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Does the Protz Decision Open The Floodgates to Hearing Loss Claims in Pennsylvania?

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There has been a lot of chatter about the Protz v. Workers' Compensation Appeal Board (Derry Area School District) decision. This article is not focused on the black letter holding in Protz or the burning question of whether Protz can be applied retroactively. This article addresses one of the many potential "unintended consequences" of the decision and its invalidation of the use of the AMA Guides in rating impairment in Pennsylvania workers' compensation cases.

In a nutshell, the Court ruled that it was unconstitutional for the legislature to "delegate" impairment ratings to the AMA and its Guides to the Evaluation of Permanent Impairment. The Court ruled that the AMA Guides, which were promulgated by a private entity and which could be changed by that entity without direction or control of the legislature, could not be used to determine the percentage of impairment for the purpose of limiting benefits to 500 weeks under the Impairment Rating Evaluation ("IRE") provisions of the Act. The Court struck the provisions of the Act that allowed for a limitation of benefits to 500 weeks in the event of an impairment rating of less than 50% under the AMA Guides, as determined by an IRE.

Much will be written about Protz with energy focused on the impact on IRE cases currently in litigation or which were decided or resolved under the portion of the statute now deemed unconstitutional. But the impact of Protz may also be profound in another context – payment of compensation benefits for occupational hearing loss.

There were only two times that the AMA Guides were referenced in the PA Act: once regarding IRE's as the basis for limiting ongoing entitlement to total disability benefits; and once for setting entitlement to compensation for hearing loss. Because Protz found delegation of legislative authority to the AMA Guides to be unconstitutional in the IRE context, the question arises as to whether reliance on the AMA Guides for determination of hearing loss compensation is also unconstitutional.

A bit of background is necessary to analyze this issue. Before 1995, the Act had an "all or nothing" provision for hearing loss benefits. If the loss was determined to be "complete for

all practical intents and purposes", the worker got 260 weeks of benefits. If not "complete for all practical intents and purposes", the worker got nothing. The determination of whether a loss was "complete" was left entirely to the subjective view of the Workers' Compensation Judge, and there was no requirement that the worker have any--let alone a significant--loss as determined under the AMA Guides. The claimant merely had to recite to a WCJ that it was difficult to hear conversation in background noise; that his/her spouse complained that the TV volume was too loud; and that he/she could not hear a server read the specials in a restaurant. Based on such testimony, a WCJ could grant benefits for "complete" loss of hearing, and "complete" losses were routinely found to exist in cases of minimal hearing loss. This development led to an explosion in hearing loss claims. Portable, truck-mounted hearing testing facilities, sponsored by claimants' attorneys, popped up at union halls, factories, and parking lots.

At the height of the stampede for benefits, major manufacturers, steel companies, foundries, and industrial facilities faced over $200 million in potential exposure for hearing loss benefits, despite the fact that in many cases there was little or no objectively measurable evidence of hearing impairment. A vigorous lobbying effort ensued and resulted in Act 1 of 1995, which based entitlement to compensation exclusively on objective hearing testing and resulting impairment ratings under the AMA Guides. This was the first time that Pennsylvania ever adopted an objective measure of any kind of impairment as a basis for compensation.

During the fight between industry and organized labor over Act 1 of 1995, labor argued that the AMA Guides should not be used and cited several alleged deficiencies in the AMA formula. For example, the AMA Guides did not consider hearing losses in the high frequencies. The AMA Guides consider only losses between 500 and 3000 hertz, though it is well established that occupational hearing loss most often affects frequencies over 3000. Another complaint was that the AMA Guides used results obtained in a sound-proof booth rather than in the context of real life background noise. Labor complained that the AMA Guides did not account for actual impact of the loss on the workers' lives and did not consider the impact of tinnitus (ringing in the ears) that can accompany occupational hearing loss and which can be very disturbing.

But the legislature was sympathetic to the fact that the old hearing loss compensation model had become distorted and abused and that Pennsylvania businesses were faced with breathtaking financial exposure due to the mass filing of thousands of claims, some of which would be granted despite any objectively measured hearing loss.

Act 1 of 1995 provided that:

Hearing loss could only be compensated based on pure-tone audiometric testing and application of the impairment ratings under the AMA Guides, Fourth Edition;

No benefits at all would be awarded for an AMA Guides impairment rating of 10% or less;

If the loss was over 10% and bilateral, the worker would get his/her percentage of impairment multiplied by 260 weeks of benefits.

As a result of the new law, virtually all pending hearing loss cases at the time were quickly settled for a fraction of the amount of potential exposure under the old law, and by and large, claimants' lawyers stopped the aggressive pursuit of hearing loss claims due to the diminished chances of winning and severe limitations on the amount that could be recovered. The volume of new claims since 1995 has evaporated from a flood to a trickle.

In 1996, for only the second time in history, the Pennsylvania legislature enacted a law based on objective measurement of impairment. Act 46 of 1996 provided that after 104 weeks of total disability, the employer could compel the worker to attend an Impairment Rating Examination by a physician screened by the Bureau. If the physician determined that the worker's impairment, as calculated by the AMA Guides, was less than 50%, the employer could limit the worker to "only" another 500 weeks of benefits, as opposed to the old law, which allowed total disability benefits to continue for life, even with no or a very low impairment rating under the AMA Guides.

The Court in Protz has now declared that this second delegation to use of the AMA Guides (for IRE's) is unconstitutional. So our attention turns to whether the first delegation to the AMA Guides, for hearing loss impairment ratings, is also unconstitutional.

