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## The Commonwealth Court Decides, Post Protz, to Reinstate Total Disability When Worker Files Petition Before Expiration of 500 Weeks of Partial. Worker Did Not File Challenge to Notice of Change Based on IRE

After the Supreme Court declared the IRE sections of the Workers' Compensation Act unconstitutional it was only a matter of time before cases involving the aftermath would work their way up to the Commonwealth Court. In *Thompson v. WCAB (Exelon Corporation)*, No. 1227 C.D. 2016, Filed: August 16, 2017, the Commonwealth Court reversed a modification of benefits to a partial based on an IRE under the Fifth Edition of the AMA guides while that modification was still on appeal when Protz was decided.

In 2005, the employer obtained an IRE (23 percent) and disability status was changed to partial by notice of change in disability status. The injured worker did not challenge the modification of disability status within the 60-day challenge period. For reasons that are not set forth by the Court, the employer filed a modification suspension petition seeking a suspension of benefits when the 500-week partial period would run out. The injured worker responded with a petition to review alleging the IRE was invalid as MMI had not been established. After remands on several issues the injured worker's appeal reached the Commonwealth Court on the issue of whether an IRE performed using the Fifth Edition AMA Guides could be used to support a change of disability status to partial when use of the Fifth Edition guides had been declared unconstitutional by the Commonwealth Court.

The employer argued that the injured worker essentially waived the constitutionality issue by failing to raise it in the litigation before reaching the Commonwealth Court. The employer also argued that the injured worker should be barred from raising the constitutionality of the IRE provisions because he failed to notify the State Attorney General of the constitutional challenge. The Court addressed these arguments in a footnote by stating that because the litigation of this case started before *Protz I* (Commonwealth Court Decision) and before *Protz II* (Pennsylvania Supreme Court Decision) the injured worker raised this issue at the first opportunity to do so and therefore had not waived it. The Court also held that the injured worker was not required to notify the Attorney General of a constitutional challenge because she was not litigating the constitutional issue, but rather seeking a remand for the Workers' Compensation Judge to apply the precedent of *Protz I* where use of the *Fifth* Edition of the AMA Guides had already been held unconstitutional.

After the injured worker overcame the procedural arguments raised by the employer, the Court ruled on the substantive issue that the modification of disability status to partial must be reversed because the Supreme Court decision in *Protz II* struck the entire IRE process from the Act as unconstitutional and no other provision of the Act allowed for modification of benefits based upon an IRE.

**Comment:** This decision addressed one of the many scenarios where changes of disability status based upon an IRE are under attack. In this case the change was by Notice and a litigated decision regarding the change had not been finally decided when the IRE provisions were found unconstitutional. The decision dismissed the employer's procedural arguments including waiver. It did not address the retroactive application of *Protz II* to IRE cases previously litigated to conclusion and it did not address res judicata arguments. Also, while this Commonwealth Court decision addressed one category of cases and clarified some of the law on this issue, at least for now, it likely will not be the final word. We anticipate that the Pennsylvania Supreme Court will have to eventually address these issues.