

The AdMIRable Review



THIS ISSUE:

MIRR Spotlight

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Causation 3-4

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Dr. Talmage has been an advisor, member, and instructor for the Medical Impairment Rating Registry since the program's inception. He is an orthopedic surgeon who now has a non-operative private Occupational Medicine practice. He is board certified in Orthopedic Surgery and in Emergency Medicine, a past President of the American Academy of Disability Evaluating Physicians, and one of the original Examination Committee members for the American Board of Independent Medical Examiners.

Dr. Talmage is an Associate Editor of *The Guides Newsletter* and was associate editor of *The Guides Casebook, 2nd Edition* published by the American Medical Association (AMA). He was a reviewer for the 5th Edition of the *AMA Guides to the Evaluation of Permanent Impairment*, a contributor to the 6th Edition, and a member of the *Errata* committee. He is a paid consultant to the AMA on various impairment and disability issues.

Dr. Talmage is also a co-editor and a chapter author for *A Physician's Guide to Return to Work* published by the AMA Press (American Medical Association) in 2005 and the *AMA Guides™ to the Evaluation of Work Ability and Return to Work, second edition* published in 2011. He will be a co-editor



for the next edition (due out in 2013) of the *AMA Guides to the Evaluation of Disease and Injury Causation*. He is a peer reviewer for the *Archives of Physical Medicine and Rehabilitation*, for *The Spine Journal*, for *Journal of Occupational and Environmental Medicine*, and for *American Family Physician*. He serves on the Editorial Advisory Board of *The Spine Journal* and *Tennessee Medicine*.

Since 1992, Dr. Talmage has given more than 600 lectures to physician audiences on orthopedic, workers' compensation, impairment, disability, and occupational medicine topics and has written many textbook chapters. He is an Adjunct Associate Professor (Occupational Medicine) in the Department of Family and Community Medicine of Meharry Medical College, in Nashville, Tennessee.

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Making Your MIR Report Shine



By J. Edward Blaisdell

One of the major differences between a standard Independent Medical Evaluation (IME) Report and a Medical Impairment Rating (MIR) Report is formatting. In a traditional IME report, the physician is free to transcribe the opinion on a private letterhead and is not required to provide detailed rationale as to how the medical impairment percentage is decided. In an MIR Report, however, the MIR Physician is required, according to Tennessee Rules and Regulations 0800-2-20-.11, to use the MIR Report form “in all cases to detail the evaluation’s results.” This MIR Report form is available in a savable, user-friendly *Microsoft Word* format by writing Jay.Blaisdell@tn.gov or Daphne.Pryor@tn.gov. Saving copies of your MIR Report saves you time if there are revisions that need to be made after your initial MIR Report is submitted. Rather than re-write the entire report, it is much easier to merely change the item in question.

The MIR Physician is also required to provide “the rationale for the rating based on reasonable medical certainty,” according to the Program Rules. This rationale must be “supported by specific references to the clinical findings, especially objective findings and supporting documentation including the specific rating system, sections, tables, figures, and *AMA Guides* page numbers, when appropriate, to clearly show how the rating [is] derived” (TN Rules and Regulations 0800-2-20-.11).

When preparing an MIR Report, take care to avoid common pitfalls that could result in rejection of the

report. For example, a miscalculated or misapplied “net adjustment formula” is one of the most common reasons a 6th Edition MIR Report is not accepted. Consequently, we have added to the MIR Report template a fill-in-the-blank formula to make the math clear. Please keep in mind that the final grade is always expressed as a letter, not a number, with the letter “C” representing the default value in the center of each class. After the modifiers are used in the net adjustment formula, a net adjustment of “+1” yields a final grade of “D,” immediately to the right of the default value within the class you have chosen. A net adjustment of “+2” yields a final grade of “E.” Similarly, a net adjustment of “-1” is the final grade of “B,” the value immediately to the left of the center default value. A net adjustment of “-2” is the final grade of “A.”

It is also important to remember that, in most cases, at least two attorneys—one for each party—as well as one of your peers and possibly a judge may be scrutinizing your work. The easier you make it for these people to follow your work, the more likely they are to understand it, and the less likely they are to question it.

Finally, if you want your MIR Report to be accepted on the first submission, please make sure you sign and date it. Please also be mindful of the due date of your MIR Report since an untimely report may result in a refund to the employer, pursuant to the Program Rules. If you are unclear of the due date of your MIR Report, if you need more time, or if you need help with any formatting or *AMA Guides* issues, please give us a call at 615-253-5616 or write Jay.Blaisdell@tn.gov. We will do everything we can to accommodate and assist you.

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SHOULD AN MIR PHYSICIAN COMMENT ON CAUSATION?

Case Law vs. the *AMA Guides*

The Case for Case Law

By Josh Baker, Esquire

The General Assembly established the MIRR Program through the Workers' Compensation Reform Act of 2004 as a vehicle to provide accurate and unbiased opinions on an injured employee's degree of permanent medical impairment for the purpose of aiding parties and the trial courts in resolving workers' compensation claims in a cost effective manner. As every MIR Physician is aware, the impairment opinions provided through the MIRR Program enjoy a presumption of accuracy, in all legal proceedings, that can only be overcome by the presentation of clear and convincing contradictory evidence. What is less clear, however, is how far the presumption of accuracy extends. The Tennessee Supreme Court Special Workers' Compensation Panel has recently addressed these questions.

