

Jane A. Lombard
Attorney at Law

Supreme Court Rules on Timing of IRE Requests Gardner v. WCAB (Genesis Health Ventures)

On December 28, 2005 the Pennsylvania Supreme Court issued their long awaited decision in Gardner v. WCAB (Genesis Health Ventures). Chief Justice Cappy, writing for the majority, affirmed the Commonwealth Court's ruling that if an IRE is not requested within 60 days of the claimant's receipt of 104 weeks of temporary total disability benefits the insurer loses the automatic relief afforded by the statute to change the benefits status from partial to total where the impairment rating is less than 50 percent. However, the Supreme Court went further than the Commonwealth Court and addressed the effect of Section 306 (a.1) (6), that is, requests made beyond the 104 week/60 day deadline. The Court held that where a request is made after the expiration of the deadline the insurer can no longer avail themselves of the self executing status change provisions, but can nonetheless effectuate that status change through the "traditional administrative process." We envision this decision will require updated Bureau regulations, perhaps a new form, and may result in further litigation. However, the fact that the Court has not forever precluded the possibility of a status change based on a favorable impairment rating when the deadline is missed is a positive result for employers and insurers.

The Court's decision also addressed the question of when does the prescribed 104 week period begin. The claimant's appeal in Rider v. WCAB (Wal-Mart) was consolidated with the Gardner case for decision purposes. There, the employer had contested claimant's entitlement to compensation benefits for a July 31, 1998 injury. The WC Judge awarded benefits on December 16, 1999. Wal-Mart appealed to the WCAB; supersedeas was denied as to the payment of compensation; employer made payment to the claimant. The WCAB remanded the matter to the WC Judge resulting, once again, in an award of benefits to the claimant in November of 2001. The employer no longer contested the payment of benefits but did request claimant submit to an IRE within 60 days of the date of the final adjudication, however, this was 163 weeks after disability actually began. The Commonwealth Court held that the employer was not bound by the strict 60 day deadline as announced in Gardner because the employer had contested liability. The Supreme Court disagreed with the Commonwealth Court. The Supreme Court, deeming the statutory language contained in Section 306 (a.2) (1) mandatory, held that the employer must request the IRE within 60 days of claimant's receipt of 104 weeks of benefits. As the plain meaning of the word "receipt" compels the finding that the claimant received benefits following the denial of supersedeas, that date triggered the running of the 104 week/60 day clock.

The Court's decisions in both Gardner and Rider are premised on application of statutory construction principles. The Court bases its ruling in Gardner on the mandatory language used by the legislature in directing the parties on requesting, submitting to, and performing the

impairment rating evaluation. Section 306 (a.2) (1) states that the employer shall request an IRE within 60 days of expiration of the 104 weeks of temporary total disability benefits; it directs the employee shall submit to such an evaluation; and it directs the doctor shall determine the degree of impairment using the AMA guidelines. The Court reasons that if it were to construe the word “shall” as used with respect to the employer’s obligation as merely permissive or directory it would necessarily have the same effect on the claimant’s and the physicians’ obligation. That is, if the 60 day deadline to request an impairment rating evaluation is considered merely a guideline for the insurer it must then also be merely be a guideline for the claimant to submit to the evaluation and the doctor to perform the evaluation pursuant to the AMA directives. Accordingly, although conceding that some ambiguity exists in the statutory language, the Court ultimately rules that to effectuate the cost containment objectives of Act 57 the use of the word “shall” in the legislation must be considered a mandatory directive on both insurers, claimants, and physicians.

Importantly, the Court holds that the failure to adhere to the 60 day time limit operates only to preclude the automatic/self executing status change provision. The Court develops a dual track approach to the status change triggered by an IRE of less than 50 percent. If the examination is requested within the 60 day deadline the status change is automatic with the proper Bureau filing and 60 days notice of the change to the claimant. If the 60 day deadline is missed the employer may still request claimant submit to an evaluation, however, if the impairment is less than 50 percent, the status change must be effectuated by the “traditional administrative process.”

The Court does not elaborate on the “traditional administrative process” but it is easily envisioned that the employer would need to petition for a status change and the matter would be assigned to a WC Judge. We will look for regulations from the Bureau addressing the process by which the status change is administratively secured. It may be that the administrative track that is set up will be similar to the review of a utilization review determination with the IRE determination face sheet considered a Bureau exhibit that can satisfy an employer’s prima facie burden of proof.

The good news from the Supreme Court for employers and insurers is the IRE status change from total to partial is not forever lost where the 60 day deadline is missed. It certainly remains a good claims handling procedure to diary those cases where a termination of benefits appears unlikely for the 60 day deadline to accomplish the automatic change. However, it is also now a good idea to revisit those files where the deadline was missed in order to request the IRE and status change administratively.

We welcome your inquiries and your thoughts on this decision. We look forward to advising you with respect to your specific cases.

Happy New Year.

*Jane Lombard Chuck Katz Steve Harlen Paul Pauciulo
Sharon McGrail-Szabo Sheilah Tone Debra Matherne Thomas Ollason*