

Commonwealth Court Rules that Using 6th Edition of AMA Guides on IREs is Unconstitutional

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In *Protz v. WCAB (Derry Area School District)* the Commonwealth Court of Pennsylvania ruled that the use of the current 6th Edition of the American Medical Association's (AMA) Guides to the Evaluation of Permanent Impairment is unconstitutional. However, in a separate (and unreported) decision issued the same day, the Commonwealth Court ruled that a claimant can waive the unconstitutionality argument by failing to assert it properly during the litigation and appeal.

Upending Accepted Practice

Section 306(a.2) of the Act, 77 P.S. § 511.2, caps a claimant's entitlement to Partial Disability benefits at 500 weeks. This Section further permits employers to modify benefits to Partial Disability if an Impairment Rating Evaluation (IRE) finds that the claimant has reached maximum medical improvement and that his whole-body impairment is less than 50%. The Act directs physicians to perform IREs and to assess whole-body impairment "pursuant to the most recent edition" of the AMA Guides.

Currently, the 6th Edition of the AMA Guides is the most recent, and standard practice has been to have IREs performed under the current 6th Edition. However, in 1996 when Section 306(a.2) was added to the Act, the 4th Edition of the AMA Guides was the most recent, and claimants have long argued that it is permissible to perform IREs only using the 4th Edition.

In a decision that upended years of understood practice, the Commonwealth Court ruled that the use of any edition of the AMA Guides other than the 4th Edition is unconstitutional because it is an "unconstitutional delegation of authority by the state legislature."

The court noted that under the Pennsylvania Constitution, only the legislature is able to make laws. While conceding that the legislature is permitted to delegate some authority to regulatory agencies, the court ruled that the legislature must first "establish primary standards and impose upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the [Act]." Here, the court ruled, simply delegating authority to the AMA—a non-governmental body—violated the Constitution because the AMA was not bound by any standards in the Act. Further, the court ruled, it was impermissible for the legislature to simply adopt sight-unseen whatever is the most recent edition of the AMA Guides.

Perhaps recognizing one big issue that the *Protz* decision would create, on the same date that the Commonwealth Court issued the *Protz* decision it also issued an unpublished decision in *Winchilla v. WCAB (Nexstar Broadcasting)*, and found that the claimant in *Winchilla* had waived the unconstitutionality argument. The facts of *Protz* and *Winchilla* were essentially identical, and both claimants' benefits were modified to Partial Disability following an IRE performed using the 6th Edition of the AMA Guides.

Unlike in *Protz*, however, the claimant in *Winchilla* did not properly raise the argument that using the 6th Edition of the AMA Guides is unconstitutional. The court found that the claimant in *Winchilla* had therefore "waived his unconstitutional delegation argument by failing to assert it in his petition for review."

While the *Winchilla* decision is unpublished and therefore future courts are not bound by it (rather, it is “persuasive authority”), this does tend to answer the question of whether or not the thousands of IREs done using the 5th or the 6th Edition are automatically invalid: not unless the claimant properly raised the unconstitutionality argument.

Questions Raised by the *Protz* Decision

Nevertheless, if left to stand and in the absence of a legislative change in the law, the *Protz* decision could have huge implications on Pennsylvania workers’ compensation cases. First, IREs would have to be done using the 4th Edition of the AMA Guides, rather than the 6th Edition. The 4th Edition did not account for psychological injuries. Therefore, if forced to use only the 4th Edition, Employers would have no ability to modify benefits pursuant to an IRE for claimants with psychological injuries. Moreover, the 4th Edition is more generous with its impairment ratings compared to the 6th Edition. Claimants whose whole-body impairment under the 6th edition is close to 50% will potentially receive a rating that exceeds 50% with the 4th Edition.

Second, there is an open question about what happens to the hundreds—if not thousands—of claims that have been modified to Partial Disability under either the 5th or the 6th Edition of the AMA Guides. While the *Winchilla* case states that claimants can waive the unconstitutionality argument by not properly raising it during the litigation or appeal, as an unreported case *Winchilla* is merely “persuasive,” rather than controlling, authority, and future courts are not bound by it. Regardless, what about the myriad of cases that were modified under the 5th or 6th Edition of the AMA Guides, and then the 500 weeks of Partial Disability has run—are those automatically re-opened? Time will tell how the courts will apply the *Protz* decision, but what seems clear is that employers should be prepared for a deluge of Petitions to Reinstate Compensation Benefits.

Third, what happens to IREs going forward? Employers cannot unilaterally choose which physician is designated to perform an IRE—either the Bureau designates the physician or the parties reach an agreement. All IRE physicians must also be certified by the Bureau to perform IREs. Under the prior understanding of the law, the Bureau would require that IRE physicians be certified to perform IREs under the 6th Edition—do they need to now ensure that the IRE physician is certified to perform IREs under the 4th Edition? The 4th Edition of the AMA Guides stopped being used when the 5th Edition was published in 2000, and there are surely physicians who have become licensed to practice medicine and perform IREs only after that date—if they never even had the opportunity to become certified under the 4th Edition, are they now barred from performing IREs?

There are many other questions that the *Protz* decision raises. Given the impact of this ruling, it is expected that the employer will file a Petition to Seek Allowance of Appeal to the Pa. Supreme Court; if so, it is expected that the Pa. Supreme Court would accept the appeal and make a final ruling, although the final ruling might not be issued for a year. Should the Pa. Supreme Court accept the appeal, the Court would hopefully issue a stay on the Commonwealth Court’s decision and permit IREs that are currently pending to still be conducted under the 6th Edition of the AMA Guides, but this is no guarantee.

Practice Tips

So what should be done until we (hopefully) get a final decision and guidance from the Pa. Supreme Court? Best practice would be for employers to continue to pursue IREs as normal and, if possible, ask the Bureau to designate a physician to conduct an IRE using *both* the 4th and 6th Editions of the AMA Guides. There is no guarantee that the Bureau will be willing or able to accommodate this request, but by making the request it will show good faith on the part of employers and would tend to show that they are doing all they can with the limited options available. Moreover, should the IRE physician perform the IRE under either the 4th or 6th Edition only, it would be prudent to request an Addendum report from the physician, in which he or she evaluates the claimant’s whole-body impairment under the other edition of the AMA Guides as well.

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As the saying goes, "May you live in interesting times." After the *Protz* decision, times are now very interesting, and we have more questions than answers.

For questions or further information, please contact Sandra Niemotka (215.864.6338; niemotkas@whiteandwilliams.com) or another member of the Workers' Compensation Group.

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