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Fax 516. 294. 2006

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Fax 856. 596. 6164

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Fax 412. 261. 5710

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Fax 717. 234. 7710

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Fax 302. 778. 1400

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Fax 304. 232. 1205

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PA Workers' Compensation "Fix" Leaves Many Unanswered Questions

Prior to 1996, a Pennsylvania employee could potentially collect wage loss benefits for a workplace injury for the duration of his or her lifetime. In order to reduce costs for Pennsylvania employers, the Workers' Compensation Act ("WCA") was amended to potentially limit the period of time in which an injured worker could receive wage loss benefits. The amendments established a process whereby an injured worker would submit to an Impairment Rating Evaluation ("IRE") upon receipt of 104 weeks of total disability benefits. If a Bureau approved physician, utilizing the American Medical Association's Guide to the Evaluation of Permanent Impairment ("AMA Guides"), determined that an injured worker's "whole body impairment rating" was less than 50%, the worker's disability status would be deemed partial in nature and thus limited to 500 weeks.



Claudio J. DiPaolo

In *Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, the Pennsylvania Supreme Court deemed Section 306(a.2) of the Workers Compensation Act, which governed the IRE process, to be unconstitutional in its entirety. Section 306(a.2) originally mandated that IREs should be performed pursuant to the "most recent edition" of the AMA Guides. In 1996, when Section 306(a.2) was enacted, the Fourth Edition constituted the most recent edition of the AMA Guides. In the years that followed, the Fifth and Sixth Editions of the AMA Guides became the "most recent edition" of the AMA Guides upon publication in 2000 and 2007, respectively. The *Protz* Court held that Section 306(a.2) unlawfully delegated legislative authority to the AMA, with respect to the approval and utilization of the Fifth and Sixth Editions of the AMA Guides. Thus, the Supreme Court's decision in *Protz* on June 20, 2017, effectively eliminated the structural framework of the IRE process in Pennsylvania, ushering in a period of uncertainty and increased insurance costs for Pennsylvania employers.

In the wake of *Protz*, many claimants expectedly petitioned to reinstate their total disability status and negate the 500-week cap in partial disability benefits. Indeed, subsequent rulings

by the Pennsylvania courts have only obfuscated the issue, failing to shed any insight on the validity of IREs which established partial disability before the *Protz* decision. In *Gillespie v. Workers' Comp. Appeal Bd. (Aker Phila. Shipyard)*, the Commonwealth Court found that a claimant had failed to challenge an IRE performed under the Fifth Edition of the AMA Guides within 60 days of receiving 104 weeks of total disability benefits, as mandated by Section 306(a.2), and therefore forfeited a reinstatement to total disability benefits. On appeal, the Pennsylvania Supreme Court vacated and remanded for a determination as to whether *Protz* applied retroactively, thereby rendering Petitioner's IRE void "*ab initio*." The Commonwealth Court in *Gillespie* has yet to issue an opinion in response to the remand.

In *Whitfield v. Workers' Comp. Appeal Bd. (Tenet Health Sys. Hahnemann LLC)*, the Commonwealth Court held that total disability status would not be reinstated unless a petition was filed within three years of the date of the most recent payment of compensation benefits. The claimant sought reinstatement to total disability after her disability status had been modified to partial status 7 years prior, asserting that the IRE was invalid per the *Protz* decision. After conducting an extensive review of *Protz* and its progeny, and also remaining cognizant of the Pennsylvania Supreme Court's remand in *Gillespie*, the Commonwealth Court held that a claimant must present a modicum of evidence of total disability prior to being eligible to resume total disability status. In essence, the Court ruled that restoration to total disability would not be automatic. Specifically, the claimant was not required to show a loss of earning capacity or a worsening of medical condition, which was the requisite burden of proof in reinstating total disability benefits prior to *Protz*. However, the Court held that a claimant needed to provide testimony that the work-related injury continued after which the burden would shift to the employer to present evidence to the contrary. The

Whitfield Court provided some fleeting clarity to claimants seeking to challenge their partial disability status, given that it explicitly limited its holding to the facts before it. The Court did not address the proverbial elephant in the room: whether *Protz* applied retroactively.

To the delight of Pennsylvania employers, and in the midst of the post-*Protz* haze, the Pennsylvania Legislature finally addressed the issue with the passage of House Bill 1840, entitled the "Protz Workers' Compensation Legislative Fix." On October 24, 2018, Governor Tom Wolf signed the Bill into law. Act 111 provides in pertinent part:

- IREs are to be performed pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition (second printing April 2009).
- The threshold for the presumption of total disability was reduced to thirty-five percent (35%) total body impairment.
- An Insurer/Employer would be given credit for weeks of total disability compensation paid prior to the effective date of Act 111 for purposes of determining whether an employee had received 104 weeks of total disability compensation.
- An Insurer/Employer would be given credit for weeks of partial disability compensation paid prior to the effective date of Act 111 for purposes of determining the number of weeks towards the 500-week partial disability maximum.

Although Act 111 has clarified some of the post-*Protz* uncertainty regarding the IRE process in Pennsylvania, many questions linger. Indeed, the Bureau of Workers' Compensation has resumed the authorization and designation of IRE physicians to perform impairment rating evaluations. Act 111 is sufficiently clear that the

utilization of the Sixth Edition of the AMA guides is valid prospectively, thereby restoring the structural integrity of the IRE process. Utilizing the plain meaning doctrine of statutory interpretation, Act 111 allows Pennsylvania employers to assert a credit for payments of total disability benefits made during the first 104 weeks of a claim even if those benefits preceded the passage of the law. Arguably, employers will also be entitled to a credit toward the 500-week period for partial disability benefit payments made prior to the enactment of Act 111, if a designated physician determines whole body impairment of less than 35%.

