had no adequate health coverage because he was out of work. He wasn't certain of his Medicaid entitlement but made a claim. He filed an application in the compensation court for medical and temporary disability benefits regarding applications for review or modification of his first two claims on the basis that his overall compensable conditions had worsened and that a material contributing factor to the petitioner's need for treatment was the compensable spinal cord stimulator battery which was part of the treatment protocol in connection with his first accident and that the same was therefore an inextricable part of the total damage to his spine following the May 1, 2021 accident, for which he was not at fault.

On the assumption that there is not a question concerning the battery itself materially impacting the overall damage to the petitioner's spine because of the last trauma, what are the arguments, if any in support of the petitioner's pending application for medical and temporary disability benefits regarding the first and/or second compensable accident?

2. What are the arguments of each respondent's counsel regarding the first and second accidents.

3. How should the workers' compensation judge rule notwithstanding the above limited information? What additional information would be necessary to better consider "compensability issues."

4. Consider alternate options for resolution. How would you approach this case?

2. The petitioner is a 45-year-old corrections officer who suffered two compensable accidents. The first was February 1, 2019, the second was March 1, 2021. In the first claim, he received an Award of 35 percent permanent partial total for an L4-5 fusion surgery with significant bilateral radiculopathy and status post pain management modalities with an ultimate resumption of employment in July of 2020. He returned to work, with his Award of compensation having been entered on January 5. 2021.

He then suffers his second compensable accident of March 1, 2021 when he fell while making an arrest sustaining trauma to his right shoulder and cervical spine resulting in a compensable right shoulder rotator cuff repair and two level cervical spine herniation with two level instrumented fusion surgery [C5-7] with a resumption of employment in May of 2022 and an award of compensation December 5, 2022 in the amount of 50 percent permanent partial total apportioned 30 percent for the cervical spine, 20 percent for the right shoulder. Both accidents were with the same employer and same counsel for the respondent. The March 1, 2021 claim did not totally disable the petitioner. He was placed on permanent light duty restrictions. There had been an attempt by the respondent to the have the petitioner terminated because he could not perform the essential functions of job duties. There was an arbitration pursuant to the collective bargaining agreement and ultimately, the petitioner was permitted to resume employment performed in-office administrative duties.

The petitioner came from a long lineage of law enforcement officers, including his grandfather, father and two uncles, and his younger brother. He was married with four young children. He had been devastated emotionally following the March 1, 2021 accident because he did not believe he was ever going to be able to resume his career. This resulted in a significant level of stress. He feared he would potentially not be able to provide for his family, including his children's college education. He was the sole provider of his family. His wife had a serious Parkinson's disorder for which she was receiving Social Security disability at a young age. She was capable of making certain that all four children received the appropriate care while the petitioner worked. This was a very close knit family but the petitioner worried excessively.

He did not pursue any type of compensable psychiatric disability in either of his two claims, in part for fear that he might have his weapon taken away from him, which would otherwise potentially terminate his law enforcement career. He felt he was constantly on the thinnest of thin ice regarding his continued employment with the respondent which he felt would again seek to terminate him if given the opportunity. His employment issue had been resolved by the time his permanency Award was entered. However, he had very significant ongoing medical treatment. He was being prescribed prescription strength Percocet and some narcotic medications which he did not take during the week while he was on duty. He began to develop increased symptomology with respect to both his neck, back and shoulder [he was right hand dominant]. He filed an application for review or modification of both of his Awards to seek potentially further medical treatment and release the need for medical treatment in connection with all three conditions. All three of the respondent's need for treatment evaluators concluded that further significant diagnostic testing was needed. His clinical presentation with respect to his neck, right shoulder and low back had all significantly worsened and each evaluating physician regarding his

neck, low back and right shoulder indicated that he probably should also be seeing a psychiatrist because of what appeared to be clinical evidence of severe anxiety and depression regarding his overall presentation. These opinions were made to the petitioner and his wife as stated in their reports to the carriers during the first week of February 2023. The low back spinal physician advised him that because of his relative inactivity, he had gained 75 pounds and was now "morbidly obese" and that any type of back spinal surgery [if necessary] would have to be deferred until there was a significant weight reduction. None of the doctors felt that they would make definitive assessments until the further diagnostics occurred. The spinal neurosurgical and right shoulder orthopedic examinations occurred within a week from each other during the first week in March 2023. The petitioner had limited accrued sick time. He was trying to not lose any time from work. He was finding it increasingly difficult attending work because of increasing physical pain regarding his compensable conditions. He had a very understanding supervisor that was allowing him to leave early, even though all of his duties were sedentary. It was just difficult for him to even mostly sit for an 8 hour shift. His sleep was becoming significantly challenged both in terms of getting to sleep and saying asleep. He tried his best not to share any of his ever increasing excessive worrying with his wife. It was obvious to her that all of this was taking a physical and mental toll on him. She felt that he should make an appointment for some professional help to help him get through this. She tried to be as supportive as possible, but she was ot a medical professional.

