

WORKERS' COMPENSATION

IREs AT ISSUE AGAIN!

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Since the introduction of Act 57 to the Pennsylvania Workers' Compensation Act, the workers' compensation arena has been faced with interpreting it as it pertains to Impairment Rating Evaluations (IREs). In Lewis v. WCAB (Wal-Mart Store, Inc.), 856 A.2d 313 (PA. 2004), the Pennsylvania Supreme Court held that an employer was entitled to no more than two impairment rating evaluations during a twelve-month period. Then, in Gardner v. WCAB (Genesis Health Ventures), 888 A.2d 758 (PA. 2005), the Supreme Court dealt with the timeliness of IREs and held that an employer may request an IRE more than 60 days after the claimant received 104 weeks of total disability, but a Modification is necessary to change the benefit status. Recently, in Diehl v. WCAB (IA Construction & Liberty Mutual, Ins.), 2008 PA Cmwlth. Lexis 312 (Pa Cmwlth. Ct 6/29/2008), the Commonwealth Court ruled that IREs beyond 60 days after the payment of 104 weeks of temporary total disability require proof of available work or earning power assessments through a labor market survey. The Diehl case is currently on appeal and not yet final.

Now, the court in Christopher Combine v. WCAB (National Fuel Gas Distribution Corporation), 954 A.2d 776 (Pa. Cmwlth. 2008) has addressed whether "Maximum Medical Improvement" (MMI) is a prerequisite to conducting any IRE. In Combine, the claimant suffered a work-related injury on December 4, 2000, in the nature of a medial meniscus tear of the left knee. A Notice of Compensation Payable was voluntarily issued, and the claimant began receiving total disability benefits.

On July 16, 2006, the employer filed a Modification Petition alleging a change of status from total to partial disability based upon an IRE of June 20, 2006, resulting in a 20% impairment. The claimant denied the allegations, asserting he had not reached

MMI. It was the claimant's position that a finding must be made that the claimant reach MMI prior to an IRE. The Workers' Compensation Judge rejected this argument stating as follows:

... Pennsylvania has promulgated statutory and regulatory rules which govern the conduct of impairment rating evaluations in Pennsylvania. A finding of maximum medical improvement is not part of that statutory scheme. Combine (Id. 954 A.2d at p.2).

The claimant appealed, and the Workers' Compensation Appeal Board affirmed. The claimant filed a Petition to Review before the Commonwealth Court. The Commonwealth Court reversed, finding that the Workers' Compensation Judge erred in granting the employer's Modification Petition.

The Commonwealth Court indicated that this precise issue is one of statutory construction. In its analysis, the court cited to portions of §306(a.2) of the Pennsylvania Workers' Compensation Act which outline the timing of an IRE evaluation. Section 306 (a.2) provides in pertinent part:

(a.2)(1) When an employee has received total disability compensation pursuant to clause (a) for a period of one hundred four weeks, unless otherwise agreed to, the employee shall be required to submit to a medical examination which shall be requested by the insurer within sixty days upon the expiration of the one hundred four weeks to determine the degree of impairment due to the compensable injury, if any. The degree of impairment shall be determined..., **pursuant to the**

most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment.
(Emphasis added.)

(2) If such determination results in an impairment rating that meets a threshold impairment rating that is equal to or greater than fifty per centum impairment under the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, the employee shall be presumed to be totally disabled and shall continue to receive total disability compensation benefits under clause (a). If such determination results in an impairment rating less than fifty per centum impairment under the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, the employee shall then receive partial disability benefits under clause (b): Provided, however, that no reduction shall be made until sixty days' notice of modification is given.

...

(5) Total disability shall continue until it is adjudicated or agreed under clause (b) that total disability has ceased or the employee's condition improves to an impairment rating that is less than fifty per centum of the degree of impairment defined under the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment.

(6) Upon request of the insurer, the employee shall submit to an independent medical examination in accordance with the provisions of Section 314 to determine the status of impairment. Provided, however, that for purposes of this clause, the employee shall not be required to submit to more than two independent medical examinations under this clause during a twelve-month period.

...

(8)(i) For purposes of this clause, the term "impairment" shall mean an anatomic or functional abnormality or loss that results from the compensable injury and **is reasonably presumed to be permanent.** (Emphasis added.)

(ii) For purposes of this clause, the term "impairment rating" shall mean the **percentage of permanent impairment of the whole body resulting from the compensable injury.** The percentage rating for impairment under the clause shall represent only that impairment that is the result of the compensable injury and not for any preexisting work-related or non-work-related impairment. (Emphasis added.)

The court then focused on the most recent edition, the 6th edition, of the American Medical Association's Guides to the Evaluation of Permanent Impairment. It should be noted, however, that the 6th edition was not applicable as the IRE evaluation took place prior to its publication. The court's attention turned specifically to § 2.3(c), 2.5(e), and 2.5(f) of the Guides, which read as follows:

2.3c When Are Impairment Ratings Performed?

Only permanent impairment may be rated according to the Guides, and only after the status of "Maximum Medical Improvement" (MMI) is determined, as explained in Section 2.5e. Impairment should not be considered permanent until a reasonable time has passed for the healing or recovery to occur. This will depend on the nature of underlying pathology, as the optimal duration for recovery may vary considerably from days to months. The clinical findings must indicate that the medical condition is static and well stabilized for the person to have reached MMI...

