Back to the Future: A Post-'Protz' Primer on Pre-'Protz' Law

Recently, the Pennsylvania Commonwealth Court signaled that it was time to go "Back to The Future" in the case of *Sicilia v. API Roofers Advantage Program (Workers' Compensation Appeal Board)*, No. 747 C.D. 2021, filed June 7, by Senior Judge Bonnie Leadbetter.

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Many of us who came of age in the '80s fondly recall the classic, sci-fi, teen movie "Back To The Future." In the film, Marty McFly, with help from his mad scientist friend Doc Brown, travels in a modified DeLorean car back in time from 1985 to 1955. There, he meets his future parents as teens and finds that he must get them to meet and fall in love, or he will cease to be. In happy-ending fashion, Marty succeeds in bringing his parents-to-be together and returns to the year 1985.

Perhaps you're wondering what a popular movie from the VHS era has to do with a scholarly article on the Pennsylvania Supreme Court's seminal case of *Protz v. Workers' Compensation Appeal Board (Derry Area School District)*, 161 A.3d 827 (Pa. 2017) (*Protz II*). Trust me, this is not a movie review. It is, however, a review of past legal principles about impairment rating evaluations (IREs) that were developed by Pennsylvania's appellate courts pre-*Protz II* that will be relied on more frequently in a future, post-*Protz II* world. Recently, the Pennsylvania Commonwealth Court signaled that it was time to go "Back to The Future" in the case of *Sicilia v. API Roofers Advantage Program (Workers' Compensation Appeal Board)*, No. 747 C.D. 2021, filed June 7, by Senior Judge Bonnie Leadbetter. In the opinion, the court, citing the pre-*Protz II* Supreme Court decision of *Duffey v. Workers' Compensation Appeal Board (Trola-Dyne)*, 152 A.3d 984 (Pa. 2017), held that in performing an IRE, an examining physician has the discretion to determine what diagnoses are "due to" the compensable injury.

In both *Sicilia* and *Duffey*, the claimants challenged the validity of the IREs performed on the basis that the physicians failed to contemplate the full range of work-related injuries in giving their impairment ratings. In both cases, an impairment rating was given for what the evaluating physician considered to be the "compensable injury," as defined in documents such as the notice of compensation Payable (NCP) and prior judges' decisions. Although the IREs in both cases appeared to be consistent with the "compensable injury" dictate of the act, both the Commonwealth Court in *Sicilia* and the Supreme Court in *Duffey*

interpreted that provision more broadly, concluding that the IRE physician has the discretion to determine what diagnoses are due to the compensable injury and to rate them accordingly. According to the *Duffey* court, an IRE will be invalidated if the physician fails to apply professional judgement in determining whether conditions identified by the claimant at the evaluation are fairly attributable to the compensable injury. To be clear, *Sicilia* and *Duffey* apply to IRE cases and it remains a claimant's burden of proving a condition is related to the work injury via a petition to review and during the course of litigation resulting in a decision that expands the nature of injury.

What is perhaps most striking about the court's decision in *Sicilia* is that it has nothing to do with an issue Pennsylvania's high courts have routinely dealt with since *Protz II*, which is its retroactive application to claimants on partial disability status from a pre-*Protz II* IRE. Nor does it address another issue the courts have addressed regularly since the passage of Act 111, which is the constitutionality of the legislation. In a sense, it's as if the courts have said that these are settled issues, and we now must assess the validity of IREs on their merits.

As a refresher, in *Protz II*, the Supreme Court struck Section 306(a.2) from the act on the basis that it was an unconstitutional delegation of legislative authority to the American Medical Association (AMA), namely through language requiring use of the most recent edition of the AMA Guides to the Evaluation of Permanent Impairment in performing IREs. Following *Protz II*, a flurry of petitions were filed seeking to reinstate claimants on partial disability status from IREs to temporary total disability status. As a result, the courts have focused primarily on the retroactive effect of the *Protz II* case on these petitions. Over time, a blueprint developed.

In *Whitfield v. Workers' Compensation Appeal Board (Tenet Health System Hahnemann)*, 188 A.3d 599 (Pa.Cmwlth. 2018), the Commonwealth Court held that claimants who wished to take advantage of the holding in *Protz II* had to file an appropriate petition within three years of the last date of payment of compensation, in accordance with Section 413(a) of the act.

In *Weidenhammer v. Workers' Compensation Appeal Board (Albright College)*, 232 A.3d 986 (Pa. 2020), the Supreme Court held that a claimant was not entitled to a reinstatement of temporary total disability (TTD) status as of the date of her 2004 IRE where her 500 weeks of partial disability had exhausted in 2013, almost four years before *Protz II*. The court said that it did not intend Protz II to be given full retroactive effect or to nullify the statute of repose in Section 413(a) of the Act.

