IN THE
SUPREME COURT OF PENNSYLVANIA

NO. 14 EAP 2004

WORKERS' COMPENSATION APPEAL BOARD
(GENESIS HEALTH VENTURES)
Appellant

v.

BARBARA GARDNER,
Appellee

BRIEF FOR AMICUS CURIAE, PENNSYLVANIA DEFENSE INSTITUTE IN SUPPORT OF APPEAL OF GENESIS HEALTH VENTURES

Appeal by Allowance from the Order of the Commonwealth Court dated January 15, 2003 Docketed at No. 1923 C.D. 2002 Reversing the Order of the Workers' Compensation Appeal Board dated August 1, 2002 Docketed at A00-0350, Reversing the Decision and Order of WCJ Joseph McManus Denying the IRE Petition of Genesis Health Ventures

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I. STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction over this Appeal of the final Order of the Commonwealth Court of Pennsylvania, pursuant to Section 724(a) of the Judicial Code.

II. STATEMENT OF INTEREST OF AMICUS CURIAE

The Pennsylvania Defense Institute ("PDI") is a statewide association of defense counsel, insurance company executives and self-insured entities that provides a forum for studying and developing public policy and for exchanging ideas on issues of concern to its constituents. The PDI represents its members and constituents in a variety of forums, including legislative matters affecting the interests of business groups and litigation affecting the interests of insurers conducting business in the Commonwealth of Pennsylvania.

Through the collective judgment of its Amicus Curiae Committee, the PDI seeks to protect the interests of its constituents by presenting to appellate tribunals well-reasoned legal analysis, supported by thoughtful consideration for the public policy.

III. SCOPE OF REVIEW

This Honorable Court's scope of review on appeal from a decision of an administrative agency is limited to determining whether any constitutional rights have been violated, whether any errors of law have been committed or whether any necessary findings of fact are not supported by substantial evidence. See Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; Davis v. Workers' Compensation Appeal Board (Swarthmore Borough), 561 Pa. 462, 751 A.2d 168 (2000); Waugh v. Workers' Compensation Appeal Board, 558 Pa. 400, 737 A.2d 773 (1999).

This Honorable Court has recently expanded the scope of appellate review in administrative cases such as this one to include "capricious disregard" analysis where, for example, the WCJ chooses not to consider uncontroverted evidence or chooses not to apply well-settled law. Leon E. Wintermeyer, Inc. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002); See also FOP Conference of Pennsylvania Liquor Control Board Lodges v. Pennsylvania Labor Relations Board, 557 Pa. 586, 735 A.2d 96 (1999).

In terms of its standard review, this Honorable Court, as an appellate tribunal, may not assess credibility or re-weigh evidence since the authority to do so rests exclusively with the WCJ. Taulton v Workmen's Compensation Appeal Board (USX Corp.), 713 A.2d 142 (Pa. Cmwlth. 1998). In examining questions of law, however, this Honorable Court's standard of review is plenary, Phillips, et. al. v. A-Best Products, et. al., 542 Pa. 124, 665 A.2d 167 (1995); Young v. Young, 507 Pa. 40, 488 A.2d 264 (1985) and, in the context of a statutory construction question, this Honorable Court's role is "to ascertain and effectuate the intention of the legislature; to the extent the legislative definition is not explicit, we may also consider, among other matters, the occasion and necessity for the statute, the circumstances under which it was enacted, the mischief to be remedied, the object to be attained, the former law, if any, including other statutes upon the same or similar subjects, the consequences of a particular interpretation, the contemporaneous legislative history, and the legislative and administrative interpretations of the statute." Commonwealth of Pennsylvania, Higher Education Assistance Agency, et. al. v. Abington Memorial Hospital et. al., 478 Pa. 514, ___, 387 A.2d 440, ___ (1978) *citing* Statutory Construction Act of 1972, 1 Pa.C.S.A. §1921.

IV. ORDER IN QUESTION

ORDER

AND NOW, this 15th day of January 2003, the Order of the Workers' Compensation Appeal Board, dated August 1, 2002, is hereby REVERSED.