The petitioner was feeling increasingly frustrated and pessimistic about what was going to occur. He didn't know how he was going to be able to lose sufficient weight to get the surgery he may need. But if he got the surgery, he felt that what little additional functionality he had, would be gone and his law enforcement career would be over. This was an unacceptable outcome. He had three MRI studies done on an expedited basis on March 10, 2023 (neck, low back and right shoulder). His physicians all advised him about the need for significant surgical interventions for each body part. His low back pain was radiating into his lower extremities was the most severe of his symptomology, but the most serious MRI finding was a two level cervical cord compression for which the petitioner was developing myelopathy and he needed immediate prophylactic surgery. This needed to be a priority. He was taken out of work because of the potential significant consequences which could occur if he had a re-injury with such significant existing cord compression. This resulted in an authorized two level discectomy with instrumented fusion performed on April 5, 2023.

Within a week from being hospitalized, the petitioner began developing enhanced cervical spine symptomology with numbness and tingling developing in both of his upper extremities. He had not yet scheduled the right shoulder re-surgery that was necessary. He was prescribed post-surgical narcotic pain medication. On the evening of April 8, he advised his wife that he would be calling the surgeon about an expedited re-evaluation to address these ongoing disconcerting issues. He was visibly shaken. His wife tried to be consoling and was telling him this was a probable, normal consequence of the surgery, and that he had her 100 percent support and that all would be well. By this time, he and his wife were sleeping in separate bedrooms because he felt that his inability to sleep adequately was interrupting her ability to sleep adequately. He was developing extreme guilt and pessimism. The petitioner was found dead by his wife the following morning. He was in bed, having taken an overdose of the narcotic

medications which had been prescribed, which was determined in the autopsy to be the cause of death. There was no "suicide" note.

Assume that you are the petitioner's attorney. You had been kept abreast of all developments by both the petitioner and/or the petitioner's wife. She had never mentioned any suicidal ideation. Petitioner had never discussed that with his wife. In fact, he had an unrealistic determination to continue with a career that he was physically incapable of performing satisfactorily consistent with the life he knew before his compensable injuries.

1, To what extent, if any, should the petitioner's attorney have had the petitioner obtain a psychiatric assessment. To what extent did the attorney have an obligation to do so or at least discuss the issue with his client knowing the circumstances which were occurring?

2. What is the standard for proving a compensable suicide and/or a compensable "overdose". Do you believe this is a compensable death?

3. Would petitioner's knowingly taking an improper ingestion of narcotic medication be a defense as non-compliant with the authorized prescription or an otherwise intentional and therefore non-compensable action?

4. Assuming a compensable death claim, how would liability be apportioned between the two claims? What additional information would you need to know?

5. Assume all of the above, but add the following hypothetical facts: When the petitioner was seen by the orthopedist for the shoulder and the neurosurgeon for his neck and low back during the last week of February of 2022, both of the physicians indicated that the overall presentation was such that petitioner would clearly benefit from a psychiatric management for clinical evidence of significant depression/anxiety. Assume further that the following day, the petitioner's wife contacted petitioner's attorney indicating that this was the case. The attorney advised that he would make an immediate request upon counsel [which was done by email] on the same date that petitioner's wife had contacted the attorney. There had been no response by respondent's counsel. On March 5, the attorney reiterated his request for an immediate psychiatric evaluation and copied the client. There was still no response. On March 10, petitioner's attorney advised the petitioner by email that there has not been any response. He e-mailed his client "you are free to choose a psychiatrist of your choosing. I suggest communicating with your primary care physician in that regard if the respondent does not schedule an evaluation." The attorney also then emailed his adversary advising the action which had been taken. He requested all reports and advised he intended to file an application to the Court seeking sanctions if there was confirmation regarding the need for psychiatric treatment. There was no follow-up with either the petitioner nor the petitioner's wife on this part of the issue, as all further communication was with respect to the ongoing further assessments which were being made on orthopedic and neurologic basis. Based on the above limited facts, was petitioner's attorney's conduct under these circumstances in any way violative of his responsibility under the Rules of Professional Conduct and/or otherwise actionable concerning any other potential cause of action?

6. Does respondent or its attorney have any potential responsibility for failing to respond to such an inquiry. What additional information would you like to know that would make these issues easier to address in terms of assessing propriety of conduct.