



An October Surprise:

*Pennsylvania Adopts Sixth Edition of AMA Guides,
Restores Impairment Rating Evaluations*

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I. BACKGROUND

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.)*,¹ 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 House Bill 1840 (now, Act 111), thereby restoring the impairment-rating mechanism by curing what was perceived to be the critical constitutional deficiency identified in 2017's *Protz*. In this respect, the law incorporates, by express reference, the Sixth Edition of the *Guides*.

Such development stands in stark contrast to the now-defunct Section 306(a.2), which was admonished by the *Protz* majority for instructing the evaluator to use the "most recent" edition of the text. This, the court held, was an unconstitutional delegation of legislative authority in violation of the Pennsylvania Constitution. Finding that the offending language could not be severed without rendering the remainder of the statutory provisions incomprehensible, the court struck the entire section, and with it, the impairment-rating mechanism itself, from the Act.

II. CRITICAL PROVISIONS OF ACT 111

The new law replaces the now-stricken Section 306(a.2) of the Act with a freshly-tailored Section 306(a.3). Incorporating a number of revisions over that of its now-defunct statutory brethren, Section 306(a.3) avoids the prior pitfalls highlighted by the *Protz* court, and delivers both self-insureds and carriers alike sought-after retroactive protections.

As its defining proviso, Section 306(a.3)(1) expressly adopts, by reference, the Sixth Edition of the *Guides* for use in rendering an impairment rating by a qualified physician. Like the stricken provisions which so held before, performance of such evaluation may only be requested

¹ *Protz v. W.C.A.B. (Derry Area Sch. Dist.)*, 161 A.3d 827 (Pa. 2017).

by an insurer within 60 days after a claimant's receipt of 104 weeks of Temporary Total Disability ("TTD") benefits. However, in another major change, if such determination results in an impairment rating that is equal to or greater than 35%, the claimant will be presumed to be totally disabled, and shall continue to receive temporary total disability benefits. This, notably, represents a 15% difference from the original statute's 50% threshold.

Notably, under the Pennsylvania system, no concept of permanent disability exists. Therefore, the *Guides* function not for awards of "PPD" as in many other states, but rather, to institute time-horizons on claims. In this respect, pursuant to Act 111, where a claimant's impairment rating is calculated to be less than 35%,² the worker's status will be deemed modified to partial disability, for which payment shall not exceed 500 weeks. However, the actual amount of compensation under such partial status *will not change from that paid under total disability*. This too represents an incorporation from the prior statute and a striking of balance between the interests of injured workers and their employer, to wit, while the employer enjoys a time-horizon for the claim, the worker maintains his or her level of benefits until ultimate exhaustion of eligibility.

In an added measure which seeks to mitigate the fallout and effects of *Protz*, Act 111 includes retroactive provisions, granting carriers and self-insureds credit for all previous weeks of both TTD and Temporary Partial Disability ("TPD") benefits paid prior to enactment.

Further, though entirely unrelated to the IRE mechanism upon which the amendment focuses, Act 111 effectuates a long-overdue update to the burial expense payable to an undertaker in cases of fatal work-related injury. While such expense had rested at \$3,000 since 1993, the same has now been increased to a maximum of \$7,000. Under controlling Pennsylvania precedent, the amount payable is that provided by law in effect on the date of death; accordingly, the new expense shall apply only to deaths occurring on or after October 24, 2018.

Finally, an extraordinary closing proviso of the new statute instructs that, within 90 days following the effective date of the amendment, the Pennsylvania Compensation Rating Bureau shall calculate the savings achieved through the implementation of the statute. *Immediately* following the calculation, the amendment further requires that a reduction of rates, equal to the savings, be applied to employers' workers' compensation policies across the Commonwealth.

III. EFFECTS AND IMPLICATIONS

A. Retroactivity

Perhaps more than any other aspect of the amendment, Act 111's retroactivity provisions, which grant employers credit for all prior payments of TTD and TPD benefits, serve as the most controversial, and are the primary anticipatory target of forthcoming constitutional challenges. In

² While the critical rating threshold has been reduced from 50% to 35%, such figure remains, by national standards, high. Conversely, under Maine law, injured workers find entitlement to long-term partial incapacity benefits where their impairment rating exceeds 18%.

this regard, the provisions implicate the time-honored challenge of ascertaining whether a new law, which seeks to be applied retroactively, deprives individuals of vested rights which are substantive, rather than procedural, in nature and effect. Indeed, this alteration has been characterized by some prejudiced stakeholders as violative of due process, with litigation advancing such theory already contemplated by aggressive injured-worker counsel.

