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Opinion No. 08-75

Constitutionality of the General Assembly's Adoption of the American Medical Association Guides to the Evaluation of Permanent Impairment ("AMA Guides")

QUESTION

Does legislative adoption of the AMA Guides to determine anatomical impairment for a compensable injury under Tenn. Code Ann. § 50-6-102(2) unconstitutionally delegate legislative authority under Tenn. Const. art. II, § 3?

OPINION

While there is not any controlling authority in Tennessee on this issue, and while Tenn. Code Ann. § 50-6-102(2) is defensible, this provision is vulnerable to attack as an unconstitutional delegation of legislative authority in violation of Tenn. Const. art. II, § 3, because by making the "most recent" edition of the AMA Guides that is in effect on the date of the employee's compensable injury the applicable edition, § 50-6-102(2) may be construed as incorporating future changes of the AMA Guides to Tennessee's statutory scheme.

ANALYSIS

The Workers' Compensation Law provides that, in determining the degree of anatomical impairment sustained by an employee as a result of a compensable injury, a medical expert must use the applicable version of the AMA Guides, or in cases not covered by the AMA Guides, by any method accepted by the medical community. Tenn. Code Ann. § 50-6-204(d)(3)(A); *see also Lynch v. City of Jellico*, 205 S.W.3d 384, 398 (Tenn. 2006). Tennessee law also provides that AMA Guides means:

> . . . the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, American Medical Association. In the event of a release of a new edition of the publication in a given year, the new edition shall be deemed to

> be the most recent edition on January 1 of the year following its release. The edition that is in effect on the date the employee is injured is the edition that shall be applicable to the claim[.]

Tenn. Code Ann. § 50-6-102(2). The administrator of the Department of Labor and Workforce Development's Division of Workers' Compensation is charged with the duty of determining the effective date of the most recent edition of the AMA Guides:

> The administrator of the division of workers' compensation shall determine the date on which the most recent edition of the AMA Guides became effective for purposes of this subdivision (d)(3) and the administrator shall maintain the full title of the most recent edition and the date it became effective on the division's website.

Tenn. Code Ann. § 50-6-204(d)(3)(C).

Article II, § 3, of the Tennessee Constitution provides, in relevant part, as follows: "The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people." Tenn. Const. art. II, § 3. Tennessee cases that involve the constitutionality of delegation of legislative power fall into two categories. The first category involves cases of legislative "acts that expressly require[] a favorable popular vote to become operative." *McFaddin v. Jackson*, 738 S.W.2d 176, 180 (Tenn. 1987). More than 100 years ago the Supreme Court expressed a clear proscription against this type of legislative enactment, stating as follows:

> *[U]nder our Constitution, no legislative act can be so framed as that it must derive its efficacy from a popular vote. To be valid it must leave the hands of the Legislature complete*; not in the sense that it must go into effect at once, it is true, but it must at its birth bear the impress of sovereignty, and speak the sovereign will. If it contain within itself a condition or a contingency suspending to some future time, or to the happening of some future event, its obligatory force as a rule of action or conduct of the people for whom it was intended, that contingency or that event must be one selected by the sovereign power itself as one, the happening of which shall render it immediately expedient that the suspension of the power inherent in the act shall cease, and that it shall at once become operative as a rule of conduct for the government of the people. . . . It is said in some of the cases that the vote is the effect of the law, and not the law the effect of the vote; but we think this is a mere play on words, since it is clear that, if all laws were made dependent upon such a

> contingency, representative constitutional government would be destroyed.

Wright v. Cunningham, 91 S.W. 293, 298 (Tenn. 1905) (emphasis added).

