



A Guide to
Pennsylvania Act 111



TABLE OF CONTENTS

Introduction.....	2
Scenario One: 104 Weeks of TTD Paid; No Prior IRE Performed....	5
Scenario Two: Prior IRE Performed; Past TPD Paid.....	6
Scenario Three: Prior IRE Performed and 500 Weeks of TPD Paid; Claimant Reinstated to TTD Following <i>Protz</i>.....	8
Scenario Four: Past TPD Paid; Claimant Experiences Future Worsening of Condition.....	9
Conclusion.....	10



Introduction

On June 20, 2017, the Supreme Court of Pennsylvania handed down its momentous landmark decision in *Protz v. W.C.A.B. (Derry Area Sch. Dist.)*, invalidating Section 306(a.2) of the Pennsylvania Workers' Compensation Act ("Act"). That decision, in so striking a portion of the law, eliminated the Impairment Rating Evaluation ("IRE") mechanism under which claimants were assigned a percentage of permanent impairment under the purview of the *American Medical Association's Guides to the Evaluation of Permanent Impairment*.

Now, little more than one year later, the Pennsylvania General Assembly has responded with new legislation restoring that which was lost. On October 24, 2018, Pennsylvania Governor Tom Wolf signed into law Act 111, restoring the IRE mechanism by curing what was perceived to be the critical constitutional deficiency identified in 2017's *Protz*.

A. Critical Statutory Changes

Practically, the new law contains a number of provisions for which all stakeholders should be acutely aware. Firstly, the new law requires that all IREs be performed pursuant to the Sixth Edition of the *AMA Guides*. Secondly, the threshold for presumption of total disability has been reduced from 50% to 35%.

Act 111 further contains expansive retroactive provisions which may affect the posture and status of a claim. In this regard, under Section 3 of the amendment, an employer is entitled to credit for all past payments of both temporary total disability ("TTD") and temporary partial disability ("TPD"). This, as will be seen in the scenarios addressed herein, can effectively serve to limit the longevity of a claim which was otherwise rendered indefinite by *Protz*.

B. Procedural Considerations

From a procedural perspective, IREs under Act 111 operate precisely the same as those performed prior to *Protz*. An employer remains entitled to an IRE

following a claimant's receipt of 104 weeks of TTD benefits. If such evaluation is requested within 60 days of the 104-week demarcation, a finding of less than 35% impairment shall work to automatically modify the claimant's status to TPD. Otherwise, where an IRE is performed outside of the aforementioned 60-day window, an employer will be limited to obtaining modification by the standard filing of an appropriate petition with the Workers' Compensation Office of Adjudication.

As it pertains to the procedural intricacies of obtaining and enforcing an IRE and corresponding rating, the Act 57 regulations (§§ 123.101-105) remain applicable. Therefore, an employer must still request a claimant's attendance at an IRE by and through Form LIBC-765. To formally adjust the status of a claim where the claimant receives an impairment rating of less than 35%, the employer shall provide notice to the claimant, their counsel, and the Bureau of Workers' Compensation by utilizing Form LIBC-764, "Notice of Change in Workers' Compensation Disability Status."

In November 2018, the Bureau of Workers' Compensation provided notice that IRE functionality had been restored within WCAIS, allowing for the authorization and designation of physicians for purposes of such evaluations. Notably, the Bureau indicated that it will seek to amend its regulations, forms, and WCAIS screens to accurately reflect the provisions and requirements of Act 111. However, until such time, erroneous language referable to Section 306(a.2) of the Act may continue to appear throughout the aforementioned materials. Where inconsistency presents, the requirements of Act 111 control.

C. Effects on Past Injuries and IREs

In consideration of Act 111's infancy, some uncertainty exists as to both the constitutionality and application of various provisions. In this regard, while neither any express language of the amendment nor court decree instructs as such, it is generally understood and accepted that IREs performed pursuant to the now-stricken Section 306(a.2) are "dead letters," and may no longer be utilized to effectuate any change in disability status. This is so, even where the previous IRE was performed under the Sixth Edition of the *AMA Guides*, as the very evaluation itself originated under the auspices and authority of the now-defunct statute.

Therefore, no IRE performed prior to October 24, 2018 (the date Section 306(a.3) was enacted) is likely cognizable, as a matter of law.

Similarly, despite any formal guidance so indicating, it is recommended that Act 111 be construed as applying to all dates of injury, regardless of whether the same falls before or after the date of the amendment's enactment. This interpretation derives from the fact that the retroactivity provisions, as referenced above, are only given practical effect if so applying to all past payments of TTD and TPD, which necessarily implicates pre-enactment dates of loss. While these provisions may well be subjected to forthcoming constitutional challenges, employers may appropriately proceed in reliance upon such language until otherwise so advised.

