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## Post-Protz Developments

By James A. Mazzotta, Esquire

We are all now familiar with the opinion of the Pennsylvania Supreme Court in the case of *Protz vs. WCAB (Derry Area School District)*, 161 A.2d 827 (Pa. 2017), which declared Section 306(a.2) of the Pennsylvania Workers' Compensation Act unconstitutional.

Since the Supreme Court's Opinion in *Protz*, we have been waiting for further direction from the appellate courts as to whether the *Protz* case would be applied retroactively to cases already pending and those previously decided.

Also outstanding were questions with regard to waiver of the right to request reinstatement based upon failure to raise the constitutional issues during prior IRE proceedings.

On June 6, 2018, the Commonwealth Court of Pennsylvania issued three Opinions which address these and other issues, although some remain open to be addressed in the future.

In the reported case *Whitfield vs. WCAB (Tenet Health System Hahnemann, LLC)*, No. 608 C.D. 2017, the court concluded that waiver does not apply as long as the claimant's petition to reinstate total disability is filed within three years of the date of the most recent payment of compensation. Under Section 413(a) of the Act, reinstatement is allowed "upon proof that the disability of an injured employe has increased, decreased, recurred, or has temporarily or finally ceased...."

The Commonwealth Court held that the claimant in *Whitfield* was eligible for reinstatement upon proof that disability continued. The burden of proof could be satisfied simply by the claimant's own testimony as medical evidence would be unnecessary.

Importantly, the Commonwealth Court did not address the question of whether waiver would apply where the claimant's reinstatement petition is filed greater than three years after the date of the last and most recent payment.

In the second case, *Pavlack vs. WCAB (UPMC South Side)*, No. 702 C.D. 2017, the Commonwealth Court addressed the question of the effective date of reinstatement if the claimant satisfies the burden announced in *Whitfield*. The Court concluded that the effective date for reinstatement would be the date the petition to reinstate total disability is filed. Other cases that had been decided previously used 6/20/17, the date of the Supreme Court's Decision in *Protz* as the effective date for reinstatement.

Importantly, the Court does not go back in time to the effective date of modification to partial disability (i.e., the date of the IRE examination) for reinstatement. This leaves open the question of whether the employer would receive "credit" for weeks of partial disability paid under the now-unconstitutional IRE provisions.

In the third case, *Moore vs. WCAB (Sunoco, Inc. (R&M))*, No. 715 C.D. 2017, the Court declined to address the question of whether all pending IREs under the various Editions of the AMA Guides would be subject to the same analysis in *Whitfield*. Reading all three cases together, each involved an IRE performed under the Fifth Edition of the Guides and, in the *Moore* case, the claimant argued for application to the Fourth Edition as well. Accordingly, the question of whether the post-*Protz* rules would apply to Editions other than the Fifth remains open.

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The Court in *Moore* also confirmed that an employer can rebut a claimant's testimony for total disability during the litigation of the reinstatement petition. It would appear that to successfully rebut the claimant's testimony, medical evidence, and perhaps the more common evidence of job availability or offer, would be required.

To summarize, reinstatement on a *Protz* issue is not automatic. The claimant must, at the very least, testify as to ongoing work-related disability. The employer is able to rebut such evidence.

And although waiver may not apply to retroactive application of *Protz*, there do remain open and valid questions as to the effective date of reinstatement, as well as whether reinstatement would be permitted after the 500 weeks of partial disability have run and three years have elapsed since the last payment of benefits.



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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](mailto:hwr@trc-law.com).

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