(Order of Commonwealth Court of Pennsylvania dated 1/15/03)

V. COUNTERSTATEMENT OF QUESTIONS INVOLVED

1. Whether the Commonwealth Court committed error by ruling that an employer permanently forfeits its right to an Impairment Rating Evaluation and potential entitlement to a modification of disability benefits following such an Evaluation, where circumstances dictate that it not request the Evaluation within 60 days of the injured worker's receipt of 104 weeks of total disability benefits, under Section 306(a.2) of the Act.

   (Answered in the affirmative by the Commonwealth Court)

VI. STATEMENT OF CASE

On October 2, 1996, appellee, Barbara Gardner ("claimant") suffered a low back injury while in the course and scope of her employment duties as a physical therapist with appellant, Genesis Health Ventures ("defendant") on October 2, 1996 (R. 3a) following which the assigned Workers' Compensation Judge ("WCJ") issued a Decision and Order granting claimant total disability benefits at a rate of $527.00 per week based upon a pre-injury average weekly wage of $1,250.00.

By October 2, 1998, claimant had received her 104th week of temporary total disability benefits (R. 3a).

On June 13, 2001, defendant requested that claimant participate in an Impairment Rating Evaluation under Section 306(a.2) of the Act. (R. 3a).

Claimant, however, objected to the requested Impairment Rating Evaluation ("IRE"), maintaining that since defendant's request was not made within sixty (60) days of the date upon which she had received her first 104 weeks of total disability benefits – on or before December 1, 1998 – defendant had permanently forfeited its right to any such Evaluation, thereby permanently precluding defendant from seeking a modification of the character of her receipt of disability benefits under Section 306(a.2) of the Act, regardless of claimant's physical condition

as assessed under the American Medical Association Guides to the Evaluation of Permanent Impairment.

Accordingly, on August 10, 2001, defendant filed a Petition for Physical Examination under Section 314 of the Act, requesting that the assigned WCJ direct claimant to participate in an IRE with orthopedic surgeon, Dr. Ronald Abraham (R. 1a).

Following the parties' submission of a Stipulation of Facts (R. 3a) outlining the material facts underlying the parties' legal dispute, WCJ Joseph McManus, by Decision and Order circulated November 2, 2001, disallowed defendant's Petition for Physical Examination, finding as fact that "the employer did not request the IRE within the 60 days of the date that Claimant had been on compensation for 104 weeks of temporary total disability and it therefore was untimely" and concluding as a matter of law that "the Employer has failed to meet its burden that it complied with the 60 day time provisions of Section 306 (A.2)(1) of the Act" strictly on the basis of his apparent presumption that the word "shall" as presented in Section 306(a.2)(1), must always reflect a "mandatory" rather than "directive" prescription of the legislature (See Appendix "A").

On November 22, 2001, defendant filed an Appeal from Judge's Findings of Fact and Conclusions of Law with the Pennsylvania Workers' Compensation Appeal Board challenging the WCJ's legal ruling and requesting an Order directing claimant to participate in the requested IRE.

By Opinion and Order dated August 1, 2002, the Appeal Board reversed the WCJ's Decision and Order reasoning as follows: (1) the language of Section 306(a.2)(1) of the Act, when considered in the context of the entire provision and with other provisions of the Act is necessarily ambiguous; (2) Section 123.102(f) of the Act 57 regulations promulgated by the Bureau of Workers' Compensation, provides a reasonable and appropriate clarification of the

ambiguity contained in Section 306(a.2)(1); (3) "to construe Section 306(a.2)(1) as a statute of limitations barring biannual IREs indefinitely into the future produces an unreasonable result"; and (4) "a mandatory construction of Section 306(a.2)(1)'s 60-day timeframe would seriously impair the overall purpose of Section 306(a.2) by permanently foreclosing the insurer's right to use IREs to measure disability." (See Appendix "B").

Accordingly, the Appeal Board concluded that pursuant to the administrative interpretation promulgated by the Bureau in Section 123.102(f) of the Act 57 Regulations, any failure on the part of an employer to request that the injured worker participate in an IRE more than 60 days following the injured worker's receipt of 104 weeks of temporary total disability benefits does not permanently preclude the insurer or employer from obtaining the Impairment Rating Evaluation but simply affects the date upon which any modification of benefits under that provision will be triggered. (See Appendix "B").

