

PENNSYLVANIA WORKERS' COMPENSATION

By Francis X. Wickersham, Esquire (610.354.8263 or fxwickersham@mdwgcg.com)



Francis X. Wickersham

Commonwealth Court denies claimant's motion to vacate her 2003 Impairment Rating Evaluation.

Susan Riley v. WCAB (Commonwealth of Pennsylvania); No. 238 C.D. 2016; Filed December 8, 2016; Judge Hearthway

The claimant suffered work-related injuries on August 7, 2000, after she was assaulted by a patient at her employer's health care facility.

The employer acknowledged the claimant's injuries by issuing a Notice of Compensation Payable. In 2003, the claimant was seen for an Impairment Rating Evaluation. The IRE physician gave the claimant a 21% impairment rating, using the 5th Edition of the American Medical Association guides, and the claimant was adjusted to partial disability status.

Many years later, in August 2012, the claimant filed a petition to review, seeking to add injuries to the NCP and alleging that the IRE physician failed to consider the full extent of her work injuries. The Workers' Compensation Judge denied these petitions, and the claimant appealed to the Worker's Compensation Appeal Board. In October 2015, while her appeal was pending, the claimant filed a motion with the Board to vacate the 2003 IRE, based on the Commonwealth Court's decision in *Protz v. WCAB (Derry Area School District)*; 124 A.3d 406 (Pa. Commonwealth 2015, appeal granted by 133 A.3d 733 (Pa.2016)).

The Appeal Board affirmed the judge's decision and denied the claimant's motion. According to the Board, the claimant could no longer challenge the 2003 IRE since she failed to do so within the necessary 60-day period set forth in Section 306(a.2) of the Act and failed to present evidence of a new impairment rating of more than 50%.

The claimant appealed the Board's decision to the Commonwealth Court, arguing the Board erred by failing to vacate the IRE that was performed in 2003. The Commonwealth Court affirmed the Board, holding that *Protz* was not controlling. The court noted that in *Protz*, the claimant

appealed the IRE within 60 days of the notice adjusting the claimant to partial disability status, whereas in this case, the claimant waited 10 years after the notice to challenge use of the 5th Edition of the AMA guides for the 2003 IRE. According to the court, this constituted a waiver by the claimant to challenge the 2003 IRE determination. II

Commonwealth Court vacates an order from the Board affirming an IRE performed using the 6th Edition of the AMA Guides holding that *Protz v. WCAB* controls.

Vincent Beasley v. WCAB (PECO Energy Company); No. 634 C.D. 2016; Filed December 22, 2016; Senior Judge Pellegrini

The claimant sustained a work injury on April 15, 2009, which the employer acknowledged by issuing a Notice of Compensation Payable. The claimant began receiving worker's compensation benefits for his work injury on April 23, 2009. On April 15, 2011, the employer filed a request for an Impairment Rating Evaluation. The claimant challenged the request, citing Section 306(a.2) of the Act as requiring the parties to first try to reach an agreement on the IRE physician before an employer files an IRE request. Ultimately, the claimant underwent an IRE that was performed on October 23, 2012.

An impairment rating of 28% under the 6th Edition of the AMA Guides was given, and the employer filed a notice to adjust the claimant to partial disability status. The claimant then filed a petition to review, challenging the IRE as defective. The Workers' Compensation Judge agreed with the claimant, holding that the IRE physician failed to demonstrate that she fulfilled the training requirements required to be an approved IRE physician and that the department's designation was made before both parties made a good faith effort to agree on an IRE physician. The judge further found that the employer failed to present evidence to establish the date the claimant received 104 weeks of temporary total disability benefits and that, therefore, it was impossible to decide whether the request for an IRE was timely, premature or late.

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The employer appealed to the Appeal Board, which reversed the judge. The Board found that the IRE was timely and, too, that the IRE physician was competent to testify. The Board additionally determined that the Act does not limit designation of an IRE physician to instances where the parties are unable to agree.

