

New PA Workers' Comp Law Designed to Save Employers Money

Articles November 26, 2018

For three decades in Pennsylvania, employers and Workers' Compensation insurance carriers could seek an independent review of the "impairment rating" of an injured worker, in order to determine the percentage of disability, and then place a 500 week cap on the injured worker's ongoing wage loss benefits. This "Impairment Rating Evaluation" system called for specifically-designated physicians to perform these IREs, upon request by the employer – but only when the injured worker had already recovered two years of wage loss benefits due to the disabling injury. Under the old system, the medical reviewer would perform an examination, and review records, in order to determine an injured worker's "impairment rating" based on a percentage system that was set forth within the American Medical Association ("AMA") guidelines. If it was determined that the injured worker's impairment rating was less than 50%, the employer could automatically cap wage loss benefits at 500 weeks.

The IRE procedure, and the percentage assignment method, came under fire from claimant's advocates, who argued that the AMA Guidelines were insufficiently exacting for measuring the level of an injured worker's disability. Claimant's advocates also argued that – by deferring to an AMA publication for guidance on the recovery of wage loss benefits for an injured worker – the Workers' Compensation Bureau was conferring legislative authority on a non-governmental body (the AMA); this, claimant's attorneys argued, was unconstitutional. In the landmark, 2017, PA Supreme Court Decision in *Protz v. WCAB (Derry Area School District)*, the IRE system was struck down; there, the claimant's attorney successfully argued that the AMA should not be relied upon for setting impairment rating guidelines or standards. Following *Protz*, employers could no longer rely on the IRE system to cap benefits, or seek a review of an injured worker's impairment rating. For employers and insurance carriers statewide, this was an impactful (i.e. expensive), ruling.

Within months of the *Protz* ruling, a handful of state legislators began discussing and drafting a proposed bill that would overturn the decision, and revive the IRE process. The discussion and drafts of a new IRE bill were finalized in the fall of 2018, and put on Gov. Wolf's desk for signature, just about ten days before the election. With the Governor's signature on "Act 111," the impact of *Protz* was reversed. Under Act 111, there are some minor differences in the application and procedure for IREs, but the basic premise of the old law and system has been reinstated.

Because the functionality of the new bill was intended to be immediately available, the PA Workers' Compensation Bureau released an "official" statement through the Workers' Compensation Automation and Integration System website:

IMPORTANT NOTICE

Workers' Compensation Act, require IREs to be performed under the 6th edition (second printing April 2009) of the AMA Guides to Evaluation of Permanent Impairment, and set the threshold for the presumption of total disability at thirty-five percent (35%).

In order to make the IRE process available to the workers' compensation community as soon as possible, since Act 111 is effective immediately, the Department of Labor and Industry, Bureau of Workers' Compensation (Bureau) has reactivated the IRE functionality in WCAIS and has resumed the authorization and designation of IRE physicians, to allow for the performance of IREs pursuant to the requirements set forth in Act 111. To maintain consistency, it is anticipated that the process will track the preexisting procedural and regulatory framework, to the extent and in a manner consistent with the provisions of Act 111.

However, please note that despite making this functionality immediately available, the Bureau is still in the process of reviewing and updating its WCAIS screens and forms, and will ultimately seek to amend its regulations, to accurately reflect the new IRE provisions and requirements in Act 111. Until these changes have been completed, some screens and forms generated regarding the IRE process still may contain erroneous language referencing the repealed language and requirements of prior Section 306(a.2), such as “the most recent edition” of the AMA Guides or a fifty-percent (50%) threshold.

Notwithstanding any language to the contrary temporarily found on WCAIS screens or Bureau forms and regulations during this transition, it is expected that all IREs will be conducted and determined consistent with and pursuant to the new statutory requirements set forth in Act 111.

In terms of direct impact and application of Act 111, that will begin to take shape relatively quickly. Employers who currently have injured workers who have been receiving full wage loss benefits for two years (or more) should act immediately – and start the IRE process. Employers who had IREs performed under the “old” system should take steps to issue (or re-issue) the proper Notice (presuming the injured worker’s impairment rating was less than 35%), to place the 500 week cap on benefits, without the need for a new IRE.

However, these employers should also be prepared for various challenges from claimant’s attorneys. For example, claimant’s attorneys could argue that – now with the passage of the new law – employers and carriers must wait an *additional* two years before starting the IRE process. That would seem a ridiculous and unintended proposition...but may require guidance from Judges and the WCAB, which will take time.

It will also take time to gauge long term cost-savings for employers. The passage of Act 111 was intended as a cost-savings for employers and insurance carriers. One of the subsections of the bill provides that insurance carriers will be required to reduce rates in direct proportion to the calculated savings (statewide) attributable to the passage of Act 111, once figures are available. If your company has a traditional Workers’ Compensation insurance policy in place, you should see savings on your premiums in the near future.

If you have questions about Act 111, or the implementation of the “new IRE” system in PA, please call Ken Scholtz at (412) 594-3903 or email.