Thus, in *Gibson County Special School Dist. v. Palmer*, 691 S.W.2d 544, 548 (Tenn. 1985), the Supreme Court held that a private act that conditioned its effectiveness upon the approval of a majority of the voters in that special school district amounted to a referendum and was an unconstitutional delegation of legislative power. On the other hand, in *McFaddin*, the Supreme Court held that a state inheritance tax statute providing that certain retirement accounts would be "taxable if subject to federal estate tax, but exempt if excluded from federal estate tax" did not violate Article II, § 3. 738 S.W.2d at 177, 180. The Court reasoned that the fact that the Legislature selected a future event that may affect the state statute did not

> render the act unconstitutional. What the Tennessee Legislature has done complies with the mandates of *Wright, that the happening of some future event be one selected by the sovereign power and that upon its happening it becomes immediately operative.* We think it is also significant that the legislature retains the power to withdraw its approval of any future amendment the Congress might make.

Id. at 180 (emphasis added).

The second category of cases involves delegation of legislative authority to administrative agencies. As the Supreme Court noted, "the General Assembly may not delegate to an executive branch agency the exercise of the legislature's discretion as to what the law shall be." *Gallagher v. Elam*, 104 S.W.3d 455, 464 (Tenn. 2003) (citing *Dep't of Pub. Welfare v. Nat'l Help "U" Ass'n*, 270 S.W.2d 337, 339 (Tenn. 1954)). "However, the General Assembly may delegate to an administrative agency the authority to implement the expressed policy of particular statutes." *Id.* This Office recently noted that the test applied "in determining whether the General Assembly has made a lawful delegation . . . [is] 'whether the statute contains sufficient standards or guidelines to enable both the agency and the courts to determine if the agency is carrying out the legislature's intent.'" Op. Tenn. Att'y Gen. No. 07-19 (Feb. 22, 2007) (quoting *Bean v. McWherter*, 953 S.W.2d 197, 199 (Tenn. 1997)). In articulating this test, the Supreme Court explained that

> *[g]overning standards need not be expressed provided such standards can be reasonably ascertained from the statutory scheme as a whole.* The necessity of expressed standards is contingent upon the statute's subject matter and on the degree of difficulty involved in articulating finite standards. *Detailed or specific legislation may be neither required nor feasible when the subject matter requires an*

> *agency's expertise and flexibility to deal with complex and changing conditions.*
>
> The requirement of expressed standards may also be relaxed when the discretion to be exercised relates to or regulates for the protection of the public's health, safety, and welfare.

Bean, 953 S.W.2d at 199 (emphasis added).

Neither of these two categories, however, directly addresses whether the General Assembly's adoption of the "most recent" edition of the AMA Guides to determine the anatomical impairment of a compensable injury constitutes a permissible delegation of legislative authority. At issue is whether the General Assembly may, without violating Tenn. Const. art. II, § 3, adopt standards developed by a private organization, such as the American Medical Association ("AMA"), in its statutory scheme.

Our research has uncovered that two other jurisdictions have addressed the issue of whether legislative adoption of the AMA Guides unconstitutionally delegates legislative power. In the first jurisdiction, the North Dakota Supreme Court held that the statute did not unconstitutionally delegate legislative authority. *McCabe v. North Dakota Workers Compensation Bureau*, 567 N.W.2d 201, 204-05 (N.D. 1997). The court interpreted a statute requiring determination of permanent impairment of work-related injuries "in accordance with and based upon the most current edition of" the AMA Guides. *Id.* at 203. In rejecting the constitutional challenge to the legislative adoption of the AMA Guides, the court applied the majority rule that "a statute that attempts to *incorporate future changes* of another statute, code, regulation, standard, or guideline is an unconstitutional delegation of legislative power." *Id.* at 204 (emphasis added).[1] Because the statute at issue requiring use of the "most recent" edition of the AMA Guides in workers' compensation cases incorporated a standard "as it existed at the time of adoption," and did not include "subsequent modifications, amendments, or variations," the statute did not pose an unconstitutional delegation of legislative power. *Id.* at 205. Further, the statute did "not delegate authority to an association to create a standard but involves a valid adoption of a standard already in existence," rendering the statute constitutional. *Id.* (citing *Michigan Mfrs. Ass'n v. Director of*

