

Henderson Brothers, Inc. White Paper

## **PCRB Seeks 6% Increase in Workers' Comp Loss Costs in Response to Protz Decision and Resulting Elimination of Permanent Partial Benefits Cap**

On August 15, 2017, the Pennsylvania Compensation Rating Bureau (PCRB), in an unprecedented course of action, proposed revised workers' compensation loss costs and ratings values effective November 1, 2017.

This filing came as a direct result from the Pennsylvania Supreme Court's decision in Protz v. WCAB (Derry Area School District), Nos. 6 WAP 2016, 7 WAP 2017 (Pa. June 20, 2017) (Protz) where the Commonwealth's highest court found certain methodology underlying Section 306(a.2) of the Workers' Compensation Act, 77 P.S. § 511.2, relating to Impairment Rating Evaluations (IREs) for worker disability assessments, to be unconstitutional. Thereafter, the Pennsylvania Bureau of Workers' Compensation declared, effective immediately, that it would no longer authorize physicians to perform IREs.



**The elimination of IREs is at the heart of this rate change. IREs were first introduced into Pennsylvania's workers' compensation system with Act 57 of 1996.**

IREs had been a mechanism utilized to cap a worker's wage replacement (indemnity) benefits at a maximum of 500 weeks, if the IRE resulted in an impairment rating below 50%. Due to the elimination of this cap, the PCRB estimated workers' compensation claim values would increase, particularly in light of the possibility of employees receiving post-Protz lifetime partial disability indemnity benefits, and derived an overall change in loss costs of plus 6.06%.

The PCRB's loss costs analyses are detailed in its Filing C-369 and Actuarial Memorandum. Please see the end of this white paper for a link to those documents.

Pennsylvania employers should now anticipate that this 6.06% increase will be incorporated into their workers' compensation insurance premiums for policies effective November 1, 2017, provided the Pennsylvania Insurance Department accepts the PCRB's proposed ratings values (which is expected). It is also likely that policies renewing in the interim will be issued with tentative rates and include a Pending Rate Change Endorsement WC 00 04 04 to account for the PCRB's proposed loss costs.

**The IRE Process**

The elimination of IREs is at the heart of this rate change. IREs were first introduced into Pennsylvania's workers' compensation system with Act

57 of 1996. If a worker had been out of work due to a workplace injury for 104 weeks, and the worker reached a plateau of medical improvement, a so-called Maximum Medical Improvement (MMI), an IRE could be requested. A physician licensed in Pennsylvania and certified by an American Board of Medical Specialties organization would conduct a medical exam in accordance with the then-current American Medical Association's "Guidelines to the Evaluation of Permanent Impairment" (the "Guidelines") and complete Form LIBC 767 with a rating of above or below 50%. If the IRE resulted in an impairment rating of 50% or greater, the worker's injury was classified as Permanent Total (PT) and the worker was eligible to receive lifetime indemnity benefits. If the IRE produced an impairment rating below 50%, which was common, the injury was classified as Permanent Partial and indemnity benefits were limited to a maximum of 500 weeks or about nine and one half years. The Protz decision eliminated this framework. Now, all injured workers are eligible for lifetime wage replacement benefits.

From 1996 to 2017, the IRE process provided a checkpoint for injured workers and their respective employers to explore return to work options for either full- or part-time opportunities. With IREs no longer permissible, employers and employees must take the initiative to manage the employee's recovery,

including his or her ability to return to work. To this end, an employer's formal Return-to-Work Program becomes critical in an environment without IREs. A Return-to-Work Program must set clear guidelines regarding partial disabilities, full- and part-time options, and the overall enablement of the injured worker to return to work. Relatedly, the PCRB also predicted that diagnostic testing and treatment plans will now become more rigorous in the early stages of employee injuries. If this occurs, the medical component of workers' compensation claims may rise for employers, but the results and progress from those tests and plans may provide employers and employees with better information regarding injuries, which again, speaks to the importance of a thoughtful Return-to-Work Program to process this information and devise a solution that benefits both the employer and employee.

### **The Protz Decision**

The Pennsylvania Supreme Court issued its decision in Protz on June 20, 2017. The Court held that the IRE process was unconstitutional because the General Assembly is not permitted to delegate its authority to issue impairment rating guidelines to a non-legislative body, which in Protz was the American Medical Association. The Court noted that "[t]he General Assembly did not favor any particular policies relative to the [AMA's] methodology for grading

impairments, nor did it prescribe any standards to guide and restrain the AMA's discretion to create such methodology," and "[w]ithout any parameters cabining its authority, the AMA would be free to: (1) concoct a formula that yields impairment ratings which are so inflated that virtually every claimant would be deemed to be at least 50% impaired; (2) draft a version of the [Guidelines] guaranteed to yield impairment ratings so miniscule that almost no one who undergoes an IRE clears the 50% threshold; or (3) do anything in between those two extremes." Protz, at p. 10. Given this potential for variability and other administrative concerns, the Court struck down Section 306(a.2) relating IREs.

The Court did not specify how its ruling should be implemented and leaves uncertainty as to whether its holding could be applied to pending workers' compensation claims and/or applied retroactively to past claims. At least for pending claims, employers should not move forward with IREs and would be wise to withdraw any modification petitions based on IRE results. Instead, a wait-and-see approach should be adopted to check whether the General Assembly will promulgate new legislation ushering in further changes.

### **The Impact to your Workers' Compensation Premium and Program**

At least initially, it should be expected that the PCRB's proposed 6.06% increase will be

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incorporated into all workers' compensation insurance premiums for policies effective November 1, 2017. The 6% increase applies only to Pennsylvania payroll amounts. It is also likely that policies renewing in the interim will be issued with tentative rates and subject to adjustments after November 1, 2017 to comport with PCRB's proposed loss costs.

Workers' compensation insurance carriers are likely to respond with a conservative approach to placing reserves on lost-time claims. In an environment where IREs are no longer permissible, injured workers are more likely to obtain lifetime wage replacement benefits, and, therefore, carriers, all else being equal, will likely value claims at higher amounts post-Protz. These higher reserves and claims values may then also impact an employer's experience modification rating, in addition to the PCRB's increased loss costs ratings.

Devising a comprehensive Return-to-Work Program can help employers mitigate these anticipated higher costs. Employers should be diligent when monitoring injured workers' lost time and creative, when possible, in bringing those employees back to work. Employers should also discuss reserves amounts with their adjusters, when possible. Utilizing these strategies, in conjunction with your insurance broker or consultant, can add some clarity and control to your workers' compensation program. These were always prudent practices to implement but are now especially important in the wake of uncertainty following the Protz decision and in an environment of likely rising costs.

**Devising a comprehensive Return-to-Work Program can help employers mitigate these anticipated higher costs.**

Follow the link below to access the PCRB Filing C-369 from August 15, 2017:

**[Proposal C-369 November 1, 2017 Loss Cost Filing to Reflect the Impact of the Protz Decision](#)**