2.5e Maximum Medical Improvement

Maximum Medical Improvement refers to a status where patients are as good as they

are going to be from the medical and surgical treatment available to them. It can also be conceptualized as a date from which further recovery or deterioration is not anticipated, although over time (beyond 12 months) there may be some expected change...

Thus, MMI represents a point in time in the recovery process after an injury when further formal medical or surgical intervention cannot be expected to improve the underlying impairment. Therefore, MMI is not predicated on the elimination of symptoms and/or subjective complaints. Also, MMI can be determined if recovery has reached the stage where symptoms can be expected to remain stable with the passage of time, or can be managed with palliative measures that do not alter the underlying impairment substantially, within medical probability.

Maximum Medical Improvement does not preclude the deterioration of a condition that is expected to occur with the passage of time or as a result of the normal aging process; nor does it preclude allowance for ongoing follow-up for optional maintenance of medical condition in question...

2.5f Permanency

Permanency is the condition whereby impairment becomes static or well stabilized with or without medical treatment and is not likely to remit in the future despite medical treatment, within medical probability. This term is usually synonymous with MMI, usually occurring when all reasonable medical treatment expected to improve the condition has been offered or provided. Impairment ratings are to be performed when an individual is at a state of permanency.

The court indicated that the term "shall" in §

306(a.2)(1) is clear and unambiguous and, since the Guides indicate that an impairment may be calculated only after an individual reaches MMI, MMI status is a prerequisite to determining an individual's impairment due to the work injury. The court further noted that reaching MMI as a prerequisite for an impairment rating is bolstered by the General Assembly, which precludes an employer from obtaining an IRE until the claimant has reached 104 weeks of total disability. The court stated that this "waiting period" is analogous to the AMA Guides instructing that an impairment rating should not be considered "permanent" until a reasonable time has passed for healing or recovery to occur. The court stated that permanency is synonymous with MMI and, since the Act provides for no more than two IREs in a twelve-month period, such language further supports that an injured worker's condition be static prior to an IRE. The court acknowledged per the Guides that, although a person's condition may change over time, further recovery or deterioration is not expected and, therefore, the individual is static or at MMI.

In a footnote, the Commonwealth Court also cited to the 4th edition of the AMA Guides, which was the most recent edition at the time §306(a.2) was added to the Act, acknowledging it has similar language to the 6th edition. For the purposes of this article, the pertinent sections of the 4th edition are as follows:

2.3 General Comments on Evaluation

An impairment should not be considered "permanent" until the clinical findings, determined during a period of months, indicate that the medical condition is static and well stabilized. (Emphasis added.)

GLOSSARY

TERMS USED IN ASSESSMENT ACCORDING TO GUIDES

... Permanent impairment is impairment that has become static or well stabilized with or without medical treatment and is not likely to remit despite medical treatment.

A permanent impairment is considered to be unlikely to change substantially and by more than 3% in the next year with or without medical treatment. If an impairment is not permanent, it is inappropriate to characterize it as such and evaluate it according to Guides criteria. (Emphasis added.)

Although the Commonwealth Court did not cite to the 5th edition of the Guides to the Evaluation of Permanent Impairment, it should be noted it also contains similar language that the claimant is to reach MMI before an impairment rating can be determined. The 5th edition reads in pertinent part, as follows:

1.2a Impairment

The Guides continues to define **impairment as "a loss, loss of use, or derangement of any body part, organ system, or organ functions." ...An impairment is considered permanent when it has reached maximal medical improvement (MMI), meaning it is well stabilized and unlikely to change substantially in the next year with or without medical treatment. The term impairment in the Guides refers to permanent impairment, which is the focus of the Guides...**

2.4 When Are Impairment Ratings Performed?

An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of maximum medical improvement (MMI). It is understood that an individual's condition is dynamic.

Maximal medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change. Once an impairment has reached MMI, a permanent impairment rating may be performed... (Emphasis added.)

Taking the Guides and the Act into consideration, MMI is clearly relevant to an Impairment Rating Evaluation.

Specifically, in Combine, the employer's medical expert testified the claimant needed a total knee replacement, which could have provided complete pain relief, eliminated swelling and limping, and given the claimant better stability. However, it was apparent that the Commonwealth Court's decision denying the modification was focused more on the medical expert's testimony that he did not believe MMI was required under the Pennsylvania law and that such a determination required a different type of evaluation.

The Combine case only served to reinforce the claimant's objections to IREs prior to reaching MMI. The real issue still is, when has the claimant reached MMI? As in all litigation, one medical expert's interpretation of MMI can vastly differ from another expert's interpretation and, therefore, it is incumbent on employers and carriers to establish the necessary evidence of MMI prior to proceeding with an IRE.

Practical Tip: Before proceeding with litigation on an IRE, establish that the claimant has reached MMI through an IME expert. The evidence from an IME physician and the IRE physician can be combined to establish that the claimant has reached MMI and that an impairment rating is appropriate at that point. MMI evidence can also be obtained, in conjunction with the IME and the IRE, through a treating physician.

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