

Governor Wolf Signed Act 111 Of 2018 “Protz Fix House Bill 1840”

Background

In 1996 Act 57 was enacted with the legislative intent to reduce Employer’s Workers’ Compensation costs with the goals of retaining Pennsylvania Employers and attracting new Employers. Act 57 provided for the implementation of an Impairment Rating system that applied to injuries occurring on and after 8/23/1996. The Pennsylvania Supreme Court in 2017 in Protz v. Workers’ Compensation Appeal Board (Derry Area School District) 161 A.3d 827 (Pa.2017) interpreted the 1996 Impairment Rating feature under Section 306(a.2) of the Pennsylvania Workers’ Compensation Act to be unconstitutional. The legislature developed in response to the Supreme Court’s Decision, House Bill 1840 for the purpose of re-implementing Impairment Rating Examinations under the Pennsylvania Workers’ Compensation Act. The Legislation House Bill 1840 signed by the Governor Wolf on October 24, 2018 is now known as Act 111 of 2018 with an effective date of 10/24/2018.

Summary

Act 111 of 2018 re-establishes Impairment Rating Examinations under the Pennsylvania Workers’ Compensation Act utilizing the 6th Edition of the AMA Guides to the evaluation of permanent impairment providing for change in status of Claimant’s benefits from total disability to partial disability status where the Impairment Rating is less than 35% under the guides. Claimant’s found partial disabled may only receive a maximum of 500 weeks of wage loss benefits. The new impairment rating system would apply to claimants who, as of 10/24/2018, have received 104 weeks of total disability benefits. The Legislation separately increases the death benefit burial expense amount from \$3,000.00 to \$7,000.00 for fatal injuries occurring on and after 10/24/2018. The Act further requires Pennsylvania Compensation Ratings Bureau to calculate the savings achieved through this Act and to provide immediate reduction of the rates equal to the savings applicable to Employer’s Workers’ Compensation policies. The Ratings Bureau, following the Protz decision, had recommended a rate increase.

Provisions of Act 111 of 2018 Amending Section 306 Of The Pennsylvania Workers’ Compensation Act

Act 111 of 2018 Amends Section 306 of the Act to include Section 306 (a.3) (1). This amendment provides that Claimants who receive temporary total disability benefits for a period of 104 weeks shall be required to submit to an Impairment Rating Examination at the request of the insurer within 60 days upon expiration of the 104 weeks to determine degree of impairment due to the compensable injury.

This amendment would mean that for individuals who prior to 10/24/2018 had received an aggregate of 104 weeks of total disability shall be required upon request of insurer to submit to an Impairment Rating Examination under the Act.

Act 111 of 2018 further amends the Act to include Section 306 (a.3) (2) that provides that if an Impairment Rating is equal to or greater than 35% under the American Medical Association “Guides to the Evaluation of Permanent Impairment,” the Claimant shall be presumed to be totally disabled, and shall continue to receive total disability compensation under the Act. Whereas, if such Impairment Rating does not meet the 35% threshold of impairment under the 6th edition of the AMA Guides, the Claimant shall then receive partial disability benefits under the Act and that no reduction shall be made until 60 days’ notice and modification is given.

This amendment reduced the previous threshold of 50% under Act 57 of 1996 to a 35% threshold for change in status of disability under the Act.

Act 111 of 2018 retains the provision that the amount of disability benefit paid to an employee who is subject to change status of disability from total to partial disability remains at the same rate. This Act further specifically provides that an insurer may at any time prior to the expiration of the statutory 500 weeks of partial disability establish that Claimants earning power has changed.

Act 111 permits Claimant to appeal the change to partial disability at any time during the 500 week period of partial disability provided that there is a determination that the claimant meets the threshold impairment rating that is equal to or greater than 35% per the 6th Edition of the AMA Guides. This would require claimant to secure their own Impairment Rating determination with a Bureau approved impairment rating physician.

For employees who have ratings at or above 35%, temporary total disability continues until adjudicated or agreed upon under the Act.

The Act requires that an employee shall submit to Impairment Rating Examinations at a maximum of no more than two independent medical examinations under this clause during a 12 months period.

This amendment in subsection (7) makes clear that in no event shall the total number of weeks of partial disability exceed 500 weeks for any injury regardless of change in disability status. This would mean that if an individual had prior weeks of partial disability for example had they returned to work and received partial disability for a period of time, insurer is entitled to credit in calculating total weeks of partial paid.

The amendment specifically defines the term “impairment” to mean an anatomic or functional abnormality or loss that results from the compensable injury and is reasonably presumed to be permanent. In addition, the percentage rating for impairment shall only be impairment that is the result of the compensable injury and not for any pre-existing work-related or non-work related impairment.

