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Protz v. WCAB (Derry Area School District): The death of the IRE

In the Summer 2016 edition of this Bulletin, this author outlined the assault the claimant's bar and the Pennsylvania appellate courts had begun on Section 306(a.2) of the Workers' Compensation Act (see TR&C Workers' Compensation Bulletin, Vol. XIII, No. 8, Summer 2016). With its recent decision in *Protz v. WCAB (Derry Area School District)*, No. 6 WAP 2016 and No. 7 WAP 2016, 6/20/2017, the Supreme Court has landed the final blow.

Section 306(a.2) of the Act provides that, after paying 104 weeks of total disability benefits, the employer may request that the claimant submit to an IRE for purpose 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.

Mary Ann Protz injured her knee in 2007 while employed by the Derry Area School District. The claim was accepted and Ms. Protz was paid total disability benefits. In October 2011 Ms. Protz was evaluated by an IRE physician at the employer's request. By that time, she had received well over 104 weeks of total disability benefits. The evaluating physician assigned a 10% whole person impairment utilizing the Sixth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (hereinafter "AMA Guides"). The employer subsequently filed a petition to modify the claimant's benefit status, and the WCJ assigned to the case appropriately granted that petition under Section 306(a.2) of the Act. The Appeal Board affirmed the WCJ on appeal. On further appeal, the Commonwealth Court reversed the WCJ and Board, holding that Section 306(a.2) of the Act, by proactively adopting subsequent versions of the AMA Guides without any governmental review, amounted to an unconstitutional delegation of legislative power under Article II, Section 1 of the Pennsylvania Constitution.

The Supreme Court granted allocatur and has now expanded the decision of the Commonwealth Court to completely invalidate

Section 306(a.2) of the Act. The Supreme Court agreed with the Commonwealth Court that the language in Section 306(a.2), which mandated the use of “the most recent edition” of the AMA Guides, was an impermissible delegation of legislative authority to a private body. However, the Supreme Court did not agree with the lower court to the extent that the evaluation should therefore be performed under the Fourth Edition of the AMA Guides. Instead, the Court held that the elimination of the language mandating the use of the most recent edition, renders that entire section of the Act invalid, as it was now devoid of any specific direction as to how IREs are to be conducted. The Court refused to postulate that the legislature intended the words “the most recent edition” to mean the Fourth Edition. Hence, the IRE is

now dead in Pennsylvania.

While each case must always be evaluated on its own merit, this author believes that all petitions currently pending to modify benefit status based upon an IRE must now be withdrawn. In addition, all petitions to compel attendance at an IRE must now be withdrawn. Failure to promptly do so will likely result in claims for unreasonable contest attorney fees. It should be noted that the Court did NOT address the issue of whether this decision would be given retroactive effect. Therefore, claimant’s who’s benefit status was previously changed pursuant to a then valid IRE, will likely be filing reinstatement petitions seeking to have their benefits status reinstated to temporary total disability.

Harry W. Rosensteel



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

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