

IREs – A DIVIDED COURT CHANGES THE LANDSCAPE

PA Workers' Compensation • September 23, 2015

A divided Commonwealth Court holds that use of the 5th and 6th Editions of the AMA Guides to the Evaluation of Permanent Impairment is unconstitutional and, therefore, IREs performed under §306 (a.2) must use the 4th Edition Guides

Protz v. WCAB (Derry Area School District); No. 1024 C.D. 2014; (Pa. Cmwlth. September 18, 2015)

The claimant sustained a work-related injury to her right knee in April of 2007. The employer paid the claimant workers' compensation benefits until she returned to work, at which time her benefits were suspended. Due to a recurrence of disability, the claimant's benefits were later reinstated per a Supplemental Agreement.

The employer then requested an Impairment Rating Evaluation (IRE), which was performed in October 2011. The physician performing the IRE used the 6th Edition of the AMA Guides to the Evaluation of Permanent Impairment (Guides), the most recent version at the time. The employer filed a modification petition seeking to convert the claimant to partial disability status.

The Workers' Compensation Judge granted the employer's petition, finding that the claimant was less than 50% impaired under the 6th Edition of the Guides. The claimant appealed to the Workers' Compensation Appeal Board, arguing that §306 (a.2) was an "[u]nconstitutional delegation of authority by the state legislator." The Board affirmed the Judge's decision, essentially finding that the issue of the constitutionality of the provision had already been decided by the Commonwealth Court.

On appeal to the Commonwealth Court, the claimant argued that §306 (a.2) of the Act was unconstitutional because it gave the AMA, rather than the General Assembly, authority to establish criteria under which a claimant is adjudicated partially or totally disabled. The claimant pointed out that, since IREs began being performed, the Guides have undergone two revisions and the current edition provided substantially different standards than those in the 4th Edition, thereby causing claimants who would have been considered more than 50% impaired under the 4th Edition to be less than 50% impaired under the 6th Edition. The

employer argued that the issue of the constitutionality of §306 (a.2) had already been decided.

The court agreed with the claimant and granted the appeal. In doing so, the court said that the mere requirement under §306 (a.2) that the most recent version of the AMA Guides be used to determine a claimant's impairment rating was, under this basis alone, enough to find §306 (a.2) unconstitutional. The court further found that the Act lacked a mechanism requiring governmental review of the Guides by the promulgation of regulations. In the court's view, the General Assembly adopted as its own the methodology enumerated by the AMA at the time it enacted §306 (a.2), the methodology contained in the 4th Edition of the Guides. The General Assembly has not reviewed and readopted the methodology contained in subsequent editions. The court noted that this lack of review of subsequent editions of the Guides left "unchecked discretion" completely in the hands of a private entity and gave the AMA "carte blanche authority" to implement its own policies and standards. The court concluded that §306 (a.2) was an unconstitutional delegation of legislative authority because it proactively approved versions of the AMA Guides beyond the 4th Edition without review. The court vacated the Board's decision and remanded the matter to the Judge to apply the 4th Edition of the AMA Guides.

It must be emphasized that the Commonwealth's Court's focus in this opinion was on the part of §306 (a.2) that states, "[i]f such a determination results in an impairment rating of less than 50% impairment *under the most recent edition* of the AMA 'Guides to the Evaluation of Permanent Impairment,' the employee shall then receive partial disability benefits... ." The remand by the court to the Judge to allow a decision to be made based on the 4th Edition of the Guides seems to indicate that IREs can be performed, provided that the 4th Edition of the Guides is used. ||

Francis X. Wickersham, Esquire
Shareholder, Workers' Compensation Department
620 Freedom Business Center, Suite 300
King of Prussia, PA 19406
Direct: (610) 354-8263 | Fax: (610) 354-8299
Email: fxwickersham@mdwccg.com