In *Dana Holding v. Workers' Compensation Appeal Board (Smuck)*, 232 A.3d 639 (Pa. 2020), the Supreme Court held that *Protz II* was retroactive to the IRE date for cases on appeal where a constitutional challenge to the IRE was raised.

In *Yolanda White v. Workers' Compensation Appeal Board (City of Philadelphia)*, 237 A.3d 1225 (Pa.Cmwlth. 2020), the Commonwealth Court held a claimant who raises a *Protz* constitutional challenge to a pre-*Protz* IRE is entitled to a reinstatement of

TTD benefits as of the date the reinstatement petition was filed, not the date of the IRE, where the claimant's modification from total to partial disability was effective in a prior year and had not been appealed.

Protz II also led to the passage of Act 111, which substantially reenacted the IRE provisions of Section 306 (a.2) of the act with Section 306 (a.3). It specified that in performing IREs, the Sixth Edition of the AMA Guides would be used. It also changed the threshold impairment percentage for modification to partial disability status from the prior 50% to 35%. Finally, the law specifically granted employers credit for any weeks of TTD or temporary partial disability (TPD) benefits paid prior to the Act's effective date, both for purposes of determining whether a claimant shall submit to an IRE and for determining the number of weeks partial disability remains payable.

From the time Act 111 was signed into law on Oct. 24, 2018, it has faced, and withstood, numerous constitutional challenges in the Commonwealth Court:

> In *Pennsylvania AFL-CIO v. Commonwealth of Pennsylvania*, 219 A.3d 306 (Pa.Cmwlth. 2019), the court held the General Assembly did not unconstitutionally delegate its legislative authority to the AMA when it enacted Section 306(a.3).
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> In *Pierson v. Workers' Compensation Appeal Board (Consol Pennsylvania Coal Company)*, 252 A.3d 1169 (Pa.Cmwlth. 2021), appeal denied, 261 A.3d 378 (Pa. 2021), the court rejected the claimant's due process and due course of law constitutional challenges, holding that Act 111 applies to injuries that occurred prior to its enactment and that the employer is credited for payment of pre-Act 111 TTD benefits and TPD benefits relative to their obligations for IREs. The court's position on the constitutionality of Act 111 has been consistently reinforced in the cases *Hutchinson v. Anville Township (Workers' Compensation Appeal Board)*, 260 A.3d 360, (Pa.Cmwlth. 2021) and *DiPaulo v. UPMC Magee Women's Hospital (Workers' Compensation Appeal Board)*, No. 878 2021; filed June 13, 2022, by Judge Christine Fizzano Cannon.

With post-*Protz II* reinstatement petitions running their course and what appears to be Act 111's constitutional durability, it may be time for Pennsylvania's workers' compensation practitioners to climb into their time traveling vehicles (Tesla Model X?) and rediscover the IRE law of a pre-*Protz II* world. What is found there should prove enlightening.

Recall that an IRE physician must first determine if a claimant is at maximum medical improvement before calculating an impairment rating. *See Combine v. Workers' Compensation Appeal Board (National Fuel Gas Distribution)*, 954 A.2d 776 (Pa.Cmwlth. 2008). Remember that an IRE requested prior to the expiration of 104 weeks of TTD is premature and renders the IRE void, even when the IRE itself is performed within 60 days of the expiration of 104 weeks of benefits. See *Dowhower v. Workers' Compensation Appeal Board (Capco Contracting)*, 919 A.2d 913 (Pa. 2007). Recollect that an IRE performed by a physician not in active clinical practice for

at least 20 hours per week will be invalid. *See Verizon Pennsylvania v. Workers' Compensation Appeal Board (Ketterer)*, 87 A.3d 942 (Pa.Cmwlth. 2014). Relevant to the aforementioned *Duffey* case, recall that an impairment rating that includes other conditions other than the accepted work-related injury does not constitute an amendment of the description of the work injury. *See Harrison v. Workers' Compensation Appeal Board (Auto Truck Transport)*, 78 A.3d 699 (Pa.Cmwlth. 2013).

Considering the *Sicilia* court's opinion, now is the time to travel back in time for the detailed and extensive pre-*Protz II* roadmap established by Pennsylvania's high courts so it can be used in a future, post-*Protz II* world. Although the Supreme Court has yet to officially weigh in on Act 111, it appears as though the IRE will remain a mechanism for Pennsylvania employers to reduce their indemnity benefit exposure. The roadmap will undoubtedly be a useful guide for employers and their counsel to ensure IREs are performed correctly and IRE cases are litigated effectively.

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