Before the Board, the claimant argued that under *Protz v. WCAB (Derry Area School District)*, which was decided after the Workers' Compensation Judge issued her decision, the IRE physician's testimony was incompetent because she used the 6th Edition of the AMA Guides. The Board refused to address the issue because the claimant had not appealed the judge's decision and never challenged the constitutionality of Section 306(a.2) of the Act.

The claimant appealed to the Commonwealth Court. While recognizing that the claimant did not challenge the use of the most recent edition of the AMA Guides before the Workers' Compensation Judge, the court, nevertheless, considered it an exception to a waiver by the claimant. The court held that, because the matter began before *Protz* was decided and the claimant raised the issue of the validity of a statute at the first opportunity to do so, the claimant was allowed to raise the issue of the improper use of the 6th Edition of the AMA Guides on appeal. The court vacated the Board's order and remanded with instruction to remand to the Workers' Compensation Judge to decide whether the 4th Edition and the 6th Edition of AMA Guides were different with respect to the injuries at issue and, if so, to receive testimony as to the impairment rating based on the 4th Edition of the AMA Guides. ||

DELAWARE WORKERS' COMPENSATION

By Paul V. Tatlow, Esquire (302.552.4035 or pvtatlow@mdwgc.com)



Paul V. Tatlow

Delaware Supreme Court holds that claimant's undocumented workers status is a relevant but not necessarily decisive factor in determining if claimant is an actually displaced worker.

Roos Foods v. Magdalena Guardado, (C.A. No. S15A-05-002 – Decided November 29, 2016)

The Delaware Supreme Court has issued its much anticipated decision on the issue of what impact a claimant's immigration status has on being a displaced worker in the context of a termination petition. The court holds that a claimant's undocumented worker status is not relevant in determining whether she is a *prima facie* displaced worker, but it is a relevant factor to be considered in determining whether she is actually a displaced worker. The impact of this holding means that undocumented workers status does not automatically make the claimant a *prima facie* displaced worker, which would in essence preclude any chance of a termination petition being successful.

The applicable law on this issue provides that a claimant may qualify as a *prima facie* displaced worker if the degree of physical impairment coupled with other factors—such as the claimant's age, education, occupational and general experience, emotional stability, the nature of the work performed—make the claimant not employable in any well known branch of the competitive labor market. If a claimant does not qualify as a *prima facie* displaced worker, she can nevertheless show that she is actually displaced by showing that reasonable, but unsuccessful, efforts were made to secure suitable employment. In either instance, the employer then has the burden of showing work is available to the claimant within her capabilities.

In *Roos*, the court finds that the Board's decision improperly found that the claimant was a *prima facie* displaced worker based entirely upon her undocumented worker status. The court states that a claimant's legal status as an undocumented worker is not relevant in determining whether the claimant is *prima facie* displaced.

On the other hand, where the claimant attempts to show that she is an actually displaced worker because reasonable efforts to secure suitable employment were unsuccessful, the status as an undocumented worker should be taken into account as a factor in determining whether she has made reasonable but unsuccessful efforts to secure suitable employment. Where the claimant makes such a showing, the employer then has the burden of demonstrating the availability to the claimant of regular employment within the claimant's capabilities. The court reasoned that it is not unreasonable for the employer to bear this burden since they hired the undocumented claimant in the first place.

Importantly, the court set forth a blue print for the type of evidence that the employer needs to present. While the Board's decision suggested that the employer must present evidence from specific employers who would be willing to hire an undocumented worker and have jobs within the claimant's ability that are open, the court clarified that no such requirement exists. Rather, the court indicated that what is required of the employer on the burden of showing that jobs are actually available for an undocumented worker is proof that can include reliable market evidence that employment within the worker's capabilities is available to undocumented workers.