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[1]For other jurisdictions applying this rule, *see also Repass v. Workers' Comp. Div.*, 569 S.E.2d 162, 177 (W.Va. 2002); *International Ass'n of Plumbing and Mechanical Officials v. California Bldg. Standards Comm'n*, 55 Cal. App.4th 245, 64 Cal. Rptr.2d 129, 134 (1997); *City of Chamberlain v. R.E. Lien, Inc.*, 521 N.W.2d 130, 132-33 (S.D. 1994); *People v. Pollution Control Bd.*, 404 N.E.2d 352, 356-57 (Ill. App. 1980); *Michigan Mfrs. Ass'n v. Director of Workers' Disability Compensation Bureau*, 352 N.W.2d 712, 715 (Mich. Ct. App. 1984); *Gumbhir v. Kansas State Bd. of Pharmacy*, 618 P.2d 837, 842-43 (Kan. 1980); *Board of Trustees v. City of Baltimore*, 562 A.2d 720, 731 (Md. 1989); *Woodson v. State*, 623 P.2d 683, 685 (Wash. 1980); *Meyer v. Lord*, 586 P.2d 367, 371 (Or. Ct. App. 1978). *Cf. Ex parte Elliott*, 973 S.W.2d 737 (Tex. App. 1998) (stating that, if a federal agency has authority to change Texas law without intervention of the legislature, such a law would be constitutionally suspect).

Workers' Disability Comp. Bureau, 352 N.W.2d 712, 715 (Mich. Ct. App. 1984)) (internal quotation marks omitted).

The other jurisdiction that has addressed this issue is *Madrid v. St. Joseph Hosp.*, 928 P.2d 250, 256 (N.M. 1996),[2] in which the New Mexico Supreme Court rejected a challenge to the state's workers' compensation statutory prescription "requiring the use of the most recent edition of the AMA Guide in evaluating impairment." The challengers principally contended that the New Mexico legislature "delegated its lawmaking power by allowing the AMA, a nongovernmental entity, to establish and periodically change the sole determinative factor of a worker's right to . . . benefits." *Id.* In rejecting the challenge, the court articulated four rationales for allowing legislative adoption of a private organization's standards. First, courts have upheld such legislative adoptions when the private organization's standards are "periodically subject to revision, in limited circumstances such as where the standards are issued by a well-recognized, independent authority, and provide guidance on technical and complex matters within the entity's area of expertise." *Id.* (quoting *Board of Trustees of the Employees' Retirement Sys. of the City of Baltimore v. Mayor & City Council of Baltimore*, 562 A.2d 720, 731 (Md. 1989)). Moreover, courts have limited the legislature's "authority to reference periodically updated standards, requiring that the arbitrator have a certain amount of discretion in adopting or applying the periodically updated standards." *Id.* Further, the New Mexico Supreme Court found that "practical necessity may require reference to the standards of private organizations." *Id.* at 257 (quoting *In re Hansen*, 275 N.W.2d 790, 796-97 (Minn. 1978)).

Fourth, the court reasoned that "where a private organization's standards have significance independent of a legislative enactment, they may be incorporated into a statutory scheme without violating constitutional restrictions on delegation of legislative powers." *Id.* Applying these standards, the court concluded that the statutory provision that incorporated the "standards of a well-recognized independent authority, in order to provide guidance to medical professionals and workers' compensation claims adjudicators on the complex issue of impairment" was not an unconstitutional delegation of legislative powers to the AMA. *Id.* at 258. The court noted that in creating the AMA Guides, the AMA employs "well-qualified individuals and physicians from all the state medical societies and medical specialty societies." *Id.* (internal quotation marks omitted). The court also rejected the challengers' argument that the periodic revision of the AMA Guides rendered the statute unconstitutional because such standards are "periodically updated because of new scientific developments recognized by eminent professionals interested in maintaining high standards in science." *Id.* at 259.

