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WORKERS' COMPENSATION NEWS

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The Retroactive Effect of Protz:

Reinstatement Petitions on Benefits Modified by Independent Rating Evaluations Must Be Filed Within Three Years of the Last Payment of Compensation

On June 20, 2017, the Supreme Court of Pennsylvania struck the entirety of Section 306(a.2) from the Pennsylvania Workers' Compensation Act as unconstitutional, which foreclosed the Employer's ability to seek a 500 week cap on wage loss benefits for claims in which total disability benefits have been paid for two or more years by way of an impairment rating evaluation (IRE) in its seminal decision in *Protz v. WCAB (Derry Area Sch. Dist.)*, 161 A.3d 827 (Pa. 2017). While the decision in *Protz*, had limited effect on newer claims, meaning those claims in which total disability had been paid for less than two years, the immediate effects of the decision were clear on older claims in that: (1) the challenges to the modifications that previously utilized IREs that were pending the Supreme Court's decision in *Protz* were immediately rendered moot and benefits remained total in character; (2) settlement values would be affected on claims in which benefits were previously modified and capped through an IRE; and (3) reserves on older claims would need to be adjusted given that there was now no longer a 500 week cap on claims involving modifications by IRE. However, what was unclear from the *Protz* decision was its retroactive effect on claims nearing, or beyond, the 500 weeks benefits had been modified to partial disability. The legal community postulated a cascade of Reinstatement Petitions on those claims in which disability status was modified based on now unconstitutional IREs.

Close to one year since the decision in *Protz*, on June 6, 2018, the Commonwealth Court addressed the retroactive effect of *Protz* in its decision in *P. Whitfield v. WCAB (Tenet Health System Hahnemann LLC)* at 608 C.D. 2017. The Claimant, Paulette Whitfield, suffered a work injury in 2002. After undergoing an IRE in 2006, the Claimant's benefits were ultimately judicially modified to partial disability in 2008, based on that IRE. The issue before the Commonwealth Court was whether the Claimant was entitled to the benefit of the decision in *Protz* when disability status was judicially modified in 2008 without challenge to the constitutionality of the IRE upon which the modification was based for more than seven years. The Commonwealth Court held that since Claimant filed her Petition to Reinstatement within three years of the date of the most recent payment of compensation (i.e. indemnity benefits), the Claimant had a statutory right to seek reinstatement under Section 413(a) of the WC Act, 77 P.S. § 772.

Once the Court in *Whitfield* reasoned that the Claimant could pursue her Reinstatement Petition, it then analyzed the Claimant's claim for reinstatement recognizing that in general circumstances in order to be entitled to reinstatement to total disability, after expiration of the 500 weeks of partial disability, a claimant must show: (1) a loss of earning capacity, and (2) a worsening of the claimant's medical

condition. However, Reinstatement Petitions following modifications based on an IRE required applying different set of criteria post-*Protz*. The Court reasoned in the first instance that it made little sense to require a Claimant seeking reinstatement based on an unconstitutional IRE to show a change in earning power when the employer was not required to show the same when it modified Claimant's disability status from total to partial on the IRE in the first place. Further, in certain cases, a Claimant will not be able show a "change" in earning power "when earning capacity remained at zero" all along. In the second instance because the change in disability status was not from a change in physical condition, and only based on a now unconstitutional IRE, it did not make sense to require the Claimant to establish a worsened physical condition.

The Commonwealth Court noted from the record that the Claimant testified that she was unable to work in any capacity since her 2002 surgery. The Employer did not present evidence to contradict the Claimant's testimony in this regard. Further, the WCJ did not assess Claimant's credibility in terms of her testimony. The Court applied *Sladisky v. Workers' Comp. Appeal Bd. (Allegheny Ludlum Corp.)*, 44 A.3d 98, 102 (Pa. Cmwlth. 2012) and *Latta v. Workmen's Comp. Appeal Bd. (Latrobe Die Casting Co.)*, 642 A.2d 1083, 1085 (Pa. 1994) reasoning that a claimant seeking to reinstate total disability benefits prior to exhaustion of the 500 week period of partial disability benefits must establish that her earning power is again adversely affected by the work injury without showing a worsened condition. Therefore if the Claimant's testimony was credited that she could not work in any capacity since her surgery, she would have met her burden of proof. In so finding, the Court vacated the Board's order and remanded with instructions for further remand to the WCJ to make factual findings on whether the Claimant credibly testified that she was totally disabled. If her testimony was deemed credible, she was entitled to a reinstatement as of the date she filed her petition.

The Commonwealth Court in *Whitfield* thus concluded that:

- (1) Because the Claimant filed her Petition within three years from the date of her last payment of compensation as permitted by Section 413(a) of the Act, she was entitled, as a matter of law, to seek modification of her disability status based on *Protz*, which found the IRE provision unconstitutional.
- (2) In order to be entitled to the reinstatement, "a Claimant must testify that her work-related injury continues, and the WCJ must credit that testimony over any evidence that an employer presents to the contrary."

Based on *Whitfield* the Commonwealth Court placed the time limitation on Claimants who seek to reinstate benefits to total disability following a modification from an IRE, within three years from the last payment of wage loss or indemnity benefits. The effect of the decision prevents Claimants from filing for reinstatement outside of that three year period from the last payment thus restricting indemnity claims that have long since closed from reopening. An appeal to the Pennsylvania Supreme Court on this issue is anticipated from the Claimant's bar following the remands, which will take 2 to 3 years to reach the Pennsylvania Supreme Court.

Employers should note that, while *Protz* struck the entirety of Section 306(a.2) from the Act, the Pennsylvania legislature is still working to redraft the provision to utilize IREs once again. A proposed bill is currently pending to correct the constitutional issues addressed in *Protz*. Further, Employers are empowered to continue to seek modifications by showing the injured worker has "earning power" by way of a labor market survey through vocational workup, which not only serves to reduce wage loss

benefits, but also provides a cap of 500 weeks on an indemnity claim and provides better leverage with settlements. Hence, notwithstanding that an impairment rating is in a suspended status in Pennsylvania, employers can still utilize the vocational review provisions of the act to reduce exposure and potentially cap a claim to 500 weeks.

If you have any questions, we would be happy to assist. Please contact:

Claudio J. DiPaolo, Chair of the Firm's Workers' Compensation Section since 2009, has practiced insurance defense litigation for over 20 years, with a concentration in workers' compensation litigation. He has defended workers' compensation matters on behalf of self-insured corporations, insurance carriers, third party administrators and various governmental agencies. Claudio has successfully represented clients before the Workers' Compensation Appeal Board, Commonwealth Court, and Supreme Court of Pennsylvania. He has also handled various other matters including employment, commercial motor vehicle, premises liability, insurance coverage, errors & omissions, and medical malpractice. He has counseled clients nationwide on workers' compensation topics, including the interplay between workers' compensation and other laws, insurance coverage issues, effective claims handling, and implementation of return to work and workplace safety programs. His clients include large multinational companies, Fortune 500, global insurers, and the nation's largest restaurant chain, pet store retailer, airline and internet retailer. Claudio is admitted to practice in Pennsylvania and New York, as well as the U.S. District Court for the Western District of Pennsylvania, the U.S. Court of Appeals for the Third Circuit, and the State of New York Supreme Court, Appellate Division, Third Judicial Department. He earned a B.A. degree at Duquesne University, and a J.D. from the Delaware Law School. Claudio has been selected as a Pennsylvania Super Lawyer in 2015, 2016, 2017 and 2018 by **Law & Politics**.



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