On September 1, 2002, claimant filed a Petition for Review with the Commonwealth Court of Pennsylvania challenging the Appeal Board's ruling.

By Opinion and Order dated January 15, 2003, the Commonwealth Court of Pennsylvania reversed the Appeal Board's ruling, reasoning that the language of Section 306(a.2)(1) is "clear and unambiguous" and that because the defendant in this case "did <u>not</u> request that Claimant submit to a medical examination within sixty days of the expiration of the 104-week period…[it] is precluded from seeking an IRE under Section 306(a.2) of the Act." (See Appendix "C") (emphasis in original).

By Order dated March 14, 2004, this Honorable Court granted defendant's Petition for Allowance of Appeal challenging the Commonwealth Court's ruling.

VII. SUMMARY OF ARGUMENT

The Commonwealth Court's ruling below, which refuses to defer to the Bureau's regulatory interpretation of Section 306 (a.2)(1) off the Act, by requiring a complete and permanent forfeiture of the employer's right to obtain an Impairment Rating under the American Medical Association Guides to the Evaluation of Permanent Impairment, where the employer does not request IRE under Section 314 of the Act, within sixty (60) days of the injured workers' receipt of the first 104 weeks of total disability benefits, should be reversed since; (1) it establishes an arbitrary regime that contravenes the primary feature of the landmark remedial legislation known as "Act 57 of 1996" – the reduction of escalating insurance costs associated with Pennsylvania work injuries; (2) it fails to defer to the insight and comprehensive regulatory assessment of the Commonwealth agency statutorily charged with the responsibility of interpreting and administering the Act and (3) it will result, without any rational basis, in the establishment of two classes of Pennsylvania workers – one potentially entitled to the receipt of lifetime disability benefits and one potentially entitled to the receipt of limited benefits for a maximum of ten years, even where the two classes of workers share the same age, the same injury and the same socio-economic background - simply on the basis of an interpretation of Section 306(a.2)(1) that has no viable underlying policy consideration.

The interpretation of Section 306(a.2)(1) of the Act by the Bureau of Workers' Compensation – developed through a meticulous regulatory process that occurred over a one and a half year period, during which comments from IRRC, Committees of the Pennsylvania House of Representatives and Senate, representatives of employees, employers, members of the Pennsylvania Bar and the Pennsylvania medical community were received, reviewed and acted upon - provides a reasonable and rational application of the statute that dutifully executes the primary policy consideration that prompted the enactment of Act 57 in the first place – combating the spiraling costs of workers' compensation in the Commonwealth of Pennsylvania.

Since the interpretation of Section 306(a.2)(1) of the Act advanced by the Commonwealth Court below constitutes an unreasonable abrogation of the remedial cornerstone of Act 57 – the transformation of the Pennsylvania Act from a pure "wage loss" disability state to a "mixed" wage loss/impairment state, the PDI respectfully submits that it should be reversed.

VIII. ARGUMENT

A. THE COMMONWEALTH COURT COMMITTED ERROR BY PROHIBITING DEFENDANT FROM HAVING CLAIMANT UNDERGO AN IMPAIRMENT RATING EXAMINATION UNDER SECTION 306(a.2)(1) OF THE ACT.

The statutory provisions at issue in this case, Section 306(a.2)(1)(6) and Section 314 of the Act, provide, in pertinent part, as follows:

> "§ 306(a.2)(1). When an employe has received total disability compensation pursuant to clause (a) for a period of one hundred and 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 and four weeks to determine the degree of impairment due to the compensable injury, if any. The degree of impairment shall be determined based upon an evaluation by a physician who is licensed in this Commonwealth, who is certified by an American Board of Medical Specialties approved Board or its osteopathic equivalent and that who is active in clinical practice for at least twenty hours per week, chosen by agreement of the parties, or as designated by the department, pursuant to the most recent edition of the American Medical Association 'Guides to the Evaluation of Permanent Impairment.'
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> * * *
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> (6) Upon request of the insurer, the employe shall submit to an independent medical examination in accordance with the provisions of § 314 to determine the status of impairment: Provided, however, That for purposes of this clause, the employe shall not be required to submit to more than two independent medical examinations under this clause during a twelve-month period.
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> * * *

