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Expectations After Pa. High Court Workers' Comp Ruling

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In a significant decision affecting employers, workers' compensation insurance carriers, and third-party administrators, on June 20, 2017, the Pennsylvania Supreme Court declared that Section 306(a.2) of the Workers' Compensation Act constitutes an unconstitutional delegation of legislative power to the American Medical Association (AMA) and struck the 21-year-old provision from the act. As a result of the Supreme Court's decision in Protz v. WCAB (Derry Area School District), the impairment rating evaluation (IRE) process has been eliminated from Pennsylvania workers' compensation law.

Section 306(a.2) of the Workers' Compensation Act, 77 P.S. § 511.2 ("the Act"), provided that an employer, after paying 104 weeks of total disability benefits, could request that the claimant submit to an evaluation by a physician for the purposes of determining the degree of his or her impairment. If the IRE rating was equal to or greater than 50 percent, a claimant was presumed to be totally disabled. A claimant was considered partially disabled if he or she had a total impairment rating of less than 50 percent.

If the employer requested an IRE within 60 days of the claimant's receipt of 104 weeks of total disability benefits, and the IRE rating was less than 50 percent, then the claimant would automatically be considered partially disabled, thereby limiting the payment of total disability benefits to the claimant to 500 weeks. The Pennsylvania Supreme Court had held that an employer may request that the claimant submit to an IRE, the results of which are not self-executing, but rather, applicable to the traditional administrative process. Gardner v. WCAB (Genesis Health Ventures), 888 A.2d 758 (Pa. 2005). Under those circumstances, the employer could file a modification petition, seeking to convert the claimant's disability status from total disability to partial disability.

The Supreme Court's decision in Protz v. WCAB (Derry Area School District) will immediately affect all cases in which claimants underwent IRE determinations. The court has not explicitly stated whether its decision is retroactive; however, employers/insurers should take the position that the decision applies only to cases involving IREs that are currently in litigation. Claimants, however, are likely to argue that Protz voids every IRE determination performed since Section 306(a.2) was enacted.

Background

Protz involves a situation in which an IRE physician evaluated the claimant's degree of impairment

pursuant to the Sixth Edition of the AMA Guides to the Evaluation of Permanent Impairment. The IRE physician found that the claimant's whole body impairment rating was 10 percent. The employer filed a modification petition, seeking to change the claimant's disability status from total disability to partial disability. The workers' compensation judge granted the employer's modification petition. The claimant appealed to the Workers' Compensation Appeal Board, arguing that Section 306(a.2) constitutes an "unconstitutional delegation of authority by the state legislature." The appeal board upheld the judge's order.

On appeal to the Commonwealth Court, the claimant challenged the constitutionality of Section 306(a.2) of the act as an unconstitutional delegation of legislative authority pursuant to Article II, Section 1 of the Pennsylvania Constitution. Specifically, she argued that the provision of the act gives the AMA, rather than the General Assembly, the authority to establish the criteria under which a claimant is found to be partially or totally disabled. She alleged that the current (sixth) edition of the guides provides substantially different criteria than the previous versions, thereby causing some claimants who would have been found more than 50 percent impaired under the fourth edition to be less than 50 percent impaired under the sixth edition.

The employer argued that the Commonwealth Court had already determined that Section 306(a.2) does not constitute an unlawful delegation of legislative authority in both Stanish v. WCAB (James J. Anderson Construction Co.), 11 A.3d 569 (Pa. Commw. 2010) and Wingrove v. WCAB (Allegheny Energy), 83 A.3d 270 (Pa. Commw. 2014), appeal denied, 94 A.3d 1011 (Pa. 2014). The Commonwealth Court noted, however, that neither party in Stanish challenged Section 306(a.2) as an unconstitutional delegation of legislative power under Article II, Section 1 of the Pennsylvania Constitution and that the court had determined that the claimant in Wingrove failed to develop his constitutional argument.

In September 2015, an en banc panel of the Commonwealth Court, in a 4-3 decision, held that the use of the fifth and sixth editions of the AMA Guides in the performance of IREs is unconstitutional. The case was appealed to the Pennsylvania Supreme Court via a petition for allowance of appeal shortly thereafter, setting the stage for the court's recent decision.

Application of Protz to Cases Involving IREs that are Currently in Litigation

Although each claim must be reviewed on a case-by-case basis, the following are insights on handling these claims in light of the Supreme Court's decision.

- **Claims in which the employer/insurer has filed a petition to compel an IRE:** Counsel for employers/insurers should immediately withdraw any such petitions, as claimants will no longer be attending IRE examinations. Similarly, if any appeals are pending concerning an order compelling a claimant's appearance at an IRE examination, those appeals should be withdrawn. Notably, the Pennsylvania Bureau of Workers' Compensation has recently issued a bulletin indicating that it will no longer schedule IRE examinations in light of the Supreme Court's holding in Protz.

