ACT 111: PRACTICAL GUIDANCE FOR PENNSYLVANIA EMPLOYERS

On October 24, 2018, Governor Wolf signed into law H.B. 1840 as Act 111 thereby reinstating the Impairment Rating Evaluation process in Pennsylvania Workers' Compensation. How does that impact Pennsylvania employers from a practical standpoint?

The following scenarios should offer hands-on help to workers' compensation administrators.

Scenario #1: Temporary total disability is being paid, but 104 weeks has not yet been met.

Suggestion: Diary for 104 weeks of temporary total disability benefits and then request an IRE by way of LIBC-766 within 60 days of reaching 104 weeks of temporary total disability benefits. Note that on October 30, 2018, the Bureau of Workers' Compensation indicated that they are re-initiating the IRE process notwithstanding the fact that the forms and screens have yet to be modified consistent with the provisions of Act 111. The bureau has indicated, via a Notice in WCAIS, that 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. IREs may now be requested consistent with the old protocol, but pursuant to the new requirements of Act 111. The bureau has indicated that it is in the process of reviewing and updating its WCAIS screens and forms and will ultimately seek mandatory regulations to accurately reflect the new IRE provisions and requirements in Act 111. Nonetheless, it is anticipated that pursuit of a timely IRE will permit employers to change disability status through filing of a Notice of Change (LIBC-764) and avoid the necessity of filing a Modification Petition (whereby claimant's attorneys have intensified their opposition to said petitions in recent years). Hence, rigid oversight of the TTD payment process and timely filing of an LIBC-766 to request an IRE is best practice for workers' compensation administrators.

Applicable Section of Act 111: 306(a.3)(1).

Scenario #2: Temporary total disability has been in excess of 104 weeks.

Suggestion: File Request for Designation of a Physician to Perform an Impairment Rating Evaluation (LIBC-766) and seek an IRE under the 6th Edition of the AMA Guides for the Evaluation of Permanent Impairment.

Applicable Section of Act 111: 306(a.3)(1) and (7).

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Scenario #3: Change in Status (i.e., temporary total to temporary partial) has occurred by Notice of Change or by way of Modification Petition, but the matter is currently in litigation subject to challenge by Claimant via a Reinstatement Petition (Claimants thereby arguing entitlement under Protz II).

Suggestion: If before a WCJ, request dismissal of the pending Reinstatement Petition if disability status had changed by IRE physician application of the 6th Edition of the AMA Guides. File a Review Petition seeking credit for all temporary partial benefits paid from the date of the IRE to current date and confirmation by court order that claimant's current status is temporary partial and not temporary total.

Similarly, if before a WCJ, but disability has changed by IRE physician's use of the 4th or 5th Edition of the Guides, file a Review Petition requesting an opportunity to have an IRE applying the 6th Edition of the Guides. In fact, you may be fortunate enough that the IRE doctor is currently certified under the 6th Edition and is capable of generating an IRE report applying the 6th Edition, backdated to the original IRE date, without the need for an updated exam. That should be the case, as all of the IRE doctors were using the 6th Edition before Protz II put a stop to the entire process. At that point, request credit for all temporary partial benefits paid from the date of the IRE to the current date, and also request a confirming order that claimant's current status is temporary partial disability and not temporary total disability.

If you are currently before the WCAB or Commonwealth Court, request that the matter be immediately remanded to a WCJ, with direction that action be taken in accordance with Act 111. When the matter is before a WCJ, seek credit and confirmation of the disability status change as noted above.

Applicable Section of Act 111: 314(3)(1) and (2).

Scenario #4: Change in Status (i.e., temporary total to temporary partial) has occurred by Notice of Change or Modification Petition, with whole body impairment determination of less than 35% (with application of 4th, 5th, or 6th Edition of the Guides) and no challenge for appeal was filed by claimant (i.e., the action is final).

Suggestion: Employer should maintain a status quo and retain claimant on temporary partial status.

Applying the same scenario as above, but claimant's whole body impairment was 35% or more, but less than 50%, this would be a scenario subject to a challenge under Act 111. If challenged, an updated IRE to determine if an impairment percentage has reduced to less than 35% may be advisable.

Applicable Section of Act 111: 306(a.3)(2).

Scenario #5: In claims where an IRE was obtained under the 6th Edition of the AMA Guides and the IRE indicated that the claimant was less than 35% impaired, but benefits were voluntarily reinstated to temporary total disability based upon Protz II, can an employer use this IRE or must a new one be obtained?

It depends upon how "benefits were reinstated to total disability based upon Protz" – if there was some sort of judicially approved stipulation or judge's decision reinstating to TTD, then that decision should be appealed (if appeal still timely) or an IRE-based Modification Petition should be filed. If the conversion to total was just an in-house adjustment that wasn't memorialized by any bureau form or pleading, we don't recommend any official action other than to continue calculating the 500 weeks from the 6th Edition IRE. The important factor is to make sure that 500 week clock was properly started via Notification of Modification or IRE-based Modification Petition.

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Scenario #6: With claims where there is an IRE in place and it was not contested under Protz, can the employer do nothing and take advantage of the IRE even if another Edition of the AMA Guides was used?

This may depend on whether the "IRE in place" which was not contested was conducted under the 6th Edition of the AMA Guides. If it was, we agree that there is nothing to do other than continue to count the 500 weeks. However, if the IRE in question was conducted pursuant to a prior Edition of the AMA Guides (4th or 5th), then clients should be aware that a claimant's attorney may eventually challenge cessation of wage loss benefits after 500 weeks by arguing that Act 111 only allows for that to happen when the initial IRE was conducted pursuant to the 6th Edition. There is likely a very small group of claims that may fall into this category, but we caution awareness if you happen to have one of those claims and encourage you to contact one of our Chartwell attorneys to discuss.

Scenario #7: For claims that would have met the 104 weeks of total disability threshold after the Protz Decision came down, can an employer move forward with the IRE without filing a petition as the 60 day window for requesting the IRE designation would not apply?

We do not read the "new" language from Act 111 as extending the 60-day window for "automatic" modification. It, instead, seems that the legislature was trying to preserve for employers the original 104 weeks of TTD paid, regardless of when that 104 weeks ended. This means that even if the employee reached 104 weeks while Protz II was controlling, the employer can still request an IRE now in light of Act 111. Nonetheless, if the employee reached 104 weeks more than 60 days before the post-Act 111 IRE is requested, then an IRE-based Modification Petition would be needed and the automatic modification cannot be taken.

There is no cause for delay in employer administrative actions as the act takes place immediately (i.e., as of October 24, 2018).

Act 111 offers some good financial news for employers as within ninety (90) days of passage, the Pennsylvania Compensation Rating Bureau has been directed to calculate the savings for employers and same shall be used to provide an immediate reduction in rates applicable to employers' workers' compensation policies.