> § 314(a). That any time after an injury the employe, if so requested by his employer, must submit himself at some reasonable time and place for a physical examination or expert interview by an appropriate healthcare provider or other expert, who shall be selected and paid for by the employer.
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> * * *
>
> (b) In the case of a physical examination, the employe shall be entitled to have a healthcare provider of his own selection, to be paid by him, participate in such examination requested by his employer or ordered by the workers' compensation judge. In instances where an examination is requested in relation to § 306(a.2)(1), such examination shall be performed by a physician who is licensed in this commonwealth, who is certified by an American Board of Medical Specialties, approved board or its osteopathic equivalent and who is in active clinical practice for at least 20 hours per week."

In accordance with its legal responsibility to "explain and enforce the provisions of this act,"[1] the Department of Labor & Industry, Bureau of Workers' Compensation issued its final rulemaking on January 17, 1998[2], interpreting and administering the remedial changes brought about by Act 57, which included the following pertinent regulations:

Sections 123.101 and 123.102, which provide in pertinent part as follows:

> "§ 123.101. Purpose.
>
> This subchapter interprets § 306(a.2) of the Act (77 P.S. § 511.2) which provides for a determination of whole body impairment due to the compensable injury after the receipt of 104 weeks of total disability compensation, unless otherwise agreed to by the parties.
>
> § 123.102. Impairment rating evaluation (IRE) requests.
>
> (a) During the 60-day period subsequent to the expiration of the employee's receipt of 104 weeks of total disability benefits, the insurer may request the employee's attendance at an IRE. If the evaluation is scheduled to occur during the 60-day time period, the adjustment of the benefit status shall relate back to the expiration of the employee's receipt of 104 weeks of total

[1] See Section 435(a)(v), 77 P.S. §991

[2] See 28 Pa. Bulletin 329 (No. 3, Saturday, January 17, 1998).

> disability benefits. In all other cases, the adjustment of the disability status shall be effective as of the date of the evaluation or as determined by the evaluating physician.
>
> (b) Absent agreement between the insurer and the employee, an IRE may not be performed prior to the expiration of the employee's receipt of 104 weeks of total disability benefits.
>
> * * *
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> (e) The insurer shall request the employee's attendance at the IRE in writing on Form LIBC-765, 'impairment rating evaluation appointment' and therein specify the date, time and location of the evaluation and the name of the physician performing the evaluation, as agreed by the parties or designated by the department. The request shall be made to the employe and the employe's counsel, if known.
>
> (f) Consistent with the provisions of § 306(a.2)(6) of the act, the insurer's failure to request the evaluation during the 60-day period subsequent to the expiration of the employee's receipt of 104 weeks of total disability benefits may not result in a waiver of the insurer's right to compel the employee's attendance at an IRE."

The Bureau's interpretation of the Impairment Rating provision is not a benign matter of historical fact that carries little or no weight in this judicial proceeding. Quite the contrary, as this Honorable Court has explained, the interpretation of a stature, advanced by the administrative agency charged with the responsibility of explaining its meaning, cannot and should not be regarded lightly.

Indeed, in the context of a variety of disputes arising out of the interpretation of legislative pronouncements, this Honorable Court has instructed that "the contemporaneous construction of a stature by those charged with its execution and application, especially when it has long prevailed, is entitled to great weight and should not be disregard or overturned except for cogent reasons, and unless it is clear that such construction is erroneous." Commonwealth of Pennsylvania, Pennsylvania Higher Education Assistance Agency, et. al. v. Abington Memorial Hospital, et. al., 478 Pa. 514, ___, 387 A.2d 440, ___ (1978) *quoting* Federal Deposit

Insurance Corp. v. Board of Finance and Revenue of Commonwealth, 368 Pa. 463, 471, 84 A.2d 495, 499 (1951).

