

MAY 2017 CASE LAW UPDATE

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Gillespie v. Workers' Compensation Appeal Board (Aker Philadelphia Shipyard), (Pa. Cmwlth May 23, 2017) 2017 WL 2153672 (Unreported Decision)

Issues: Whether the Workers' Compensation Judge (WCJ) correctly dismissed the claimant's Petition to Review the change of disability status following an unappealed IRE.

Answers: Yes.

Analysis: Claimant petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) denying his petition to revise his disability status from partial to full disability. In doing so, the Board reversed the decision of the Workers' Compensation Judge (WCJ), who upheld Claimant's constitutional challenge to his impairment rating evaluation (IRE), for the stated reason that Claimant's challenge to his IRE was untimely filed. Claimant filed his challenge eight years after his employer notified him of a change in his workers' compensation disability status. Concluding that Claimant's petition was untimely, The Commonwealth Court affirmed the Board.

Claimant was employed by Aker Philadelphia Shipyard (Employer) and sustained an injury on January 8, 2004. On November 20, 2007, the IRE determined a whole body impairment of 25 percent in doing this evaluation, using the Fifth Edition of the American Medical Association "Guides to the Evaluation of Permanent Impairment" (Fifth Edition AMA Guides). Based on the IRE, Employer issued a "Notice of Change of Workers' Compensation Disability Status" to Claimant. Notably, Claimant continued to collect full disability compensation, but the change in his status limited his compensation period to 500 weeks.

Eight years later, in September 2015, Claimant filed a Reinstatement Petition asserting that his IRE was a nullity because the IRE used the Fifth Edition AMA Guides to do his evaluation of Claimant. In support, Claimant relied upon this Court's decision in *Protz v. Workers' Compensation Appeal Board (Derry Area School District)*, 124 A.3d 406 (Pa. Cmwlth. 2015). In *Protz*, the Commonwealth Court determined that only the Fourth Edition of the AMA Guides had been authorized by the legislature for guidance in an IRE. The legislature's attempt to approve future editions of the AMA Guides was unconstitutional because its legislative authority may not be delegated to a private body such as the American Medical Association. Employer opposed Claimant's reinstatement petition.

Because Claimant's impairment rating was made on the basis of the Fifth Edition of the AMA Guides, the WCJ concluded that Claimant sustained his burden of proving that the IRE was a nullity as was the change in his disability status. The Board reversed and explained that a

claimant has 60 days within which to file a petition challenging the validity of a change in his disability status as a result of an IRE. See Section 306(a.2)(2) of the Act, 77 P.S. § 511.2(2). After 60 days, a claimant may challenge his partial disability status by presenting a new impairment rating evaluation that shows a full body impairment of 50 percent or more. Claimant did not file an appeal within 60 days of the notice of change in his disability status, and he did not obtain a new impairment rating. Accordingly, Claimant did not meet his burden under Section 302(a.2)(2) of the Act.

The Commonwealth Court affirmed the Decision of the Board. In doing so, they distinguished the opinion in *Mazuruk v. Workers' Compensation Appeal Board (Gillin and Sons Contracting, Inc.)*, (Pa. Cmwlth., No. 1216 C.D. 2015, filed October 14, 2016) (unreported). In *Mazuruk*, the employer filed a petition to modify compensation benefits based upon an IRE showing that the claimant had an impairment rating of 24 percent, using the Sixth Edition of the AMA Guides. The WCJ granted the employer's petition, and the Board affirmed the decision of the WCJ. On appeal, the claimant argued that the IRE was not performed under the most recent edition of the AMA Guides. We agreed and remanded the matter with instructions that the WCJ permit the employer to have the claimant submit to a new IRE to be performed in accordance with the Fourth Edition of the AMA Guides. *Mazuruk* is distinguishable. First, the claimant in *Mazuruk* lodged a timely challenge to his IRE determination and had an appeal pending at the time that *Protz* was issued. As such, that challenge was permitted to stand. In the current case, no appeal or challenge was pending.

Conclusion and Practical Advice: The Commonwealth Court concluded that the timeliness issues contained in Section 302(a.2)(2) of the Act are still applicable. If the claimant does not file a challenge to the validity of the IRE within 60 days they then have the burden of showing an impairment above 50%.

Brownsville General Hospital, Inc. v. Workers' Compensation Appeal Board (Berish), (Pa. Cmwlth May 23, 2017) 2017 WL 2255548 (Unreported Decision)

Issues: (1) Whether the Judge was justified in concluding that the claimant was entitled to a wheelchair accessible van.
(2) Whether the Judge was correct in its evaluation of the reliability of the van provided.

Answers: Yes and Yes.

Analysis: Claimant sustained an injury in 2005 when she was assisting a patient out of bed and into a chair. Employer issued a notice of compensation payable which described the injury as a low back sprain. On July 30, 2012, the WCJ granted Claimant's petition for review of medical treatment alleging that she had developed paralysis as a result of the work injury and required subsequent surgical treatment. The WCJ specifically found that Claimant's February 24, 2011 surgery and her subsequent paralysis were causally related to Claimant's June 22, 2005 work injury.

On April 3, 2013, Claimant filed a Petition, wherein she requested Employer to purchase a wheelchair-accessible van on the basis it is reasonable, necessary and causally related to Claimant's accepted work injury. On July 30, 2014, Claimant passed away. Claimant's Counsel has asked that any recovery be paid to Claimant's husband.

During the course of the litigation, the parties submitted a written stipulation that: (1) this matter involves the Petition in which Claimant sought payment by Employer for a third wheelchair-accessible van (Van 3) she claimed was necessary for transportation due to her condition; (2) Employer denies that it is responsible for Van 3, as it purchased Van 2; (3) Van 3 was purchased by Claimant and her husband for \$72,058.56; (4) Claimant and her husband sold Van 2 for \$6,000.00; (5) Claimant and her husband sold Van 3 for \$30,000.00; and (6) the amount in controversy is \$36,058.56.

Employer argues that it should have had the option to repair or replace Van 2. This argument *might* have merit if Claimant had selected Van 2 or, at a minimum, participated in its selection; however, she did not. Employer purchased Van 2 without Claimant's input or approval, and it was not sufficient to meet Claimant's medical needs from the outset.

Following a review of the testimony the Commonwealth Court affirmed the WCJ conclusion that Van 2 was not reliable, in addition to it not meeting Claimant's medical needs. As such, it was reasonable for Claimant to purchase Van 3 rather than repair Van 2. Accordingly, the Commonwealth concluded that it may have been better if Claimant had contacted Employer before purchasing Van 3, there was no error in the WCJ's conclusion that Claimant's failure to do so did not negate that "Claimant had met her burden of proving that Van 3 was reasonable, necessary, and causally related to the work injury and that [Employer] should be responsible for paying for [Van 3]." This conclusion is especially true here where, Claimant's frustration was understandable, in that Employer selected Van 2 without Claimant's input and as the WCJ observed, "in not having a reliable vehicle [as well as] ... the desire to avoid the red tape and

delays, including possible litigation, which [Claimant] would have had to go through if [she] attempted to obtain [Van 3] through [Employer].”

Employer next contends that the Board and the WCJ erred by finding that Claimant was entitled to a new van because the Claimant's lifestyle was such that she and her husband purchased used vehicles. The Commonwealth Court disagreed.

Conclusion and Practical Advice: This case is very fact specific case and again is unreported. However, the general principles are something that carriers should be aware of when evaluating purchasing orthopedic devices. When remodeling a home or purchasing medical equipment such as a van or wheelchair, it is better to secure the approval and consent of the claimant prior to the purchase.