- **Claims in which an IRE determination recently has been made and an automatic notice of change in status has been issued:** In these cases, the change in status will likely be no longer effective. Employers/insurers will need to re-evaluate their reserves because wage loss benefits will no longer terminate 500 weeks after the change in status. These claims also should be evaluated in order to determine whether a settlement can be reached or if a termination petition or a suspension or modification petition (based on a job offer or labor market survey)

would be appropriate.

- **Claims in which an IRE determination recently has been made and modification petition litigation is pending at any stage:** For cases in which a claimant recently has attended an IRE evaluation and where litigation is pending before a workers' compensation judge, Workers' Compensation Appeal Board, the Commonwealth Court or the Supreme Court concerning such a modification petition, counsel for the employer/insurer should withdraw the petition or appeal. In addition, the employer/insurer may need to re-evaluate reserves for such claims.

Application of Protz to Cases Involving IREs that are Not Currently in Litigation

As noted above, the Supreme Court has not explicitly stated whether its decision is retroactive. Attorneys that represent claimants are likely to argue that the decision should apply retroactively so that all changes in status made pursuant to IRE determinations are null and void. They will also likely argue that for any claims in which wage loss benefits stopped after 500 weeks of disability benefits were paid following a change in status, those claims (1) should be re-opened, and (2) that past-due and ongoing benefits should be paid to those claimants.

Pennsylvania courts generally adhere to the principle that a party whose case is pending at any stage of litigation, including a direct appeal, at the time of the new appellate decision is entitled to the benefit of changes in the law. Commonwealth v. Brown, 431 A.2d 905, 906-07 (Pa. 1981); see also Blackwell v. State Ethics Commission, 589 A.2d 1094, 1099 (Pa. 1991) (holding that the court's determination that Section 4(4) of the Sunset Act is unconstitutional is to be applied retroactively to the parties before the court and to all cases pending at the time of that decision in which the issue of the constitutionality of that section was timely raised and preserved).

Employers and/or insurers may argue, similarly, that Protz applies only to cases in litigation at the time the Supreme Court issued its decision in which the issue was raised and preserved. In the event that workers' compensation judges, the appeal board, and/or the appellate courts eventually rule that Protz applies retroactively, there will be significant exposure for claims from the past 20 years for which wage loss benefits were no longer paid based upon Section 306(a.2) of the act.

The issue of whether the Protz decision applies retroactively will most likely arise in the following scenarios:

- **Claims in which a claimant's status was previously changed via an automatic notice of change in status and no challenge was filed within 60 days:** Claimants' attorneys may file reinstatement or modification petitions requesting that their clients' status be returned to total disability and that their total disability benefits be reinstated (if they were stopped) in situations in which notices of change in status were issued and where the 60-day time period for challenging the notice expired. In these situations, employers and/or insurers can argue, as discussed above, that the Supreme Court's ruling does not apply retroactively.

- **Claims in which a claimant's status was previously changed via agreement:** Again, claimants' attorneys may file reinstatement or modification petitions, or petitions to set aside a compromise and release agreement, requesting that their clients' status be returned to total disability and that their total disability benefits be reinstated (if they were stopped) in cases where the parties reached a settlement after the claimant's disability status changed due to an

IRE determination. In such cases, employers and/or insurers can argue that this allegation has been waived, that Protz does not apply, and that the matter cannot be reopened.

- **Claims in which a claimant's status was previously changed via a workers' compensation judge's decision and order granting a modification petition that was not appealed or where the appeal has concluded:** Finally, claimants' attorneys may file reinstatement or modification petitions requesting that their client's status be returned to total disability and that their total disability benefits be reinstated (if they were stopped) in situations in which workers' compensation judges have granted a modification petition and changed a claimant's status from total disability to partial disability and where the claimant has not pursued an appeal or where the parties litigated the appeal and the appeal was decided in the employer's and/or insurer's favor. In these situations, employers and/or insurers can argue that this issue has been waived where no appeal has been filed, that Protz does not apply, and that the matter cannot be reopened.

Going forward there is likely to be new case law involving the application of Protz. Action by the Pennsylvania Legislature following the decision is also a possibility. Employers and insurers should proactively examine each claim involving an IRE in order to determine whether Protz applies and how Protz affects the status of the claim going forward, as the Supreme Court's decision is likely to generate a great deal of litigation concerning these issues.

Karyn Dobroskey Rienzi is a principal at Post & Schell PC in Philadelphia in the firm's appellate department. She focuses her practice exclusively on post-trial and appellate matters in a variety of practice areas, including casualty, insurance coverage, premises liability, products liability, and workers' compensation. In her appellate practice, Rienzi works closely with trial attorneys on pretrial and trial strategies in state and federal court to protect and enhance a client's post-trial and appellate rights.