In reversing the Commonwealth Court's rejection of a regulation issued by the Pennsylvania Department of Revenue – "that decision is in error because the Court confined its examination to one isolated portion of the statute while disregarding crucial language expressing a policy judgment to tax corporations precisely as the regulation specifies" – this Honorable Court observed in Philadelphia Suburban Corporation v. Commonwealth of Pennsylvania, Board of Finance and Revenue, 535 Pa. 298, 635 A.2d 116 (1993) that "in a case such as this, where the subject matter is within the agency's area of expertise and beyond general judicial competence, we give great weight to the agency's interpretation." 535 Pa. at ___, 635 A.2d at ___, *citing* Uniontown Area School District, 455 Pa. 52, 78, n26, 313 A.2d 156, 169 n26 (1973); SmithKline Beckman Corp. v. Commonwealth, 85 Pa. Cmwlth. 437, 458, 482 A.2d 1344, 1353 (1984), *affirmed* 508 Pa. 359, 498 A.2d 374 (1985).

The United States Supreme Court has instructed that even where the administrative interpretation at issue has **not** long prevailed – arguably it has in the context of Section 306(a.2)(1) – the statutory construction advanced by the agency responsible for explaining and enforcing the statutory scheme at issue, must be afforded substantial deference: "[u]undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute." Id. *quoting* National Labor Relations Board v. Hearst Publications, Inc., 322 U. S. 111, 130-31, 64 S. Ct. 851, 860, 88 L. Ed. 1170 (1944).

The PDI respectfully submits that the Bureau's[3] interpretation of Section 306(a.2) of the Act deserves is entitled to great deference because it represents the by-product of a full and inclusive regulatory process that received, reviewed and synthesized commentary from the Independent Regulatory Review Commission ("IRRC")[4] the Senate Committee on Labor and Industry, the House Labor Relations Committee and organizations and individuals representing the interests of the workers' compensation community none of whom proposed or even contemplated the interpretation advanced by the Commonwealth Court, and because it is consistent with the both the remedial policy underlying Act 57, the reduction of workers' compensation costs in the Commonwealth of Pennsylvania and the indisputable reality that no rational basis for the assumption underlying the Commonwealth Court's ruling below that the legislature intended to establish two classes of Pennsylvania injured workers after June 24, 1996 can possibly be found to exist.

1. The Remedial Policies of Act 57 of 1996

The amendments to the Pennsylvania Workers' Compensation Act, known as "Act 57 of 1996" have been described as the most dramatic changes to the Pennsylvania Act since the 1972/1974 changes to the law that were prompted by recommendations issued by the U.S. Department of Labor's National Commission on Workmen's Compensation Laws, which encouraged an expansion and liberalization of the law that was followed by twenty years of far-reaching interpretation by the Pennsylvania Appellate Courts. See Pennsylvania Workers' Compensation Law & Practice, §§ 1:5, 15:10 (Thomson/West Publishing, 1995).

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[3] The Bureau is an agency of more than 160 employees who work out of its Harrisburg headquarters and more than 280 Office of Adjudication employees who work out of 24 field offices throughout the Commonwealth. The Bureau's Mission Statement recognizes its responsibility to carry "out the provisions of the Act and related legislation" and to "enforce the provisions of the Act." (See "Pennsylvania Workers' Compensation and Workplace Safety Annual Report – Fiscal Year 2002/03").

[4] As discussed below, the final form Act 57 Regulations were deemed approved by the House and Senate Committees on November 18, 1009 and were approved by IRRC on November 20, 1997. See 28 Pa. Bulletin 329 (No. 3, Saturday, January 17, 1998).

The advent of Act 44 of 1993 saw the introduction of "medical cost containment" to the Pennsylvania workers' compensation scheme by a Legislature seeking to reduce the costs work–related injuries through the establishment of medical fee caps, utilization review and physician self-referral prohibitions.