Potential Challenges To Act 111 of 2018

The Claimant’s bar may likely mount legal challenge to Act 111. Act 57 in 1996 had applied to individuals whose dates of injuries were on and after 8/23/1996. The requirements of

Act 111 applies to individuals receiving Workers' Compensation as of date of enactment of 10/24/2018 who have already received total disability for an accepted work injury and requires individuals who have received 104 weeks of temporary total disability to submit to impairment rating examinations under the Act. We may anticipate the Claimant's bar challenging Act 111 as a violation of the Pennsylvania Constitution alleging impermissible retroactive effect denies Claimants substantive due process. Claimant's may argue their substantive rights to benefits under the Act are not being defined by the State of the Law at the time that they experienced their injury but rather by a statute subsequently enacted. Claimant's bar might attempt to resurrect a constitutional challenge to the adoption of the 6th edition Guides which Pennsylvania Courts previously held adoption of a specific edition may indeed be constitutional.

We anticipate that where insurers request Claimant to submit to impairment rating examination under Act 111, that Claimants will refuse to attend such examination in which case insurer will file Petition to Compel to secure an Order compelling Claimant to attend Impairment Rating Examination. Claimant's attorney's at that point would likely state their basis for refusal to attend examination. Although we believe such a challenge at the examination stage is premature and that any challenge is ripe at the time of any actual modification of benefits, if any challenge is to be made by Claimant.

Act 111 Does Not Cure Prior Pre-Protz IREs

Act 111 does not solve the problem of cases where Impairment Rating Examinations have occurred that have been subject to a Protz challenge where the Pennsylvania Commonwealth Courts Decision in Whitfield v. WCAB (Tenet Healthcare System Hahnemann, LLC) decided 6/6/2018 is controlling. Whitfield requires claimant's to meet the burden of reinstatement where claimants benefits had been modified under a pre-Protz decision IRE.

However, in cases where Claimant has had benefits reinstated from a prior Act 57 IRE and Claimant is receiving total disability benefits and has received 104 weeks of total disability, that Claimant may be subject to an Act 111 Impairment Rating Examination.

Carrier Considerations

With the enactment of Act 111 of 2018 carriers may wish to identify all cases where an employee for an accepted compensable injury has received and come into possession of 104 weeks of temporary total disability benefits paid under the Act. Pennsylvania Supreme Court in Dowhower v. WCAB (Capco Contracting) decided April 17, 2007 on the issue of timing, that a request to the Bureau for designation of an IRE physician must be made within 60 days after the employee comes into possession of 104 weeks of total disability benefits and not before the employee comes into possession of 104 weeks of total disability benefits. We believe the Bureau is updating their forms to reflect the change in the law.

Once the carrier has identified those cases in which claimants have come into possession of 104 weeks of benefits, LIBC-766 Request for Designation form to be utilized to request a

physician designated by the Bureau of Workers' Compensation to perform an Impairment Rating Examination.

Act 111 mandates that Impairment Rating Examinations may only be performed by approved physicians licensed in the Commonwealth of Pennsylvania who is certified by the American Board of Medical Specialties, and has an active clinical practice for at least 20 hours per week, chosen by agreement of the parties or as designated by the department. Carriers may wish to confirm that any physician designated by the Bureau that they meet the requirements of Act 111. Absent physician credentials suggestion is made to contact the Bureau to request re-designation in instance of any physician who has not maintained those credentials.

Once a carrier has received designated Impairment Rating physician, carrier may utilize LIBC-765, Impairment Rating Evaluation Appointment to advise the Claimant as to his IRE appointment. Recommendation is made to direct the notification to the Claimant by regular and certified mail as well as to his counsel if known. Carrier may wish to share with the examining physician pertinent medical records including supplying a copy of State Form or Decision defining the work injury as well as providing impairment rating physician a partially completed LIBC 767 with claim number and date of injury and identifying information of the Claimant for the physicians completion regarding details of the Impairment Rating Examination. Following the Impairment Rating Examination, in the event the claimant is found less than 35% impaired, insurer should issue LIBC-764 Notice of Change of Workers' Compensation Disability Status to be filed with the Bureau ensuring that the adjustment is made within 60 days of Impairment Rating Examination. A copy must be sent to claimant and his counsel.

Recommendation is made consistent with the requirements of Act 111 to secure the benefit of the IRE statutory administrative scheme that the Request for Designation of impairment rating physician occurs within 60 days of the date that claimant comes into possession of 104 weeks of total disability. Under Gardner v. WCAB (Genesis Health Ventures), decided 12/28/2005, claims for Request for Designation made within 60 days of the date that Claimant comes into possession of 104 weeks of benefits, the insurer may administratively adjust claimant's benefits utilizing LIBC-764 Notice of Change in Workers' Compensation Disability Status filing same with the Bureau. For requests made beyond the 60 day window, insurer would be obligated to initiate a Petition for Modification with the Bureau to be assigned to a Workers' Compensation Judge to present evidence and secure adjudication that Claimant's status should be amended to partial disability based upon Impairment Rating Examination finding Claimant less than 35% impaired under the 6th Edition of the AMA Guides.

Conclusion

The enactment of Act 111 reinstates with Impairment Rating Examinations under the Pennsylvania Workers' Compensation Act which had been in place since August 23, 1996 until the Pennsylvania Supreme Court's decision in Protz in 2017. As a result, insurers and self-insureds again may secure Impairment Rating Examinations of Claimants in long-term disability cases. In those cases where Claimants are less than 35% impaired under the 6th edition of the AMA guides, liability for wage loss benefits would be capped at the 500-week partial disability maximum under the Act.