

WORKERS' COMPENSATION SHOP TALK

QUESTION: Is a Claimant's Refusal to Undergo Psychological Testing During an Examination a Basis for Suspending a Claim?

Employers are guaranteed the right to have a claimant examined by R.C. 4123.651. Pursuant to that section, an employer of a claimant who alleges a physical or psychological injury is entitled, without the approval of the BWC or Industrial Commission, to have the claimant examined by a physician or psychologist of the employer's choice one time "upon any issue asserted by the employee or a physician of the employee's choice or which is to be considered by the Commission..." R.C. 4123.651(A). A refusal to submit to such an examination or execute a release may result in a suspension of the claim during a period of refusal. R.C. 4123.651(C). Recently, the Ohio Court of Appeals, Tenth Appellate District was presented with a case involving a claimant who attended a psychological exam but, upon the advice of counsel, refused to submit to written testing, and whether that refusal justified a suspension.

State ex rel. Cribbs v. Indus. Comm., 2019-Ohio-2883, involved a firefighter who sustained several physical injuries in the course and scope of employment. He later sought to have his claim recognized for several psychological conditions, including "substantial aggravation of pre-existing major depressive and anxiety disorder" based upon a medical diagnosis by a psychologist who performed a Personality Assessment Inventory Test. When the employer scheduled the claimant for an IME with its own psychologist, the claimant showed up but refused to participate in any psychological testing based upon the advice of counsel. Claimant apparently based his refusal upon provisions in the Industrial Commission's own "Medical Examination Manual" that allows claimants to refuse testing. (The Manual instructs examiners that psychological testing such as the MMPI and Bender-Gestaldt are considered "part of a psychological examination" and if the claimant declines testing, examiners are to "note the refusal and base opinions on available data.") The motion proceeded to hearing and the additional psychological conditions were allowed by a DHO over the employer's objection, but an SHO vacated that order and suspended the claim due to the claimant's refusal to subject himself to testing. This prompted an action seeking a writ of *mandamus* with the Tenth District.

The Tenth District affirmed, finding that the manual governed only examinations by medical examiners engaged by the Industrial Commission, not employers. The rights of employers are governed by R.C. 4123.651, which permits examinations and authorizes a suspension of claims for failure to submit to them. The Court rejected the claimant's argument, and found no "good cause" existed to justify the claimant's refusal to take the tests.

The "Medical Examination Manual" cited in *Cribbs* governs examinations ordered by the Industrial Commission, and prescribes procedures most often associated with permanent total



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disability (“PTD”) claims. The claimant’s attorney’s attempts to impute those procedures on examinations performed by employers fell flat with the Court.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers’ compensation issues, please feel free to contact me.

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