In *Danny Smith v. Nestle Waters North America, Inc.*, the parties selected Dr. Joseph Trubia, an orthopedic surgeon practicing in Gallatin Tennessee, from the MIR Registry to give an impairment opinion for an employee who had suffered a back injury. Dr. Trubia provided the examination and produced an MIR Report and, later, during a deposition, opined that the employee's injury was work-related. The employer moved to exclude Dr. Trubia's causation opinion claiming that the MIRR Program rules prohibited him from opining on the issue. The trial court denied the employer's motion. The employer appealed and the Panel affirmed holding that Dr. Trubia's opinion was

relevant evidence and therefore admissible. In *Courier Printing v. Sims*, the Panel faced a similar set of circumstances when Dr. David Gaw, a Nashville orthopedic surgeon, was selected from the MIR registry to provide an impairment rating. Like Dr. Trubia, Dr. Gaw was also asked during a deposition to give an opinion on causation and Dr. Gaw opined that the employee's injury was work-related. The trial court admitted Dr. Gaw's causation opinion over the objections of the employer. On appeal, the Panel affirmed the admission of Dr. Gaw's causation opinion and further held that, while the opinion was admissible, it did not enjoy the presumption of accuracy that attaches to a MIR Physician's impairment opinion.

So what does this mean for MIR Physicians? Put simply, an opinion on causation is beyond the intended scope of the MIRR Program. In fact, in most MIR cases, the injury has long been accepted as work-related, and causation is no longer disputed. Consequently, the "MIR Report Instructions" discourages MIR Physicians from providing blanket causation opinions. Not only do such opinions lack a presumption of accuracy, as provided in *Courier Printing v. Sims*, but they also have the potential of unsettling an issue that is already settled. Furthermore, such opinions make it difficult for litigants and courts to differentiate the proper burden of proof—"preponderance of the evidence" or "clear and convincing"—which can result in additional litigation and unnecessarily delay claims. Finally, if nothing else, MIR Physicians are not given a fee for providing blanket causation statements.

(Continued on next page .)

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SHOULD AN MIR PHYSICIAN COMMENT ON CAUSATION?

Case Law vs. the *AMA Guides* (continued)

Letting the *Guides* Be Your Guide

By J. Edward Blaisdell

As an MIR Physician, however, your responsibility is to provide a medical impairment rating according to the *AMA Guides*. In MIR evaluations that involve two or more possible diagnoses for the same body part, you should, according to the *AMA Guides*, 6th Edition, consider causation.

For example, when assessing lumbar injuries with two or more potential diagnoses, please refer to page 562: “If more than one diagnosis can be used, the one that provides the most clinically accurate impairment rating is selected; this will generally be the more specific diagnosis.” The authors then describe what they mean by the “more specific diagnosis.” In cases where “more than one diagnosis is applicable (eg, spinal stenosis and AOMSI), the causally-related diagnosis that provides the higher impairment rating should be used.” Thus, the “more specific diagnosis” is the one that provides the highest rating AND is causally related, either directly or through aggravating an underlying condition.

For a knee injury, please refer to page 499: “If more than 1 diagnosis can be used, the one that provides the most clinically accurate impairment rating should be used; this will generally be the more specific diagnosis.” If you feel that a meniscal tear aggravated underlying arthritis, the arthritis would be the proper diagnosis (provided it results in a higher rating than a meniscal tear). If, however, you feel the claimant’s symptoms stem solely from the meniscal tear, then “meniscal tear” would be the proper diagnosis, even though it does not yield the higher rating.

For upper extremities with two or more potential diagnoses, cite page 389: “If more than 1 diagnosis can be used, the one that provides the most clinically accurate impairment rating should be used; this will generally be the more specific diagnosis.” The phrase “more specific diagnosis,” as defined on page 562, is “the causally-related diagnosis that provides the higher impairment rating.” For shoulder injuries with two or more potential diagnoses, please refer to page 387: “In most cases only one diagnosis will be appropriate. If a patient has 2 significant diagnoses, for instance, rotator cuff tear and bicep tendonitis, the examiner should use the diagnosis with the highest impairment rating for the impairment calculation.” On page 390, the authors elaborate: “The evaluator is expected to choose the most significant diagnosis and to rate only that diagnosis using the DBI method that has been described. If clinical studies confirm more than 1 of the following symptomatic diagnosis—rotator cuff tear, SLAP or other labral lesion, or bicep tendon pathology—the grade can be modified according to the Clinical Adjustment Table (15-9).”

Consequently, although blanket statements on causation are discouraged because they are beyond the scope of the MIR Program and carry no presumption of accuracy, when the body part in question has more than one possible diagnosis, the *AMA Guides* will require you to opine that it is causally related, either directly or through aggravation, before taking it into consideration. If both potential diagnoses are causally related, choose the one that will yield the highest rating. When in doubt, please refer to the *AMA Guides*, use your professional judgment, cite and support your work, and let the attorneys sort the rest.

“In cases that involve two or more possible diagnoses for the same body part, you should, according to the *AMA Guides*, 6th Edition, consider causation.”

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