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Defending Cases in the Aftermath of Protz

Given the Pennsylvania Supreme Court's holding in *Protz v. WCAB (Derry Area School Dist.)*, 161 A.3d 827 (Pa. 2017), declaring the Impairment Rating Evaluation (IRE) provisions contained in the Workers' Compensation Act unconstitutional, our firm has developed some best practices to aid in defending claims for reinstatement to total disability status.

The following document outlines the various scenarios in which Impairment Rating Evaluation determinations may be postured. To facilitate a uniform, cohesive, and consistent strategy for such cases, TT&H recommends the following approaches in defending claims for reinstatement to total disability, following a prior determination of partial disability status via the IRE process.

In general, most claims will fall within one of the following categories:

1.) Where a modification petition was previously adjudicated;

2.) Where 500 weeks of partial disability were paid and 3 years have passed since the last payment made;

3.) Where 500 weeks have passed since the last payment of partial disability, but claimant is still within 3 years of the last payment made;

4.) Where 60 days have passed since a unilateral status change to partial disability;

5.) Where a stipulation was entered into between the parties pertaining to the partial disability status of a claimant;

6.) Where a claimant's 500 weeks is now set to expire and there are no pending proceedings.

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Scenario 1: Where a modification petition was previously adjudicated…

Where a modification petition was previously adjudicated, TT&H maintains that the legal doctrine of *res judicata* is applicable, rendering the decision final. This is so even where the claimant's five-hundred weeks of partial disability has not yet expired.

Claimants are likely to file reinstatement petitions, arguing that, because Section 306(a.2) was stricken from the Workers' Compensation Act, past adjudications are now in violation of the Act and must be overturned, with claimants restored to total disability.

Our recommended response to this argument is that prior adjudications must be honored, despite a change in the law. As a threshold matter, both collateral estoppel and *res judicata* are recognized in workers' compensation proceedings. *Hebden v. WCAB (Bethenergy Mines, Inc.)*, 597 A.2d 192 (Pa. Commw. 1991).

Res judicata "prevents the relitigation of claims and issues in subsequent proceedings." *PMA Insurance Group v. WCAB (Kelley)*, 665 A.2d 538 (Pa. Commw. 1995). There are two related, but distinct principles included in *res judicata*: (1) "technical *res judicata*," which is also known as claim preclusion; and (2) collateral estoppel, also called issue preclusion.

For purposes of IREs, technical *res judicata* will be the most useful doctrine to preserve a past modification petition. Technical *res judicata* "applies to claims that were actually litigated as well as those matters that should have been litigated." Generally, "causes of action are identical when the subject matter and the ultimate issues are the same in both the old and new proceedings." *Henion v. WCAB (Firpo & Sons, Inc.)*, 776 A.2d 362 (Pa. Commw. 2001).

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Scenario 2: Where 500 weeks of partial disability were paid and 3 years have passed since the last payment made…

Where five-hundred weeks of temporary partial disability (TPD) were paid, and three years have passed since the date of last payment made, TT&H maintains that *Blackwell v. Com., State Ethics Com'n*, 589 A.2d 1094 (Pa. 1991) controls, rendering such claims final and ineligible for reinstatement.

In *Blackwell*, the Pennsylvania Supreme Court held that Section 4(4) of the Sunset Act was invalid as an unconstitutional delegation of legislative authority. In doing so, the court deemed all administrative-agency "transactions" that occurred during the period in question "null and void." Despite this designation, those transactions went undisturbed *unless* they were properly preserved in litigation pending at the time of the court's decision. Therefore, retroactivity of the holding was limited to active and pending litigation.

Importantly, in *Blackwell*, Section 4(4) of the Sunset Act was held to be void *ab initio*. In this respect, it was as if that section of the statute had never been enacted to begin with. Given these similarities, *Blackwell* presents as a compelling precedent to limit the retroactive effect of *Protz*.

Claimant's counsel is likely to argue that, because the entire statute was voided, the five-hundred-week provision of Section 306(a.2) is unenforceable, thereby permitting reinstatement of benefits.

TT&H maintains the position that, pursuant to *Blackwell*, these IRE transactions should remain in place unless properly preserved in pending litigation. Therefore, if they are not the subject of active litigation, they remain undisturbed and subject to the limitations that existed when they became final — that limitation being the Section 413(a) statute of repose.

Pursuant to Section 413(a) of the Workers' Compensation Act, claimants have three years from the date of last payment of partial disability paid to reinstate total disability. If no petition for reinstatement is filed within three years, the statute of repose acts to extinguish the claimant's right to any remedy for the injury in question.