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[2]Notably, the *McCabe* court declined to follow *Madrid* because it conflicted with North Dakota's precedent. *McCabe*, 567 N.W.2d at 205. In addition, the *McCabe* court stated that New Mexico's statutory scheme differed significantly from North Dakota's because "New Mexico laws allow use of other publications in determining impairment, and the percentage determined from applying the Guides is only one factor in a complex formula for calculating total impairment. By contrast, the North Dakota statutory scheme . . . directs use of the most recent edition of the Guides to determine [workers' compensation] benefits." *Id.* (citations omitted).

A statute is entitled to a strong presumption of constitutionality. *Dennis v. Sears, Roebuck & Co.*, 446 S.W.2d 260, 263 (Tenn. 1969). Statutes are "clothed in a presumption of constitutionality [because] the Legislature does not intentionally pass an unconstitutional act." *Vogel v. Wells Fargo Guard Services*, 937 S.W.2d 856, 858 (Tenn. 1996) (quoting *Cruz v. Chevrolet Grey Iron Div. of General Motors*, 247 N.W.2d 764, 769 (Mich. 1976)). Any doubt should be resolved in favor of the constitutionality of a statute. *Marion County Bd. of Comm'rs v. Marion County Election Comm'n*, 594 S.W.2d 681, 684 (Tenn. 1980).

Applying these canons of constitutional interpretation, this Office concludes that, while there is not any controlling authority in Tennessee on this issue, Tenn. Code Ann. § 50-6-102(2) is vulnerable to attack as an unconstitutional delegation of legislative authority in violation of Tenn. Const. art. II, § 3, because by making the "most recent" edition of the AMA Guides that is in effect on the date of the employee's compensable injury the applicable edition, § 50-6-102(2) may be construed as incorporating future changes of the AMA Guides to Tennessee's statutory scheme. Tenn. Code Ann. § 50-6-102(2) unambiguously defines the term AMA Guides as the "most recent" edition of that volume. Should a new edition of the AMA Guides be released during the course of a year, Tenn. Code Ann. § 50-6-102(2) prescribes that "the new edition shall be deemed to be the most recent edition on January 1 of the year following its release." The problem with the statute arises because it provides that the edition in effect on the date of the employee's injury will be the applicable edition. Tenn. Code Ann. § 50-6-102(2). Essentially, Tennessee not only incorporated a standard — the "most recent" edition of the AMA Guides — as it existed at the time of its *legislative adoption*, as in *McCabe*, but it went one step further. By specifying that the edition in effect on the date of the employee's injury will be the applicable edition, § 50-6-102(2) purports to adopt a *future edition* of the AMA Guides. That is to say, § 50-6-102(2) adopts the "most recent" edition of the AMA Guides, not at the time of the statute's enactment by the General Assembly, but at the time of the employee's compensable injury. Such an adoption potentially constitutes a "future change" of a standard in violation of the majority rule[3] applied in *McCabe*, 567 N.W.2d at 204.

It remains true that, as the *Madrid* court recognized, the AMA has independent, well-recognized standards subject to periodic revision that provide guidance on the organization's subject of expertise — medical impairment ratings resulting from injuries or conditions. 928 P.2d at 256, 258. Moreover, a pragmatic imperative exists to deferring to a private organization like the AMA, which compiles relevant scientific standards to evaluate physical impairment as a result of work-related injuries, because the General Assembly possesses "neither the time nor the expertise" to make these determinations. *Id.* at 257. In addition, because the AMA's standards have significance *independently* of a legislative enactment, they arguably may be incorporated into Tennessee's Workers' Compensation Law without offending Article II, § 3. *Madrid*, 928 P.2d at 257. Yet, because Tennessee appears to have adopted a future edition of the AMA Guides in its

[3]It bears noting that no jurisdiction outside New Mexico, to date, has followed *Madrid*.

statutory scheme, the statute is vulnerable to attack as an unconstitutional delegation of legislative power in violation of Tenn. Const. art. II, § 3.

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