

**Workers' Compensation Defendants Severely Impaired by Recent
Commonwealth Court Decision**

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The Pennsylvania State Police are not the only ones tightening the definition of “impairment”. The Commonwealth Court also is attempting to walk a fine line when it comes to defining impairment. As a result, the ability of workers’ compensation defendants to limit the length of time wage loss benefits can be received by claimants just got more oppressive.

Combine v. WCAB (National Fuel Gas Distribution Corporation), decided by Commonwealth Court on August 14, 2008, held that a workers’ compensation claimant must first be at Maximum Medical Improvement (MMI) in order for his or her benefits to be modified from Temporary Total Disability (TTD) to Partial Temporary Disability (PTD) under the provisions of the Workers’ Compensation Act dealing with Impairment Rating Evaluations (IREs).

In so doing, the Court may have left open multiple questions, such as:

- What is MMI, exactly?
- When must claimant be determined to be at MMI – at or before the time of the IRE?
- Who determines whether claimant is at MMI – the IRE physician, an independent medical examiner, claimant’s treating physician, or someone else?
- How is it determined that claimant is at MMI – administratively or judicially?

By way of background, Section 306 (a.2)(1) of the Act, 77 P.S. Section 511.2, provides that a claimant is required to submit to an IRE, to determine the percentage of impairment, if any, at the expiration of his or her receipt of 104 weeks of total disability

compensation. The claimant's IRE rating is determined by a physical examination performed by a physician licensed in Pennsylvania, with a clinical practice of at least 20 hours per week, and who is approved by the Bureau of Workers' Compensation (BWC). The IRE physician applies standards set down by the American Medical Association's "Guide to the Evaluation of Permanent Impairment" (AMA Guides). If claimant's impairment is found to be less than 50%, his or her status changes from total to partial disability, for wage loss purposes. This does not mean that claimant's weekly workers' compensation rate changes, but it does mean that claimant's ability to receive those benefits is no longer infinite – it is capped at the statutory 500 weeks of partial disability.

A finding of partial disability pursuant to an IRE does not permanently fix the right to the parties. Claimant may at anytime during the receipt of 500 weeks of partial disability benefits challenge the finding of less than 50% impairment. Similarly, defendants can continue to seek to further modify, suspend or terminate claimant's compensation benefits – although one wonders whether that last option remains viable under the Combine case, given the significance that the Court attaches to the concept of "permanency" of the injury.

At issue in Combine was Section 306(a.2)(8)(i) of the Act, which provides as follows:

For purposes of this clause, the term "impairment" shall mean an anatomic or functional abnormality or loss that results from the compensable injury and is reasonably presumed to be permanent. (Emphasis in Combine).

Further, at Section 306(a.2)(8)(ii), the Act provides that:

For purposes of this clause, the term "impairment rating" shall mean the percentage of permanent impairment of the whole body resulting from the compensable injury... (Emphasis in Combine).

Combine also pointed to the fact that impairment ratings are performed pursuant to the most recent edition of the AMA Guides. In so doing, Combine dissected the latest edition of the Guides, and concluded that a permanent impairment could be found only after MMI exists.

In Combine, claimant sustained a work related injury to his left knee on December 4, 2000 in the nature of a medial meniscus tear. The employer acknowledged the injury and began paying claimant TTD. Defendant subjected claimant to an IRE on June 20, 2006 and he was deemed to have a 20% impairment. Less than a month later, defendant filed a Modification Petition seeking to change claimant's disability status from TTD to PTD. Claimant denied being at MMI and denied that defendant's requested relief was appropriate. The Workers' Compensation Judge (WCJ) granted defendant's Modification Petition. The WCJ rejected the argument advanced by claimant that there must be a finding claimant has reached MMI prior to calculating an impairment rating. The Judge noted that neither the statute specifically, nor the regulations interpreting the statute, as promulgated by the BWC, required a finding of MMI. The Appeal Board affirmed the WCJ. The claimant then appealed to Commonwealth Court.

The Commonwealth Court addressed the matter as a question of statutory construction, subject to full appellate review. In so doing, the Commonwealth Court reversed both the Appeal Board and the WCJ by digging beyond the statute or regulations. The Commonwealth Court noted that the statute referred to the AMA Guides and delved deep into its language in concluding that neither MMI nor permanency existed at the time the claimant was subject to his IRE. Hence, the IRE

findings could not serve as a basis to modify claimant's compensation. The Court pointed to all of the following factors in its reasoning:

- The statute uses the term "shall" in an unambiguous fashion, in referencing the fact that the AMA Guides govern when an IRE can take place – namely, after claimant reaches MMI.
- The statute sets forth that an IRE can only be obtained after claimant has received 104 weeks of total disability – this waiting period correlates to the instructions contained in the guides that impairment should not be considered permanent, which is synonymous with MMI, until a reasonable time has past for healing or recovery to occur. Combine interpreted this to mean that claimant's condition must be relatively static without the expectation claimant will either further recover or deteriorate.
- It must first be determined whether claimant is at MMI prior to determining claimant's impairment rating.

The Court noted that the IRE doctor failed to testify that claimant had reached MMI – indeed, the IRE doctor, in a rather arrogant way that the Court noted was troubling, failed to explain whether the claimant was at MMI at all. The IRE doctor testified that "I usually don't take that question because that requires a different kind of evaluation:" In so doing, the IRE doctor's testimony failed to establish claimant was at MMI.

Pennsylvania Courts have not been shy to the discuss IREs – Combine is at least its sixth shot at IREs since 2007. While the dicta in the cases suggests that the IRE physician can determine, at the time of IRE, that claimant is at MMI, and that this determination is subject to judicial review, many of the issues surrounding IREs remain unsettled. Perhaps we will again see a challenging set of facts lead to unpredictable results. One is left to wonder whether the testimony of the IRE doctor in Combine doomed the defendants' position that an MMI determination was not needed in order to

reach a conclusion that claimant's injury was permanent and therefore subject to modification.