D. Scenarios Addressed; Import of Consultation

Herein, this guide seeks to provide practical recommendations in the application and implementation of Act 111 to the claims-handling process by addressing the most common scenarios which are anticipated to present. However, as with most matters of the law, particular facts and circumstances may materially impact and alter the analysis, strategy, and ultimate outcome of any decision-making process. Therefore, it is recommended that questions or concerns regarding specific claims be addressed in direct consultation with counsel so as to provide the most tailored and accurate assessment possible.



Scenario One

POSTURE

The claimant has received 104 cumulative weeks of TTD benefits, however, no IRE was ever obtained as a consequence of *Protz*.

LAW

Pursuant to Act 111, the employer is entitled to a credit for all past TTD benefits paid. Therefore, regardless of whether such benefits were paid pre- or post-*Protz*, an employer may immediately obtain an IRE if the claimant has received a cumulative total of 104 weeks of TTD benefits.

EXAMPLES

(1) The claimant received 104 weeks of TTD benefits from 6.10.2015 through 6.10.2017. Before an IRE could be obtained, *Protz* was handed down. An employer may now obtain an IRE, as Act 111 grants credit for the pre-*Protz* TTD payments made.

(2) The claimant received 104 weeks of TTD benefits from 6.10.2016 through 6.10.2018. Therefore, a portion of the TTD benefits were paid pre-*Protz*, and a portion after. An employer may immediately obtain an IRE, as Act 111 grants credit for both the pre- and post-*Protz* TTD payments made, resulting in a cumulative total of 104 weeks received.



Scenario Two

POSTURE

The claimant previously received 104 cumulative weeks of TTD benefits, after which an IRE was performed, pre-*Protz*. Pursuant to that IRE, which resulted in an impairment rating of less than 50%, the claimant was modified to TPD status.

LAW

Pursuant to Act 111, the employer may now obtain a new IRE, performed under the Sixth Edition of the *AMA Guides*. This is so regardless of whether, in light of *Protz*, the claimant was voluntarily modified back to TTD, judicially modified back to TTD, or remains on TPD if no action was ever taken.

Under all of these circumstances, the pre-*Protz* IRE is likely considered defunct and without force of law, even if performed pursuant to the Sixth Edition of the *Guides*, as the same proceeded under the authority and auspices of the now-stricken Section 306(a.2) of the Act. Therefore, an IRE must now be performed under Section 306(a.3) so as to allow a modification to TPD, or, if the claimant remained on TPD as a result of inaction, to ensure the ongoing validity of such status.

Dependent upon specific circumstances, where TTD was never reinstated following *Protz*, an employer may wish to refrain from pursuing a new IRE until such time as a claimant seeks reinstatement. However, it is recommended that counsel be consulted in determining the most appropriate strategy and action in these situations.

Under this scenario, if an IRE results in an impairment rating of less than 35%, the employer may take a credit for all prior TPD benefits paid to the claimant. Where a claimant was modified back to TTD, either voluntarily or judicially, in light of

Protz, a credit should be taken for partial disability benefits paid up to the date the claimant was formally modified from TPD to TTD (as opposed to utilizing the date *Protz* was handed down or any petitions/documents may have been filed).

EXAMPLES

(1) Prior to *Protz*, the claimant received 104 weeks of TTD benefits, and thereafter underwent an IRE. That IRE resulted in an impairment rating of less than 50%. The claimant was modified to TPD status, and continued to receive 100 weeks of benefits. Now, an IRE under the Sixth Edition of the *Guides* is obtained, which finds the claimant to be less than 35% permanently impaired.

The claimant should be modified to TPD status, with only 400 weeks of benefits now payable (the 100 prior weeks of pre-*Protz* TPD benefits having been credited and deducted from the 500-week allotment).

(2) Prior to *Protz*, the claimant received 104 weeks of TTD benefits, and thereafter underwent an IRE. That IRE resulted in an impairment rating of less than 50%. The claimant was modified to TPD status, and continued to receive 250 weeks of benefits. Now, an IRE under the Sixth Edition of the *Guides* is obtained, which finds the claimant to be less than 35% permanently impaired.

The claimant should be modified to TPD status, with only 250 weeks now payable (the 250 prior weeks of pre-*Protz* TPD benefits having been credited and deducted from the 500-week allotment).

An extensive number of mathematical variations under this scenario may exist, all of which simply result in past weeks of TPD benefits being deducted from the claimant's 500-week allotment once returned to TPD status.



Scenario Three

POSTURE

The claimant previously received 104 cumulative weeks of TTD benefits, after which an IRE was performed, pre-*Protz*. Pursuant to that IRE, which resulted in an impairment rating of less than 50%, the claimant was modified to TPD status. The claimant thereafter received 500 weeks of TPD benefits.

Following *Protz*, the claimant filed a Petition for Reinstatement of TTD benefits within three years of the last payment of compensation, and the same was granted by a Workers' Compensation Judge. Since that adjudication, the claimant has continued to receive TTD benefits.