B. *Applicability of Prior Precedent*

Between the passage of Act 57 in 1996, and the handing-down of *Protz* in 2017, a significant body of case law developed pertaining to IREs under Section 306(a.2) of the Act. Now, the Pennsylvania practitioner is left to consider whether cases so interpreting the stricken statute remain applicable to the new Section 306(a.3), or if this corpus of cases must now be cast aside as judicially untethered to its originating statutory text.

A careful review of the new amendment reveals that its language is substantially similar – and, in part, identical – to that which preceded. For this reason, a persuasive argument exists in support of the continued precedential effect of pre-*Protz* case law.

As one example, this author is reminded of the Pennsylvania appellate court’s 2008 holding that a claimant, off work and receiving TTD benefits, must be found to have attained maximum medical improvement as a condition precedent to being assigned an impairment rating under the *Guides*.³ The reasonable observer is compelled to conclude that such case law remains applicable to Section 306(a.3), and that all material statutory elements for which the precedent relied upon remain intact.

C. *Delegation*

Unsatisfied by the delegation restrictions imposed by *Protz*, a number of leading claimants’ attorneys throughout the Commonwealth have posited that the *mere adoption*, by reference, of the *Guides* is, in itself, an unconstitutional delegation of legislative authority to a private entity in violation of the Pennsylvania Constitution. Thus, in these attorneys’ eyes, Section 306(a.3) fails to cure the deficiencies for which its authors intend.

Such line of argument seems misplaced in this author’s view, and fails to recognize the regularity by which legislatures and administrative agencies utilize the mechanism of incorporation by reference. In a recent example, on October 1, 2018, the Pennsylvania Department of Labor and Industry adopted the use of the International Building Code 2015, International Fire Code 2015, International Fuel Gas Code 2015, and International Plumbing Code 2015, amongst others.⁴

³ *Combine v. WCAB (National Fuel Gas Distribution Corp.)*, 954 A.2d 776 (Pa. Commw. 2008).

⁴ PENNSYLVANIA DEPARTMENT OF LABOR & INDUSTRY, UCC Codes, available at: <https://www.dli.pa.gov/ucc/Pages/UCC-Codes.aspx> (last visited October 25, 2018).

To date, no constitutional challenges pertaining to such incorporations have been filed in any courts of the Commonwealth. Thus, it must be considered that arguments advocating a global restriction on mere incorporation by reference are borne merely of contempt for the *Guides* themselves, rather than sound principles of constitutional law and separations of power. Indeed, were incorporation by reference barred entirely, absurd results might well ensue whereby a legislative body would be required to reproduce an entire publication within a proposed bill so as to avoid an unconstitutional delegation of authority.

Seeking to curb such rabidity in 2017's *Protz*, the majority cautioned, "... [O]ur precedents to date have not unequivocally supported the Commonwealth Court's view that the General Assembly cannot, under any set of circumstances, delegate authority to a private person or entity."⁵ The court further noted that the holding "should not be read as an endorsement ... that the delegation of authority to a private actor is *per se* unconstitutional."

IV. 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 benefits. As a practical matter, Pennsylvania carriers and self-insureds now enjoy immediate restoration of the IRE mechanism as a claim management tool. With an impending reassessment by the Pennsylvania Compensation Rating Bureau, short-term appreciable cost-saving is all but guaranteed.

Still, significant questions present as to the full effect of the law and its constitutional resilience in the face of assured future challenges. For these reasons, national observers will surely be monitoring such developments to both enrich their own understanding and extrapolate lessons from the Pennsylvania experience for application in other jurisdictions navigating similar questions of law.

⁵ *Protz v. WCAB (Derry Area Sch. Dist.)*, 161 A.3d 827, 837 (Pa. 2017).