The Court in Protz outlined the basis for requiring that the legislature create the governing law, and why "outsourcing" the law making function to an agency, organization or company may be an unconstitutional delegation of legislative authority. The Court did not declare an iron-clad rule that delegation to another entity is always unconstitutional, but instead noted that legality of such delegation hinges on several enumerated factors. Delegation of legislative power is unconstitutional unless the legislature:

1) establishes primary standards and imposes upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the enabling legislation;

2) the basic policy choices are made and specified by the legislature;

3) the legislation contains adequate standards which will guide and restrain the exercise of the delegated administrative functions;

4) articulates a public policy for why the delegation is being made;

5) states the basic policy choices that are being addressed by the designee;

6) demonstrates that it is not giving the recipient agency "carte blanche" to implement its own standards;

7) preferably, delegates to a public agency or entity, as opposed to a private business or company: "delegation to a private entity poses unique concerns, including that such entities are isolated from the political process and shielded from public accountability"; and

8) delegates to an entity that allows for public hearings, accountability to the electorate, or other indicia of transparency if it has the power to change the delegated standard.

In the hearing loss legislation, the Fourth Edition of the AMA Guides was specified, with no noted mechanism for changing editions in the future. Setting a specific edition of the Guides, and "etching that version in stone" may be just as wrong as allowing the AMA to change the Guides in the future; advances in science, measurement, testing, etc. would have to be forever ignored if the Fourth Edition lives as the sole standard indefinitely. The Protz Court noted that, "If the AMA chooses to publish new editions infrequently, Pennsylvania law may fail to account for recent medical advances." This appears to be the case for hearing loss ratings, because the formula, considerations and technologies have all changed since the publication of the Fourth Edition and will likely change again in the future.

This is not an academic argument. Interestingly, the authors of the Sixth Edition specifically criticized the Fourth Edition as inconsistent, lacking empirical support, and outdated. The Sixth Edition added a factor in hearing loss for tinnitus, which is not part of the Fourth Edition formula. New testing, more reliable than standard audiometry, such as auditory brain stem evoked potentials, is now in use; no such testing had been available at the time the Fourth Edition was written. Whereas in Protz, there was merely a fear that the AMA might someday change the Guides in future, in hearing loss, the AMA has already done so. Yet,

claimants are still bound by a 25-year-old formula that the AMA itself now rejects as antiquated and inferior, because the legislature delegated to the AMA's Fourth Edition of the Guides, and did so without any language expressing its policy reasons without providing any controls or guidelines to deal with future changes in the Guides.

Protz did not rule out the possibility that all delegations of authority to private entities are per se unconstitutional. Nor did it address whether delegation to a specific version of the AMA Guides would "cure" the delegation issue. The Court noted that, "We merely caution that our holding today should not be read as an endorsement or rejection of the Commonwealth Court's view that the delegation of authority to a private actor is per se unconstitutional. Nor do we foreclose the distinct possibility that a more exacting form of judicial scrutiny is warranted when the General Assembly vests private actors with regulatory or administrative powers." It appears that if the hearing loss provisions reach the Court on an unconstitutional delegation issue, the Court might consider such delegation to a private entity per se unconstitutional, and if it does not do so, it may subject the provisions to a higher level of scrutiny because a private entity is the recipient of the delegation.

On the other hand, the Court in Protz seemed most offended by the ability of the AMA to change the Guides with carte blanche in the future, as opposed to a delegation to a specific, existing version of the Guides:

At the outset, it is important to clarify that the non-delegation doctrine does not prevent the General Assembly from adopting as its own a particular set of standards which already are in existence at the time of adoption. However, for the reasons we have explained, the non-delegation doctrine prohibits the General Assembly from incorporating, sight unseen, subsequent modifications to such standards without also providing adequate criteria to guide and restrain the exercise of the delegated authority.

Having determined that the legislature did not specify the Fourth Edition as the standard for IRE's, the Court did not, and could not, have commented on whether the IRE statute would have been constitutional if it had specified the Fourth Edition, rather than referring to "the most current edition."

The AMA Guides for determining hearing impairment are controversial. There are dozens of other ways to rate hearing impairment, and many states, other countries, and other programs use formulae other than those outlined in any edition of the Guides. The legislature could have included policy statements, guidance, controls and procedures to keep the hearing

loss impairment rating system "fresh" in the face of future developments and technologies, and more importantly, squarely under the management and control of the legislature, but did not do so. Instead, it appears to have delegated the impairment rating task en toto to the AMA, with no controls, guidance, or mechanism to ensure that the public's interests are safeguarded. The AMA holds no public hearings on its Guides and is not in any way accountable to the legislature or the public for the manner or content of its determinations.

If the use of the AMA Guides for hearing loss is unconstitutional, the ramifications could be an enormous problem for industry, insurance, and the comp litigation system itself. Thousands upon thousands of claimants who were disqualified from benefits under the AMA Guides or the 10% loss threshold might once again be entitled to staggering amounts of benefits. If the Guides are deemed unconstitutional for evaluation of hearing impairment, there is--unlike the IRE provisions--no "Plan B" for employers. Without the IRE provisions, employers can still use the traditional methods of limiting benefits to 500 weeks – proving full recovery, proving alternative earning power, or proving actual earnings. But if the AMA-based hearing loss provisions fall out of the Act, it is difficult to imagine what system would be used in its stead. If we revert to the status quo ante, trivial losses of less than 10% could be awarded more than a quarter of a million dollars for "complete loss of hearing for all practical intents and purposes" as and when subjectively determined by a WCJ.

I have identified many other potential "unintended consequences" of the Protz decision, some of which have even greater potential impact on Pennsylvania, and will continue to provide analyses of each in due course.