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## **WORKERS' COMP ALERT**

### **Commonwealth Court Holds That Insurer's Failure To Request IRE Within 60 Days Of Claimant's Receipt Of 104 Weeks Of Total Disability Waives Insurers' Right To Ever Obtain IRE**

The Commonwealth Court en banc has limited an insurer's opportunity to request that an injured employee undergo an impairment rating evaluation. The effect of the Court's holding in Gardner v. W.C.A.B. (Genesis Health Ventures), 2003 Pa. Commw. LEXIS 29, filed January 15, 2003, is that the initial IRE must be scheduled within 60 days of the date of the employee's receipt of 104 weeks of total disability benefits or the right to obtain an IRE is forever waived.

### **The Court's Reasoning**

The Commonwealth Court focused on an identified conflict between Section 306(a.2)(1) of the Pennsylvania Workers' Compensation Act and Section 306(a.2)(6) of the Act. Section 306(a.2)(1) states that:

When an employee 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 ...

In contrast, Section 306(a.2)(6) states:

Upon request of the insurer, the employe shall submit to an independent medical examination in accordance with the provisions of Section 314 to determine the status of impairment ...

Section 314 provides that the employee must submit to an independent medical examination or expert interview "at any time."

The Commonwealth Court held that Section 306(a.2)(1) is clear and unambiguous in requiring an insurer to request that the Claimant submit to an IRE within 60 days of the expiration of the 104 week period in order to preserve the IRE process.

The employer relied on Section 123.102(f) of the Regulations which states that “consistent with Section 306(a.2)(6)”, the insurer’s failure to request the IRE within the 60 day period may not result in a waiver of the insurer’s right to compel the employee’s attendance at an IRE. However, the Court ruled that Section 306(a.2)(6) does not allow an insurer to request an IRE when the insurer has failed to request one within the 60 day period under Section 306(a.2)(1). Accordingly, the Court held that Section 123.102(f) of the Act 57 Regulations is contrary to Section 306(a.2)(1) of the Act and is invalid.

### **Summary**

Therefore, if an insurer fails to schedule an IRE within 60 days following the expiration of the 104 week period, it is precluded from ever seeking an IRE under Section 306(a.2)(1) of the Act in order to modify total disability benefits to partial disability benefits based on the Claimant’s permanent impairment. The insurer then retains only the right to request an IME and an expert interview under Section 314 of the Act to obtain medical and vocational evidence in order to modify the Claimant’s benefits from total to partial based on a change in the Claimant’s medical condition and the existence (availability) of work to demonstrate his earning power. Counsel for the insurer has indicated that an appeal is possible.

### **Suggestions For Future Handling**

For now, insurers would be wise to diary their files for the expiration of the period of 104 weeks of total disability and, in most cases, to schedule IRE’s within 60 days thereafter.

A 0% impairment rating would be appropriate if residuals of the injury are not permanent and/or significant residuals are not identified. A 0% impairment rating would limit the remaining disability period to 500 weeks and would not seem to preclude a subsequent petition for termination.

Please feel free to contact us about this or any case, and we will be happy to discuss your questions.

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