

THE CHARTWELL

LAW OFFICES, LLP

Presented by Andrew Klaber at the Pennsylvania Bar Institute Fall Section meeting September 19, 2008

Impairment Rating Evaluation; the Defense Perspective

I - Summary of Statutory Authority

Section 306(a.2)(1) of the Workers' Compensation Act provides in part: When an employee receives total disability compensation for a period of 104 weeks, unless otherwise agreed to, the employee shall be required to submit to a medical examination which shall be requested by the insurer within 60 days upon the expiration of the 104 weeks, to determine the degree of impairment due to the compensable injury, if any.

Under Section 306(a.2)(2), if an impairment rating determination is less than 50%, the employee's disability status should be changed from total to partial. The change does not affect the amount of compensation payable to the employee.

Section 306(a.2)(3). If the degree of impairment is found to be less than 50%, then a Notice of Change in Workers' Compensation Disability Status Form must be filed with the bureau. (LIBC 754)

II - Practical Benefits of Securing an IRE

In simple terms, the IRE allows the employer to cap a claimant's entitlement to indemnity benefits under the Act. Assuming that the employer adheres to the Statute, and the guidance of the Courts, the IRE provisions can be effective in limiting wage loss exposure at 500 weeks of total disability benefits, beginning of the date of the IR exam. This 500 week period may begin to run as early as 104 weeks after the first receipt of TTD benefits. However, if the IRE request is untimely or the exam itself is delayed, the employer's exposure may extend beyond 604 weeks of benefits. This brief summary of the process sets forth the basic framework for the IRE process and several practical suggestions for defense counsel.

Generally speaking, the majority of Workers Compensation cases will be litigated, or resolved, well before the employer pays out 604 weeks of total disability benefits. The IRE is not appropriate for all cases, but nonetheless represents a valuable tool for the control of cases involving significant exposure. Indeed, in cases involving catastrophic injuries, multiple failed surgeries, or complicated injuries, the IRE provisions may be one of the few practical methods in which the employer can control their exposure from wage loss benefits. It will not serve to cap the employer's medical care obligations under the Act.

When used effectively, the Impairment Rating will encourage a claimant, and their

Valley Forge Office
Valley Forge Corporate Center
2621 Van Buren Avenue
Norristown, PA 19403
(610) 666-7700
(610) 666-7704 (fax)

Philadelphia Office
Bell Atlantic Tower
1717 Arch Street, Suite 2920
Philadelphia, PA 19103
(215) 972-7006
(215) 972-7008 (fax)

Pittsburgh Office
409 Broad Street
Suite 200
Sewickley, PA 15143
(412) 741-0600
(412) 741 0606 (fax)

Harrisburg Office
1017 Mumma Road
Suite 100
Wormleysburg, PA 17043
(717) 909-5170
(717) 909-5173 (fax)

info@chartwelllaw.com
www.chartwelllaw.com

counsel, toward resolution. Absent some end point for their entitlement, and absent a compelling need for a lump sum of money, a claimant has little incentive to engage in realistic settlement discussions. While it has become standard practice to leverage the possibility of a termination, or modification based upon vocational development, these traditional means of controlling liability may be ineffective in complicated medical cases. If nothing else, the 500 week period after the IRE may be used as an outside parameter, or starting point, for the claimant's best case scenario for recovery. Knowing this, a claimant may be more inclined to acknowledge and accept a reasonable settlement figure. It should also be noted that a Judge mediating a case may use this cap as a means of encouraging a claimant to settle the case. All of this assumes that the claimant's objections to the IRE process, explored later in this document, are ineffective. However, even if the IRE is challenged, it may nonetheless have some utility during the litigation process.

III - Timing of the IRE Request

According to the Pennsylvania Supreme Court decision in Gardner v. WCAB (Genesis Health Ventures), 888 2d 758, the employer may request an IRE outside the 60-day period outlined under Section 306(a.2)(1). Although the Gardner decision was drawn into question by the recent opinion in the Diehl case, that case has been vacated and will be re-heard by the Commonwealth Court. Thus, for the time being, the employer's "penalty" for an untimely IRE requires them to file a petition and convince the Judge as to the validity of the IRE findings. This may involve additional expense and invites litigation where it is not necessarily required. The additional passage of time between the expiration of 104 weeks, and the date of the IRE, may also serve as motivation to request the exam in a timely fashion. As a practical matter, it is advisable to diary the case and make the request for an IRE within the 60 day window. Bear in mind that the exam need not be scheduled immediately after securing the designation of the IR expert.

The flexibility allowed by the Supreme Court's decision in Gardner allows the employer to use the IRE remedy in a more strategic manner, without fear of losing the remedy. For example, the employer may wish to wait for an IRE in the wake of recent surgical intervention. Similarly, the employer may wish to refrain from securing an IRE should there be an pending issue with regard to the description of the injury.