The Supreme Court reversed the Superior Court's decision and remanded this case for a hearing before the Board. We have learned that the remand hearing before the Board will take place in late February. It will be closely watched to see what evidence the employer presents in an effort to show that the claimant is not a displaced worker despite her undocumented worker status. ||

NEWS FROM MARSHALL DENNEHEY

Ross Carrozza and **Jennifer Callahan** (Scranton, PA) are speaking at the National Business Institute's two-day seminar focused on handling workers' compensation cases. The seminar will explore the comprehensive nature of a workers' compensation claim from start to finish and provide attendees with the knowledge they need to improve the outcomes of their workers' compensation cases. Jennifer's presentation focuses on settlement options, while Ross discusses Medicare set-aside arrangements. This seminar will take place at the Courtyard Scranton Wilkes-Barre, Scranton, PA on Tuesday, April 25 and Wednesday, April 26, 2017. [Click here](#) for more information.

Kacey Wiedt (Harrisburg, PA) successfully defeated a reinstatement petition seeking workers' compensation benefits for hip replacement surgery as a result of a work injury. The claimant initially sustained a left hip injury resulting in hip replacement surgery in 2012. The claimant then sustained multiple hip dislocations following the hip replacement surgery resulting in the claimant undergoing hip revision surgery in 2015. The Workers' Compensation Judge found that the claimant's hip replacement surgery and disability were not the result of the initial injury of 2012.

Ashley Talley (Philadelphia, PA) successfully litigated a petition to terminate benefits despite an attempt by the claimant to include a variety of cognitive, neurological and spinal injuries based upon the opinions of two medical experts. The claimant was receiving workers' compensation benefits for a soft tissue injury she sustained while working for a national financial institution. The employer filed a petition to terminate benefits based upon the opinion of a neurologist, after which a petition was filed by the claimant seeking to expand the injury. The employer relied upon the expertise of its neurologist, who was found to be more credible and persuasive than the claimant's experts. The judge granted the employer's petition, thereby terminating benefits of the claimant in their entirety.

Kacey Wiedt (Harrisburg, PA) successfully defended the claim of a school teacher seeking benefits for low back surgery as a result of a work injury. The claimant sustained a trapezius strain when she tripped over a hockey stick while distributing exams to her students in a classroom. The claimant received physical therapy and alleged that she

injured her low back during the physical therapy exercises. She underwent lumbar spine surgery and related that the surgery and treatment were the result of injury during the course of physical therapy. Kacey argued that the surgery and low back injury were not a result of the claimant's physical therapy, but due to degenerative disc disease. The judge found that the claimant did not suffer a low back injury as a result of physical therapy activities and that the claimant's activities with physical therapy did not cause the need for surgery, or accelerate or aggravate her pre-existing degenerative disc disease condition. The judge denied and dismissed the claimant's review and reinstatement petition and granted the defendant's termination petition.

John Zeigler (Harrisburg, PA) received a decision and order from a Workers' Compensation Judge dismissing, with prejudice, claim and penalty petitions. The judge agreed with John's argument that the defendant was prejudiced by the claimant's failure to attend two independent medical examinations, by the passage of time and, in turn, an inability to mitigate what was at all times represented to be a continuing disability claim. The judge highlighted the claimant's failure to appear for the most recent hearing on the petition to compel a second rescheduled IME exam without any reasonable excuse for missing the hearing. The judge also highlighted the claimant's failure to submit any medical evidence in compliance with the judge's scheduling order. The dismissal of the petitions with prejudice eliminates possible long-term claim exposure and possible penalty exposure.

Michele Punturi (Philadelphia) successfully defeated a claim petition seeking workers' compensation benefits for an alleged work injury. Michele presented four fact witnesses from the employer who testified that the defendant's procedural policies with respect to reporting an injury were not followed, and that the claimant never reported any alleged injury to her supervisors. Michele also clarified that the claimant's medical expert, a chiropractor, did not have an accurate history and that the basis for his opinions were not supported by the medical records, the complaints, the history or the diagnostic studies. Rather, the judge relied on the testimony of Michele's expert, a board certified orthopedic surgeon, and his ability to consider all the medical records and diagnostic studies. This favorable decision also resulted in no liability for the claimant's attorney's litigation. ||