

Did the Commonwealth Court Decide the Retroactive Effect of ‘Protz’?

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In June, the Pennsylvania Supreme Court declared Section 306(a.2), the impairment rating evaluation provisions of the Pennsylvania Workers’ Compensation Act, to be unconstitutional under Article II, Section I of the Pennsylvania Constitution pursuant to the nondelegation doctrine in [Protz v. Workers’ Compensation Appeal Board \(Derry Area Sch. District\), 161 A.3d 827](#) (Pa. 2017) (Protz II). The court condemned Section 306(a.2) as delegating a “broad and unbridled” authority to the American Medical Association (AMA) to create a methodology for grading impairments without prescribed standards to restrain the AMA’s discretion. Section 306(a.2) allowed employers to request that a claimant undergo an impairment rating evaluation (IRE) to determine if their workers’ compensation benefits should be changed from temporary total to temporary partial in nature, based upon the most recent edition of the AMA’s “Guides to the Evaluation of Permanent Impairment.” The court struck Section 306(a.2) from the act in its entirety and found it to be an unconstitutional delegation of legislative authority. However, the court left the retroactive effect of its ruling unaddressed and no subsequent application was made to ask the court to clarify this aspect of its decision.

In the wake of Protz II, litigants have searched for answers as to how to address disability status that has been changed by an IRE process now deemed unconstitutional. In August, the Commonwealth Court issued its

first significant post-Protz decision, applying Protz II retroactively in the appeal of a pending IRE modification claim in *Thompson v. Workers’ Compensation Appeal Board (Exelon Corp.)*, 2017 Pa. Commw. LEXIS 596, (Pa. Cmwlth., Aug.16) (Thompson II). The court found that the claimant’s benefits had been erroneously modified from total to partial under Section 306(a.2) of the act based upon Protz II, and that the claimant did not waive her Protz issue having raised it at the first opportunity. While Thompson provides scant guidance for future cases involving differing facts, it strongly suggests that Protz II will be applied retroactively where the claim is pending and the unconstitutionality issue was preserved.

The Thompson claimant sustained a work-related injury while employed at Exelon Corp. on Oct. 16, 1998. The employer subsequently changed the claimant’s disability status from total to partial based upon an IRE of Sept. 12, 2005. On Dec. 29, 2010, the employer filed a petition to modify and suspend the claimant’s benefits and indicated that the claimant would reach 500 weeks of partial disability benefits as of Oct. 8, 2012. In April 2011, the claimant filed a review petition seeking a review of the 2005 IRE determination because she had not reached maximum medical improvement (MMI). The workers’ compensation judge consolidated the various petitions and issued a decision granting the employer’s modification petition, denying the employer’s suspension petition, and denying

in part the claimant's review petition. The judge concluded that the IRE established that the employer was entitled to a modification of claimant's benefits from total disability to partial disability, and also that the claimant had reached MMI at the time the IRE was conducted.

The Workers' Compensation Appeal Board affirmed, and concluded that the claimant was time-barred from challenging the change of her disability status, having failed to appeal within the 60-day time period after she received notice of change in disability status. The board also found that the claimant could not appeal within the 500-week period of partial disability without having an IRE determination finding her whole body impairment above 50 percent. The claimant petitioned the Commonwealth Court, arguing that the notice changing her disability status deprived her of due process by concluding that she was time-barred from challenging her disability status. The Commonwealth Court agreed with the claimant, finding that the language in the notice was inadequate and deprived the claimant of her due process rights, and vacated and remanded back to the Board to consider the merits of her appeal. (Thompson I).

On remand, the board concluded that the judge did not err in determining that the employer was entitled to an automatic modification of the claimant's benefits under Section 306(a.2) of the act, and that the claimant's benefits should be modified from total to partial disability. In response, the claimant filed an appeal raising new arguments based upon [Protz v. Workers' Compensation Appeal Board \(Derry Area School District\)](#), 124 A.3d 406 (Pa. Cmwlth. 2015) (en banc) (Protz I), including that her benefits were modified based upon an IRE performed using the Fifth Edition of the AMA Guides, which had been declared unconstitutional by the Commonwealth Court.

In the interim, Protz II was decided by the Pennsylvania Supreme Court, and the Commonwealth Court again reversed and vacated the board and judge's decision relying upon Protz II. (Thompson II). The Commonwealth Court applied Protz II without expressly addressing its retroactive effect and reversed the Board's opinion to the extent that it modified claimant's benefits from full to partial.

Thompson II does not expressly discuss the retroactivity principles set forth in the seminal [Blackwell v. Commonwealth of Pennsylvania, State Ethics Commission](#), 589 A.2d 1094 (Pa. 1991), but is consistent with Blackwell's holding that retroactive application of a decision that legislative power was unconstitutionally delegated to another body, is limited to pending cases where the litigant had timely preserved the unconstitutionality issue. The Commonwealth Court's reasoning in Thompson II in reversing the modification of benefits is that Section 306(a.2) had been stricken from the act as unconstitutional, and no other provision allowed for modification of benefits based on an IRE. Arguably, this can be said of many cases where Section 306(a.2) modifications are pending.

The Commonwealth Court's treatment of the waiver issue also signals that Protz II will be applied retroactively to pending claims so long as the Section 306(a.2) unconstitutionality issue was preserved. The court explains that the Thompson litigation began before Protz I and II were decided; that the appeal implicated the validity of Section 306(a.2)(1); and, that the Section 306(a.2)(1) issue was raised at the first opportunity, citing Pa. R.A.P. 1551(a). The court does not clarify what it means by the first opportunity and the facts are unclear, but other Commonwealth Court decisions addressing Protz I have found no waiver of Section 306(a.2) claims under similar circumstances.

Workers' compensation counsel cannot expect further clarification from Thompson II as to the extent to which Protz II will be applied retroactively, as no further appellate review was sought. In the short run, litigants will have to await the next Commonwealth Court case in the pipeline, or word from the legislature. The one thing that is certain from Thompson II is that employers will have to learn to live with Protz II.



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