In situations where five-hundred weeks and three years have run on a claimant's TPD, our firm believes that the Section 413(a) statute of repose applies. Because *Blackwell* holds that invalid transactions remain undisturbed unless properly preserved, it follows that the statute of repose — which attached to the last date of payment — similarly goes undisturbed; because the statute of repose extinguishes the right to a remedy, claimants in this situation should not be permitted to reinstate benefits.

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Scenario 3: Where 500 weeks have passed since the last payment of partial disability, but claimant is still within 3 years of the last payment made…

Where five-hundred weeks have passed since the last payment of partial disability, but claimant remains within the three-year window to reinstate total disability, TT&H maintains that claimants have the burden of establishing:

(1) No ability to generate earnings ("zero earning capacity"); and

(2) That their medical condition has worsened.

Williams v. WCAB (Hahnemann University Hosp.), 834 A.2d 679 (Pa Commw. 2003), citing *Stanek v. WCAB (Greenwich Collieries)*, 756 A.2d 661 (Pa. 2000).

Additionally, if a claimant failed to challenge the IRE determination within sixty days, defense counsel may invoke the principles of *Blackwell*, arguing that the issue must have been properly preserved. Here, by not appealing within sixty days, a claimant would have allowed the IRE determination to go unchallenged and thereby become final after five-hundred weeks of TPD were paid. (See Scenario 2 for *Blackwell*).

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Scenario 4: Where 60 days have passed since a unilateral status change to partial disability…

Where sixty days have passed since a modification to partial disability, claimant continues to receive partial disability, and a reinstatement petition is filed, TT&H believes that WCJs are likely to grant reinstatement to total disability.

However, despite this likelihood, TT&H believes a viable argument exists, pursuant to *Blackwell*, that challenges brought after the sixty-day appeal window cannot be reopened, as they were not properly preserved and the issue was not in active litigation at the time of *Protz II*.

Specifically, *Blackwell* held that any transactions that went "unchallenged" during the period of invalidity in that case were final and would not be disturbed. Similarly, IRE determinations not appealed within sixty days also went "unchallenged" and should not be disturbed.

Despite the likelihood of a WCJ's granting of total disability, we recommend the following practices in defending such claims:

1.) Request that the issues be briefed before any determination is made; and

2.) Properly preserve the issue on the record for purposes of future appeal.

By following these protocols, we can effectively preserve these issues for subsequent appeal; any future changes in the law which may benefit our positions then have a greater chance of retroactive application.

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Scenario 5: Where a stipulation was entered into between the parties pertaining to the partial disability status of a claimant…

Where a stipulation was previously entered into between the parties pertaining to the partial disability status of a claimant, the defense of *res judicata* is available. TT&H maintains the position that, pursuant to *Weney v. WCAB (Mac Sprinkler Systems)*, 960 A.2d 949 (Pa Commw. Ct. 2008), stipulations approved by a WCJ have the effect of technical *res judicata*, barring a claimant from re-litigating the same cause of action.

In *Weney*, the parties stipulated to an amended NCP, acknowledging certain described injuries, which the WCJ granted in a formal decision. No appeal was taken and the decision became final. Thereafter, claimant filed a second petition to amend the description of injury. While the WCJ granted the petition and permitted amendment of the injury, on appeal, Commonwealth Court held that the doctrine of technical *res judicata* applied, barring claimant from changing the description of injury for a second time.

The *Weney* court further noted that " … the General Assembly intended for litigants to raise any issues of which they are aware, and know to be related to a particular work incident, during the same review petition proceedings. This approach … promot[es] administrative economy and efficiency within the workers' compensation system."

This same reasoning can be applied to IRE determinations; if a claimant did not raise a constitutional challenge at the time of adjudication (by stipulation or decision), and stipulated to partial disability status, the doctrine of technical *res judicata*, pursuant to *Weney*, prevents that claimant from re-litigating an issue of which they should have been aware (namely, the constitutionality of Section 306(a.2)) or had the chance to litigate. Further, preventing claimants from re-litigating these issues promotes "administrative economy and efficiency within the workers' compensation system."

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Scenario 6: Where a claimant's 500 weeks is now set to expire and there are no pending proceedings…

Where a claimant's five-hundred weeks is set to expire, and no active litigation or pending proceedings exist, TT&H recommends that insurers cease payment of benefits as scheduled.

Absent any formal adjudication of a particular claim, TT&H maintains that prior adjudications and automatic modifications (where no appeal was taken within sixty days) continue to have the force of law pursuant to the theories of *res judicata* and *Blackwell*, respectively.

Therefore, insurers have reasonable grounds to cease payment after five-hundred weeks, unless a WCJ instructs otherwise. It is conceivable that claimants' attorneys will pursue penalty petitions in the event a petition is filed. Despite this, TT&H believes that sound legal principles and controlling precedent provide a reasonable basis to contest such claims, and that such actions are not in violation of the Pennsylvania Workers' Compensation Act.