

Special Report: IRE Provisions of the Workers' Compensation Act Found to Be Unconstitutional

Background/Case Review

On September 18, 2015, the Commonwealth Court filed its decision in Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.), 2015 Pa. Commw. LEXIS 404 (Pa. Commw. Ct. Sept. 18, 2015). In that opinion, the court declared Section 306(a.2) of the Workers' Compensation Act (hereafter the "Act"), 77 Pa. Stat. Ann. § 511.2, to be an unconstitutional delegation of legislative authority insofar as it proactively approved versions of the American Medical Association's Guides to the Evaluation of Permanent Impairment (hereafter "AMA Guides") beyond the Fourth Edition without review. In short, this opinion makes it unconstitutional to use the Fifth and Sixth Editions of the AMA Guides in the performance of IREs.

By way of background, Section 306(a.2) of the Act provides that after 104 weeks of total disability benefits, the employer may request that the claimant submit to an IRE for purposes of determining the degree of his or her impairment. If the IRE rating is less than 50 percent, and the IRE was requested within 60 days of the claimant's receipt of 104 weeks of total disability benefits, then the claimant will be automatically considered partially

disabled with the simple filing of a notice of the status change. This in turn reduces the amount of compensation that must be paid to 500 weeks. The employer may also seek to have a claimant submit to an IRE, and then accomplish a change in status through filing of a Modification Petition where the initial request to submit to an IRE was not made within 60 days of the claimant's receipt of 104 weeks of total disability benefits.

Prior to the Protz case, the degree of impairment was to be determined "pursuant to the most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment." This provision, Section 306(a.2) of the Act, was enacted in June of 1996, when the Fourth Edition of the AMA Guides was in effect. Since that time, the Fifth and Sixth Editions of the AMA Guides have been published in November of 2000 and December of 2007, respectively. The effect of the statutory language was to proactively approve each edition of the AMA Guide as subsequent versions were published.

The court in Protz held that Section 306(a.2) of the Act, by proactively adopting subsequent versions of the AMA Guide without

any governmental review, amounted to an unconstitutional delegation of legislative power under Article II, Section 1 of the Pennsylvania Constitution.

Effect of the Protz Decision

Based on the Protz ruling, claimants at every stage of litigation will likely argue that the decision applies and that any IRE determination issued under the Fifth or Sixth Editions of the Guides is invalid.

In Pennsylvania, it has long been the rule of law that the court must apply the law as it exists at the time of its decision. *See e.g.*, Commonwealth v. Kohl, 615 A.2d 308 (Pa. 1992); Commonwealth v. Brown, 431 A.2d 905 (Pa. 1981) (*citing* United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801)). Nonetheless, if a case is pending at any stage of litigation, and a new appellate decision changes the law governing the case, then the court generally must apply the changes in the law. Id.

When determining the retroactive effect of a decision holding a statute unconstitutional, Pennsylvanian courts have acknowledged at least four potential approaches:

1. Give the new rule purely prospective effect so that it is not even applied to the parties in the case in which the new rule is announced.
2. Limited retroactive application to the case in which it is announced.
3. Apply the new rule to the case in which it is announced and to all cases pending at the time the new rule is announced.
4. Give the new rule fully retroactive effect. Under this approach, the new rule is applied to the case in which it is announced, to all cases pending at the time the new rule is announced, and even to cases which are final at the time the new rule is announced.¹

Blackwell v. State Ethics Comm'n, 589 A.2d

1094 (Pa. 1991) (*citing* Commonwealth v. Geschwendt, 454 A.2d 991 (Pa.1982) (plurality; overruled by Federal Court). Regarding the fourth option, the court noted that finality was defined as "an order terminating the litigation between parties to the suit by precluding a party from further action in that court." Id.

In recognizing these options, Pennsylvania courts have largely returned to the general rule of providing retroactive effect to such decisions, but only as to those cases still pending final decision (at either the trial or appellate level). *See* Passarello v. Grumbine, 87 A.3d 285 (Pa. 2014); Blackwell, supra. Whether a judicial decision should apply retroactively is a matter of judicial discretion to be decided on a case-by-case basis. Id.; Office of Disciplinary Counsel v. Surrick, 749 A.2d 441, 444 (Pa. 2000). In deciding the retroactive effect, courts look at whether: (1) retroactive effect will further or hinder the purpose of the new rule; (2) the parties will be unfairly prejudiced because they relied on the old rule; and (3) giving the new rule retroactive effect will detrimentally affect the administration of justice. Passarello, supra.; Cleveland v. Johns-Manville Corp., 690 A.2d 1146, 1151 (Pa. 1997).

