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Weber Gallagher

Recommendations in the Post-Protz Era

Our Pennsylvania Workers' Compensation Group attorneys are committed to providing you with continuous updates on the fallout from the Pennsylvania Supreme Court's decision in *Protz v WCAB (Derry Area School District*). Below, we have prepared a series of recommendations to guide your strategic thinking involving several fact patterns, and to suggest strategic solutions. In each case, we advise that you discuss specific strategies and solutions with your attorney before taking any action, as the below cannot be relied upon as legal advice in any specific situation. For more background information on the *Protz* case, please click here. This site will be updated as more information becomes available.

Cases with Pending IREs (pre-request, post-request, or just completed IRE without further steps taken)

- The Bureau has confirmed that it will no longer designate a physician to perform an IRE.
- Benefits can no longer be modified/capped based upon the results of an IRE. No need to take further action, simply stop the process.

Cases in Which TPD Benefits are Being Paid Pursuant to an Unchallenged Notice of Change of Disability Status

- If the employee has not sought reinstatement of TTD, do not reinstate. Rather, continue to allow the 500-week clock to run at partial disability status in an effort to expand possible defenses and await potential further court rulings or legislative action.

Cases Currently in Litigation at Various Stages:

- *Pending Modification Petition before Judge based on an IRE of < 50:* **Withdraw the Petition.** The entire IRE Section of the Act has been declared unconstitutional. There is no longer a statutory basis upon which a WCJ can grant relief following an IRE. Pending Modification Petitions should be withdrawn. If this is not done, you are exposed to unreasonable contest attorney fees.

Comment: If benefits are being reinstated to TTD we should utilize a Supplemental Agreement or Stipulation confirming that ***you are not waiving your rights*** should the Legislature enact new ***and retroactive*** statutory language replacing Section 306(a.2). If the employee will not sign either document, the petition should be withdrawn in court, on the record, with this argument established by counsel.

- *Pending Appeals at any level:* **Leave the Appeal pending for now.** Even if the employee did not raise a Protz-based constitutional argument before the WCJ, the employee may now argue that the statute upon which the Judge granted relief is constitutionally invalid. Since the *Protz* decision provides no guidance as to whether it will be applied retroactively, or only prospectively, it is best to keep the appeal option open.

Cases in Which IRE Litigation Has Concluded Without Pending Appeal:

- Where we have a final decision approving the modification of benefits based on an IRE and the employee files a petition for reinstatement: **Defend the Status Quo**.
- While the employee can raise the *Protz* argument at any time, you can defend your position on the legal grounds of **res judicata/collateral estoppel**, meaning that the matter has been decided and cannot legally be revisited.

Employee Has Already Received 500 Weeks of TPD

- In older cases, if the employee has received 500 weeks of TPD and now the TPD has stopped, and that stoppage occurred within the last three years (referencing the statute of limitations on filing to reinstate),

you should: **Defend the Status Quo**.
- Similarly, if the employee has received 500 weeks of TPD such that the TPD has stopped more than three years ago, such that the statute of limitations applies, and the employee files a Petition for Reinstatement: **Defend the Status Quo**.
- In these cases, reinstatement will likely represent a significant and costly change. While the employee has an argument that benefits should be reinstated under *Protz*, you can argue that the employee needs to prove a change in status after the expiration of 500 weeks to get a reinstatement. Both the Act and case law support this argument, and the defense, compared with the cost of a reinstatement, is certainly worthwhile pursuing.
- This argument is strongest after the three year statute of limitations on reinstatement has passed, based on the Act and case law.

Case Has Settled With a Compromise and Release

- If the employee files a Petition for Reinstatement following an approved Compromise and Release, alleging that the case was undervalued because of a now-unconstitutional IRE: **Defend the Status Quo.**
- A Compromise and Release is final, so it cannot be reopened unless there was a material mistake of fact (not a misinterpretation of then-existing law).
- If the employee feels wronged by the result, the remedy is to pursue a malpractice claim against the employee's attorney who valued the case and guided it toward settlement.

Miscellaneous Recommendations

- Arguably, IREs changed settlement values only in a small subset of cases with serious injuries, total disability (but under 50 percent IRE results) and little likelihood of a return to work. Therefore, continue to pursue settlement negotiations for injury cases at current pricing levels, using existing, valid exposure reduction tools and strategies.
- In situations where the employee's attorney is becoming unreasonable, hold the line. It is more cost effective in the long run not to break your model for valuing cases than to start making exceptions which could lead to an overall increase in settlement payouts. Consider more aggressive use of vocational placement, for example: use physical capacities from the employee's treating physician, ask your IME doctor for alternative physical capacities based on subjective complaints, consider funded employment.

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