For the vast majority of claims, the application of *Protz* and Act 111 will have little substantive impact given the

typical duration of Pennsylvania claims, which resolve well within the 500-week partial disability period. However, for existing and future claims with large exposures, the restoration of the IRE process will serve as a useful tool to limit ongoing wage loss benefits and posture for a reasonable resolution. Nonetheless, employers and insurers need to remain very wary of any purported “legislative fix” when evaluating claims with large exposures.

Indeed, many questions remain regarding the retroactive application of *Protz* relative to IREs completed prior to the passage of Act 111, thus ensuring the continuing saga surrounding the disability status of injured workers in Pennsylvania.

Claudio J. DiPaolo, Chair of Rawle & Henderson’s Workers’ Compensation Section since 2009, has practiced insurance defense litigation for over 20 years, with a concentration in workers’ compensation matters.

He began his career with an appointment to the Pennsylvania Department of Labor and Industry as an opinion writer, where he drafted hundreds of administrative law decisions involving adjudicated workers’ compensation matters. Prior to joining Rawle & Henderson in 2008, Claudio practiced at the nation’s largest employment law firm. Mr. DiPaolo has counseled clients regarding compliance with federal, state, and local laws, and preventing liability for workplace injuries. He has made presentations to clients throughout the country on various topics such as the interplay between workers’ compensation and ADA, FMLA, Title VII, and SSDI/SSI. His clients include large multinational companies, Fortune 500 corporations, global insurers, and the nation’s largest restaurant chain, pet store retailer, airline and internet retailer.

Mr. DiPaolo was selected as a Pennsylvania Super Lawyer in 2015, 2016, 2017, 2018 and 2019 by *Supers Lawyers*, a service of Thomson Reuters. Only the top 5% of the lawyers in Pennsylvania are chosen annually for this honor.

Claudio can be reached directly at (215) 575-4343 • cdipaolo@rawle.com

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PHILADELPHIA

William C. Stubits has joined our **Philadelphia** office as Of Counsel to the Firm. He concentrates his law practice in the areas of environmental, mass and toxic torts, product liability, medical professional liability, premises liability and construction. He has over 30 years of experience as a complex litigation defense trial attorney, having successfully defended large companies from catastrophic claims brought by some of the most prominent plaintiff's firms in Philadelphia.

William earned his J.D. from the Villanova University School of Law in 1985 and his B.A. in English from the University of Notre Dame in 1982. He is admitted to practice in Pennsylvania and Tennessee, and also the U.S. District Courts for the Eastern and Middle Districts of Pennsylvania and Third Circuit Court of Appeals. He is a member of the Pennsylvania Bar Association.

Prior to joining Rawle & Henderson LLP, William was a partner with a Philadelphia litigation defense firm.

Bill can be reached directly at (215) 575-4322 • wstubits@rawle.com



William C. Stubits

NEW YORK CITY

Gabriel A. Arevalo has joined our **New York City** office as an associate. He focuses his practice in the areas of insurance coverage, casualty, premises liability, product liability, construction accidents and commercial motor vehicle defense.

Gabriel earned his J.D. from the Maurice A. Dean School of Law at Hofstra University in 2017. He was a staff member of the *Hofstra Labor & Employment Law Journal*, an ABA Representative for the Student Bar Association and a member of the Latino/a American Law Students Association. He was on the Dean's List every semester. In addition, Gabriel was a judicial intern for the Queens Supreme Court, Civil Term, from May to July 2015. He earned his B.A. in Political Science & Government from Stetson University in 2014. While attending Stetson University, he was Parliamentarian for the Student Government Association, Comptroller for the Student Activity Fund Allocation Committee, and Treasurer of the Hispanic Organization for Latin Awareness. In addition, he was a Latin American Field Research Grant Recipient. He is fluent in Spanish.

Gabriel is admitted to practice in New York. Prior to joining Rawle & Henderson LLP, he was an attorney with an insurance defense law firm in New York City.

Gabriel can be reached directly at (212) 323-7085 • garevalo@rawle.com



Gabriel A. Arevalo

NEW JERSEY

Nicolas B. Pedone has joined our **Marlton, New Jersey**, office as an associate. He concentrates his law practice in the area of workers' compensation litigation.

Nicolas earned his J.D. from Rutgers University School of Law-Camden in 2010. While attending law school, he was Notes Editor for the *Rutgers Journal of Law and Public Policy*. He interned for the Honorable Gloria M. Burns of the United States Bankruptcy Court in Camden. Following law school, Nicolas had a judicial clerkship with the Honorable Lawrence P. DeBello of the Superior Court of New Jersey, Chancery Division – Family Part in Mercer County. He earned a B.A. in History & Political Science, *magna cum laude*, from Albright College in 2005. He was on the Dean's List from 2001 to 2005.

Nicolas is admitted to practice in New Jersey and Pennsylvania, and also the U.S. District Court for the District of New Jersey.

Prior to joining Rawle & Henderson LLP, Nicolas was a workers' compensation attorney with a midsize defense law firm in central New Jersey.

Nick can be reached directly at (856) 797-8920 • npedone@rawle.com



Nicolas B. Pedone