While it is presently unclear what effect the court will ultimately provide to this decision, the present situation is analogous to that examined by the court in Blackwell, supra. In Blackwell, the court examined the effect of a ruling holding that a provision of the Sunset Act was an unconstitutional delegation of legislative power under Article II, Section 1 of the Pennsylvania Constitution. Reviewing the unconstitutional delegation of legislative power under the three factors above, the court held that the effect of the decision should be applied retroactively to the parties before the court and to all cases pending at the time of that decision. The court explained that this

holding:

(1) serves the purposes of the new decision to mandate conformity with the constitution; (2) takes into account that numerous transactions which were concluded unchallenged in reliance upon [the applicable provision] and are now final; and (3) has a limited effect on the operations of the various agencies, boards and commissions in that our retroactive application is restricted to the instant case and all cases pending at the time of [the decision] in which the validity of [the applicable provision] was properly raised and preserved.

Id. at 1099-1100.

Similar to Blackwell, the present case involves an unconstitutional delegation of legislative power. Further, the decision in Blackwell was consistent with the general treatment of appellate decisions in this jurisdiction. As such, it is very likely that such treatment will be afforded to the Protz decision moving forward.

Recommendations

While the application outlined in the preceding section appears to be most likely, it is very likely that claimants will argue for a complete retroactive approach. As the Pennsylvania Supreme Court has yet to rule on the constitutionality of Section 306(a.2) of the Act, let alone the application should it uphold the Commonwealth Court's holding, employers must plan appropriately for the time being. The following offers advice for navigating the Protz decision as we await additional guidance from the court:

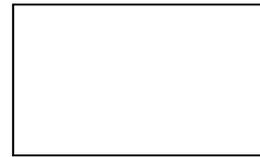
- Future IREs – For all future IREs, employers should task the physician with making a determination under both the Fourth and most recent version of the AMA Guide. Under the present landscape, the IRE determination under the

Fourth Edition should be controlling. Nonetheless, a determination under the most recent version will offer protection of the IRE should the Protz decision be reversed by the Pennsylvania Supreme Court.

- Pending Litigation where an IRE has Already been Performed – Where an IRE has already been performed and the case is either within the 60 day window after an automatic Notice of Change in Status has been issued, or the case is in litigation at any stage (WCJ, WCAB, Commonwealth Court, or Supreme Court), an employer should immediately seek an addendum report from the IRE physician setting forth his determination under the Fourth Edition. Alternatively, the employer should seek to have a new IRE performed.
- 60 Days has Passed Since Notice of Change in Status with No Challenge OR Final Order on Modification Petition was Granted and Appeal Period has Passed – As stated above, the court has not determined the retroactive effect of the Protz decision. Nonetheless, similar case law suggests that the Protz case will not have any effect on these cases should claimant file a Reinstatement or Modification Petition. While the argument exists, it is presently unclear if a WCJ will entertain such an attempt.

¹This application only appears to have been applied in very unique situations. *See e.g. Arsenault v. Massachusetts*, 393 U.S. 5, 89 S.Ct. 35, 21 L.Ed.2d 5 (1968). (Per Curiam opinion applying Gideon v. Wainwright retroactively in case where defendant was convicted without being provided counsel at critical stages of litigation).

Thomson, Rhodes & Cowie, P.C.
1010 Two Chatham Center
Pittsburgh, PA 15219



TR&C



ATTENTION READERS: The editors of the Thomson, Rhodes & Cowie Pennsylvania Workers' Compensation Bulletin invite you to submit questions you may have dealing with workers' compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified workers' compensation attorney.

Send questions to: Harry W. Rosensteel, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219, hwr@trc-law.com.

The Bulletin is a quarterly publication reviewing recent trends in Pennsylvania Workers' Compensation Law. All original materials Copyright 1993-1995 by Thomson, Rhodes & Cowie, P.C. The contents of this Publication may be reproduced, redistributed or quoted without further permission so long as proper credit is given to the Thomson, Rhodes & Cowie Pennsylvania Workers' Compensation Bulletin.

The Thomson, Rhodes & Cowie Pennsylvania Workers' Compensation Bulletin is intended for the information of those involved in the workers' compensation system. The information contained herein is set forth with confidence, but is not intended to provide individualized legal advice in any specific context. Specific legal advice should be sought where such assistance is required.

Prior issues are available on our web site at <http://www.trc-law.com> or upon request. Please direct inquiries to Harry W. Rosensteel, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, Pennsylvania 15219, (412) 232-3400, hwr@trc-law.com.