

WORKER'S COMP ALERT

Re: **Protz v. Worker's Compensation Appeal Board (Derry Area School District)**

On Friday, September 18, 2015 the Pennsylvania Commonwealth Court decided *Protz v. WCAB (Derry Area School District)*. The Court held that Section 306 (a.2) of the Pennsylvania Worker's Compensation Act, as amended, is an unconstitutional delegation of legislative authority in that it provides for the use of the most current version of the American Medical Association's Guides to the Evaluation of Permanent Impairment. The en banc Court split four to three in favor of finding an unconstitutional delegation of legislative authority to the AMA. The majority opinion is authored by President Judge Dan Pellegrini. The majority agreed with the claimant that the provision of the statute which allows for the impairment rating to be determined by the most recent edition of the AMA Guides is constitutionally precluded insofar as the Legislature, in providing for the use of the most recent Guides, failed to provide any standards for the AMA to follow or a review process. It was most troubled by the fact that this delegation of authority was to a private party, the AMA, rather than a governmental entity. The Court remanded the case back to the Workers' Compensation Judge for a determination of the impairment rating pursuant to the 4th Edition of the AMA Guides. The 4th Edition was in effect at the time Section 306 (a.2) of the Act was promulgated. This case will have a significant and immediate impact on cases where impairment rating evaluations are scheduled and are pending before WC Judges in connection with Petitions for Modification and Petitions to Review Notice of Status Change.

We expect that the employer in the *Protz* case, the Derry Area School District, will request allocator to the Pennsylvania Supreme Court. However, in terms of addressing the immediate impact of this decision, we recommend that you continue to request designation of the impairment rating evaluator within 60 days of the claimant coming into receipt of 104 weeks of temporary total disability benefits, but reserve scheduling the examination until we are provided further guidance from the Courts and the Bureau. In those cases which are pending where the IRE has taken place but the rating is being contested, we would suggest determining if the impairment rating evaluator was certified under the 4th Edition and ask for an assessment under the 4th Edition as well as the 6th Edition. While we wait to determine further action on this decision by the Court it may also be appropriate to seek a stay of any pending litigation on Petitions for Modification or Petitions to Review.

We will continue to keep you advised of developments under this case as it continues to evolve. We are also available to discuss with you your individual cases and look forward to the opportunity to advise you on a case by case basis.

SWARTZ CAMPBELL LLC
Worker's Compensation Department