

WARNING!

IRE MUST BE REQUESTED WITHIN 60-DAYS OR THE RIGHT TO DO SO IS FOREVER LOST

On January 15, 2003, the Commonwealth Court issued a decision that changes the law in Pennsylvania concerning Impairment Rating Evaluations. *Barbara Gardner v. Workers' Compensation Appeal Board (Genesis Health Ventures)*, No. 1923 C.D. 2002.

Ms. Gardner was injured in October of 1996. As of October 2, 1998, she had received 104 weeks of temporary total disability benefits. On June 13, 2001, her employer requested an independent impairment rating evaluation (IRE). The claimant objected to the request because it was not made within sixty days of the date on which she received 104 weeks of temporary total disability benefits. The employer then filed a petition seeking to compel the evaluation.

The Workers' Compensation Judge denied the petition based on section 306(a.2)(1) of the Workers' Compensation Act:

When an employe has received total disability compensation...for a period of one hundred four weeks, unless otherwise agreed to, the employe shall be required to submit to a medical examination which **shall be requested by the insurer within sixty days upon the expiration of the one hundred four weeks** to determine the degree of impairment due to the compensable injury, if any.

The employer filed an appeal to the Workers' Compensation Appeal Board, which reversed the WCJ's decision based upon

the regulation found at 34 Pa.Code §123.102(f), which states:

Consistent with section 306(a.2)(6) of the [A]ct (77 P.S. §511.2), the insurer's failure to request the evaluation during the 60-day period subsequent to the expiration of the employe's receipt of 104 weeks of total disability benefits may not result in a waiver of the insurer's right to compel the employe's attendance at an IRE.

The claimant then filed a petition for review with the Commonwealth Court.

The Court agreed with the claimant that **the employer's failure to request an IRE within 60-days of the expiration of 104 weeks of total disability benefits precludes the employer from requesting an**

IRE at any time outside the 60-day period.

In rendering its decision, the Court focused on the Act itself, which states that an employee who has received 104 weeks of total disability shall be required to submit to a medical evaluation “which **shall be requested** by the insurer **within sixty days** upon the expiration of the one hundred four weeks.” There must be a request within that 60-day period to trigger the IRE process. The court stated that this means that, under section 306(a.2)(6) of the Act, **when the insurer has initiated the procedure in a timely manner and has not obtained a claimant impairment rating less than fifty per centum**, the insurer may seek **additional** independent medical evaluations under section 314 of the Act to obtain an IRE,

but no more than two during a twelve-month period.

The Court noted that, to the extent that the regulations relied upon by the WCAB contradict the Act, the regulations are invalid.

In this case, because the IRE was not requested within 60-days of October 2, 1998, the employer was not entitled to an IRE and is forever precluded from seeking an IRE in order to modify the claimant’s benefits.

The lesson to be learned is clear. Mark your calendar with regard to each claim. If you ever want to have an IRE in



order to reduce a claimant’s benefits, you must act in a timely fashion. **The request must be made within the 60-day time period after the expiration of the 104-week period of temporary total disability payments. Failure to do so will forever preclude an IRE.**

Although the Court did not address whether or not the evaluation had to take place within that 60-day period, that issue could be raised. Therefore, in order to protect yourself, **make certain that the request is made and the evaluation is completed within 60-days after the expiration of the 104-week period of temporary total disability payments.** If the evaluation is not completed, you are inviting litigation and possible extinction of your right to an IRE.

ATTENTION READERS, the editors of Thomson, Rhodes & Cowie Pennsylvania Workers’ Compensation Bulletin invite you to submit questions you may have dealing with workers’ compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified workers’ compensation attorney.

Send questions to: Harry W. Rosensteel, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219.

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