LAW

Pursuant to Act 111, the employer may now obtain a new IRE, performed under the Sixth Edition of the *AMA Guides*. If the IRE results in an impairment rating of less than 35%, the employer shall take a credit for all prior TPD benefits paid to the claimant. Here, because the claimant previously received 500 weeks of TPD benefits, the employer owes no additional benefits.

EXAMPLE

Prior to *Protz*, the claimant received 104 weeks of TTD benefits, and thereafter underwent an IRE. That IRE resulted in an impairment rating of less than 50%. The claimant was modified to TPD status, and received 500 weeks of benefits. Now, an IRE is obtained which finds the claimant to be less than 35% permanently impaired. As the claimant has exhausted his 500-week entitlement to TPD benefits, no additional benefits are owed.



Scenario Four

POSTURE

The claimant has received various periods of TPD benefits, both pre- and post-*Protz*. The claimant now experiences a worsening of condition, which results in modification to TTD.

LAW

Pursuant to Act 111, the employer may obtain an IRE after the claimant's receipt of 104 weeks of TTD benefits. The IRE must be performed under the Sixth Edition of the *AMA Guides*. If the IRE results in an impairment rating of less than 35%, the employer may take a credit for all prior TPD benefits paid to the claimant, both pre- and post-*Protz*.

EXAMPLE

The claimant has received 50 cumulative weeks of TPD benefits as of 11.01.2018. He then experiences a worsening of condition and is modified to TTD as of 11.02.2018. The claimant thereafter receives TTD benefits through 11.02.2020 (resulting in 104 weeks of TTD payments). At that time, the employer may then obtain an IRE under the Sixth Edition of the *AMA Guides*. If such evaluation results in a finding of less than 35% permanent impairment, the employer may modify the claimant's status to TPD, and shall receive a credit for the 50 prior weeks of partial disability benefits paid. Therefore, the claimant is only entitled to 450 weeks of TPD benefits.



Conclusion

The passage of Act 111 represents a significant legislative victory for Pennsylvania workers' compensation stakeholders adversely affected by the 2017 loss of IREs and their risk-mitigating effects. Now, with the restoration of impairment ratings, employers and carriers alike regain a critical tool in the management of claims where prolonged periods of disability present.

Still, significant questions linger as to the full effect of the law and its constitutional resilience in the face of assured future challenges. For these reasons, invested observers should continue to monitor developments related to the amendment, and its evolving implementation.

The attorneys of Thomas, Thomas & Hafer LLP stand ready to advise and assist claims professionals with the knowledge and expertise necessary for navigating Act 111. Contact us today with any questions or concerns in the handling of claims under the new Section 306(a.3) of the Pennsylvania Workers' Compensation Act.



Our History

In 1977, ten men and women joined their practices to form a new law firm in Harrisburg, PA that would later become known as Thomas, Thomas & Hafer. Serving the utility and insurance industries, their “mission” was a modest one: survival.

With the passage of each month and year, the confidence of this group grew as did the expectations of a satisfied clientele. A vision for the future began to emerge as Thomas, Thomas & Hafer earned the trust of its clients and the respect of its peers in the legal community. It soon established itself as the largest civil litigation defense firm located in Central Pennsylvania.

That vision—a regional law firm dedicated to the defense of insureds, insurers, and self-insureds—continues to grow today. With offices located in Allentown, Harrisburg, Philadelphia, Pittsburgh, Wilkes-Barre Pennsylvania, Baltimore Maryland, Washington DC, and Marlton & Clinton New Jersey, the firm’s 86 lawyers practice law in six (6) states — Pennsylvania, Maryland, New Jersey, Virginia, Ohio and West Virginia — and the District of Columbia. Their mission statement: to provide exceptional legal services tailored to the needs and expectations of a diverse client base in a manner that meets the highest standards of professional integrity.



Our Locations

Allentown, PA	1550 Pond Road, Suite 210, Allentown, PA 18104 P: 610-868-1675
Baltimore, MD	1829 Reisterstown Rd., Suite 200, Baltimore, MD 21208 P: 410-653-0460
Hampton, NJ	53 Frontage Road, Hampton, NJ 08827 P: 908-238-0131
Harrisburg, PA	305 North Front Street, Harrisburg, PA 17101 P: 717-237-7100
Marlton, NJ	750 Route 73 South, Suite 205, Marlton, NJ 08053 P: 856-983-0200
Philadelphia, PA	1600 JFK Blvd. Suite 620, Philadelphia, PA 19103 P: 215-564-2928
Pittsburgh, PA	525 William Penn Place, Suite 3750, Pittsburgh, PA 15219 P: 412-697-7403
Washington, D.C.	1025 Connecticut Ave NW, Washington, DC P: 202-945-9500
Wilkes-Barre, PA	1065 Highway 315, Suite 205, Wilkes-Barre, PA 18702 P: 570-820-0240