While there are some situations where an IRE, and concurrent litigation, may work against the interests of the employer, there is little to be lost in parallel tracks of litigation in most cases. More to the point, counsel for the employer should continue with all other efforts to limit their exposure, even after the IRE is secured. While the IRE may be an effective bargaining tool, there is nothing in the Act, under the current interpretation of case law, to prevent the employer from litigating Termination, Modification, or Suspension Petitions after securing an IRE.

At one point, it was thought that an IRE evaluation could preclude the defendant from filing for a termination of benefits. This particular theory was invalidated by the decision of Schater v. WCAB (SPS Technologies) 910 A.2d 1236 (Pa. Cmwlth. 2007.) in which the Court

ruled that an employer may terminate benefits even after an opinion finding permanent impairment. While the litigation of a Termination petition after an IRE is not prohibited as a matter of law, counsel for the employer should consider the practical consequences of such an action. Is it possible that a WCJ would not look favorably upon an attempt to argue for a full recovery in the face of an IRE report finding 5% permanent impairment? Prior to filing for an IRE, counsel should consider the facts of the case and assess the likelihood of concluding the case at a figure under 500 weeks of TTD.

At any time during the 500-week period following an IRE, the claimant may file a petition to review his/her disability status. The ability of the claimant to challenge the IRE over a 9.6 year period represents a significant impediment to true file closure. Can a file be effectively valued and/or capped if it can be re-opened? Is the value of the IRE process lessened by this uncertainty? These questions cannot be answered at present but it is suggested that the IRE process is preferable to inactivity and the status quo.

One such avenue of challenge may involve a Review petition seeking to expand the NCP. In theory, the failure of the IRE physician to consider all work related injuries may invalidate the IRE. However, as a practical matter, this avenue for a challenge is dependent upon a successful effort to expand the NCP. If this is not undertaken before the expiration of the 104 weeks, the claimant may have a difficult time convincing the Judge that the additional injury/condition is indeed related to the accepted injury. As a practical matter, the longer the claimant waits to challenge the IRE, the more difficult the Review petition becomes. This concept is explored in greater detail elsewhere in these materials.

Generally speaking, it is important to recognize that the initiation of the IRE process is not the end of the litigation. It is but one part of the defense strategy and must be used in conjunction with traditional methods for closing cases and controlling liability. More to the point, the finding of a permanent impairment will not preclude vocational development efforts. Unlike a Termination petition, there is no clear contradiction between an effort to return a claimant to the work force and a finding that the same claimant has some percentage of permanent physical limitations.

IV - IRE Chronology of Events

1. Employers must first identify those cases that are appropriate for an IRE. Generally speaking, these are cases that present complicated or severe injuries. Other indicators that an IRE may be appropriate include a claimant or counsel with irrational expectations of the case value. Consider the nature of the case, the medical record, and the likelihood of resolving the case through traditional methods. Carefully consider the impact of IRE proceedings on any other pending, or potential petitions, such as a Termination.
2. Maintain a diary of all case and request an IRE after the claimant has received 104 weeks of temporary total disability benefits.

3. Contact opposing counsel or the claimant and select a physician to perform the IRE. If the parties cannot agree to a physician, request that the bureau "break the tie and appoint a physician".
4. Assuming Bureau involvement is required, prepare and file LIBC -766, Request for Designation of a Physician to perform and Impairment Rating Evaluation.
5. The Bureau will then issue a Notice of Designation of Impairment Rating Evaluation (IRE) Physician. The form provides further instructions regarding the employer's obligation to alert the claimant, claimant's counsel, and the IRE physician when the appointment is scheduled. Forms LIBC-765 and LIBC-767 shall be used for these purposes.
6. Prepare a packet of information for the IR expert that includes a clear explanation of all injuries that occurred in the work injury. All available medical records should also be provided. The statute does not outline the exact contents of the packet and a more complete set of records is generally preferable.
7. If the claimant does not attend the scheduled examination, file a petition to compel. If appropriate, the Judge will issue an Interlocutory Order compelling the employee to attend. While the case law in the issue is scarce, there is some suggestion that a claimant's failure to attend an IRE may serve as a basis for a forfeiture proceeding.
8. After receipt of the IRE Determination, Prepare an LIBC-764 and forward it to the claimant and counsel. This assumes the IRE request is "timely".
9. If the IRE request was "untimely" and beyond the 60 day window, prepare and file a petition to Modify benefits based upon the IRE determination.
10. If opposing counsel challenges the IRE finding, or challenges the Modification petition, depose the IRE physician and secure testimony supporting the Impairment Rating.
11. During the pendency of the IRE proceedings, continue in efforts to control liability through traditional methods including the termination, suspension, or modification. Continue with periodic medical examinations, claimant reporting forms and surveillance if appropriate.
12. Continue in settlement negotiations with the claimant and counsel in an effort to resolve the case.

Page 5
November 9, 2008

Andrew Klaber
The Chartwell Law Offices
409 Broad Street
Suite 250
Sewickley, PA 15143
412-741-0600
aklaber@chartwelllaw.com