

More Impairment Rating Evaluation Developments-Partial Disability Credits Remain!

The Pennsylvania Supreme Court has denied allocatur (permission to appeal) in *Moore v. WCAB (Sunoco, Inc. (R&M))* No. 422 MAL 2018, Order dated 12/27/18. By doing so, the Court declined to hear the injured worker's argument that he should be entitled to ongoing total disability benefits without a credit for partial disability benefits paid following a prior IRE. Given the Court's holding, IRE practice is now governed by the Commonwealth Court's holding in *Whitfield v. WCAB (Tenet Health System Hahnemann, LLC.)* 188 A.3d 599, 616 (Pa. Cmwlth. 2018) along with Act 111, which created a new Impairment Rating Evaluation process, effective 10/24/18.

In *Whitfield*, the Commonwealth Court held that even though the Supreme Court in *Protz* declared the IRE section of the Pennsylvania Workers' Compensation Act to be unconstitutional, an employee was only potentially eligible for a reinstatement of total disability as of the date the employee filed a petition for reinstatement, not as of the original IRE date. In so holding, the *Whitfield* Court implicitly permitted employers a credit for previously paid partial disability benefits based on a past IRE. It must be noted that *Whitfield* applies only to cases where there has been a previous final adjudication of modification to partial before the *Protz* decisions. On the contrary, in cases where an original appeal of the IRE/modification to partial was still pending at the time, *Protz* was decided then the reinstatement of total disability will be as of the original IRE date.

Then, on October 24, 2018, Governor Wolf signed Act 111 which clarified *Whitfield* and confirmed that an employer is entitled to a credit for all partial disability paid benefits based on a prior finalized IRE. Act 111 further allowed employers to obtain a new IRE so long as they used the 6th Edition of the AMA Guides to the Evaluation of Permanent Impairment. An employer can effectuate a change of status from total disability to partial disability so long as the employee has reached maximum medical improvement and the total body impairment related to the compensable injury is less than 35%.

Comment: The Supreme Court's denial of allocatur in *Moore* is a major victory for employers and insurers in Pennsylvania. Unless there are new developments, employers will continue to be entitled to a credit for partial disability paid against the 500-week partial disability maximum based on a prior finalized IRE. Even though *Whitfield* permits an employee to potentially get back on total disability as of the reinstatement petition date, Act 111 and traditional vocational placement practice (medical evidence of work capabilities, job offer, even part-time or funded employment or Labor Market Survey) allow an employer to manage its future indemnity exposure through the exhaustion of the remaining weeks of partial disability in the 500-week maximum period.