

## The Commonwealth Court Interprets and Applies Protz II in the Whitefield Decision

The Commonwealth Court of Pennsylvania, sitting en banc, issued three decisions this week concerning the application of the Supreme Court's Opinion in *Protz v. WCAB (Derry Area Sch. Dist.)*, 161 A.3d 827 (Pa. 2017) (*Protz II*) on petitions seeking reinstatement of temporary total disability status. While the factual/procedural histories of each case are somewhat different, the Court's application of *Protz II* was consistent.

Through the primary reported case of *Whitfield v. WCAB (Tenet Health System Hahnemann, LLC.)*, 608 C.D. 2017 and the unreported opinions in *Moore v. WCAB (Sunoco, Inc.)*, 715 C.D. 2017 and *Pavlak v. WCAB (UPMC Southside)*, 715 C.D. 2017, the Court provided a detailed analysis of the applicable statutory provisions which provided for a change in the employee's disability status based upon proof of earning power or based upon the results of an IRE.

The Court then analyzed the case law, which developed since its 2015 opinion in *Protz I* initially declared a portion of Section 306(a.2) of the Act unconstitutional. As the Court explained, reliance on those cases has been undermined by the Supreme Court's Opinion in *Protz II*, which struck the entirety of Section 306(a.2) from the Workers' Compensation Act. In this regard, the Court concluded that the timeframes set forth in other sections of Section 306(a.2) of the Act are no longer valid.

Ultimately, the Court went on to hold in all three cases that an employee could seek reinstatement of temporary total disability benefits following an IRE based change in benefit status as long as a the reinstatement petition is filed within three years of the date of the most recent payment of compensation. But in order to obtain relief, the employee must still show (in these particular cases on remand) that she or he is totally disabled, after all this time, to be entitled to reinstatement.

As the Court explained, the employee may establish this fact with his or her own testimony at which point the burden shifts to the employer to prove the contrary. If no contrary evidence is presented and the Workers' Compensation Judge credits the employee's testimony, reinstatement is warranted as of the date the reinstatement and/or modification petition was filed.

**Comment:** We believe it is critical to note that the Court consistently rejected any "retroactive" analysis or application of *Protz II*. In this regard, the Court specifically stated that the *Protz* decisions did not - as the workers' compensation employees' bar has consistently argued -- automatically revert the employee's status back to total disability. These decisions do not impose any new legal consequences based upon a past transaction. In fact, the Court specifically stated that the decision does not alter the employee's past status. Rather, it gives effect to the employee's status as it existed at the time he or she filed the Reinstatement Petition, if the petition was filed within the appropriate statutory timeframe. And while there will unquestionably be further appeals to the Pennsylvania Supreme Court, these cases clearly provide support for the continued denial of any Reinstatement Petition demanding retroactive reinstatement of benefits as of the date of the IRE or the original date of the change in benefit status. As the Court made clear, relief can only be granted as of the date the Reinstatement Petition was filed. Furthermore, since the Court concluded that its decision did not alter the past status of the claim, there is no reason at this time to believe that an employee's previous receipt of temporary partial disability benefits based upon the results of his or her IRE would not count toward the 500 week limit of temporary partial disability benefits under Section 306(b) of the Act relating to a employee's earning power. Thus, use of a labor market study may well be an appropriate defense to any future Reinstatement Petition based upon *Protz*.

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If you need more information about these cases or have questions about how they may affect your claims, please contact David G. Greene, who was defense counsel in the *Moore* case.

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