The passage of Act 44 foreshadowed Act 57 - the next logical step in achieving a reduction in the cost of work-related injuries. Spearheaded by the insurance lobby, Act 57 sought to contain indemnity costs through the introduction of "Compromise and Release Settlements" as well as "off-set" provisions prohibiting injured workers from receiving wage loss "double recoveries" and, perhaps most significant of all, the transformation of the Pennsylvania Act from a traditional "wage loss" statute to a "mixed" statute combining the pure wage loss assessment with the pure impairment rating, or "scheduled" approach that has been adopted by other jurisdictions throughout the United States.

There has never been any dispute that the passage of Act 57 was motivated by a consensus that the cost of work injuries in Pennsylvania had become so exorbitant that many companies in the Commonwealth had found it impractical to conduct business or to maintain an employment base in Pennsylvania. See Township of Lower Merion v. Workers' Compensation Appeal Board (Tansey), 783 A.2d 878 (Pa. Cmwlth. 2001); Kramer v. Workers' Compensation Appeal Board (Rite Aide Corp.), 794 A.2d 953 (Pa. Cmwlth. 2002).

In fact, on January 17, 1998, following the publication of the Bureau's first two Notices of Proposed Rulemaking on April 5, 1997 and June 28, 1997, it was anticipated that the implementation of Act 57 would result in cost savings to the regulated community at more than

$225 million for the first policy year commencing on February 1, 1997. See 28 Pa. Bulletin 329 (January 17, 1998).[5]

2. Widespread Approval of Section 123.102(f) by the Legislature, IRRC and the Pennsylvania Workers' Compensation Community

From the enactment of Act 57 on June 24, 1996 through January 17, 1998 when the final version of the Act 57 Regulations was published in the Pennsylvania Bulletin, the Department of Labor and Industry, Bureau of Workers' Compensation administered a comprehensive regulatory process aimed at providing detailed guidance for the uniform application of Act 57. During the course of that process, the Bureau published multiple notices[6] initially inviting interested parties to participate in the formulation of the Statement of Policy and the Proposed Rulemaking process through which written comments to the Bureau Director and invited written and verbal comments addressing how Act 57 should be interpreted from various "stakeholders" affected by the passage and implementation of Act 57, resulting in the drafting of three versions of the Act 57 regulations.

Among those participating in the "stakeholders'" meetings were Pennsylvania Trial Lawyers Association, the Lehigh Valley Carpenters' Union, the Pennsylvania Conference of Teamsters, and the Pennsylvania Bar Association's Workers' Compensation Section.[7] In addition, the Bureau received comments from a number of groups and individuals including the Pennsylvania AFL-CIO, the American Insurance Association Law Department, and esteemed members of the Pennsylvania workers' compensation Claimants Bar and Defense Bar.[8]

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[5] The enactment of Act 44 and Act 57, as interpreted by the Bureau, has apparently helped reduce the costs of Pennsylvania work injuries. See "Pennsylvania Workers' Compensation and Workplace Safety Annual Report – Fiscal Year 2002/03" at pp. 12-13).
[6] See 26 Pa. Bulletin 3979 (August 17, 1996); 27 Pa. Bulletin 1731 (April 5, 1997); 27 Pa. Bulletin 3141 (June 28, 1997); and 28 Pa. Bulletin 329 (January 17, 1998).
[7] See 27 Pa. Bulletin 1731, 1732 (April 5, 1997).
[8] See 28 Pa. Bulletin 329, 331-332 (January 17, 1998).

The Bureau's initial Statements of Policy published on April 5, 1997 included the first version of the Regulation at issue in this matter which instructed, in pertinent part, as follows:

> "§ 122.102. Impairment rating evaluation requests.
>
> (a) Within 60 days of an employe's receipt of 104 weeks of total disability compensation, the insurer may request the employe's attendance at an impairment rating evaluation. The insurer shall request the evaluation either 60 days prior to, or up to 60 days after, the expiration of the employe's receipt of 104 weeks of total disability compensation. The impairment rating evaluation may not take place prior to the expiration of the employe's receipt of 104 weeks of total disability compensation. The 104 weeks of total disability shall be calculated on a cumulative basis.
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> * * *
>
> (d) <u>The insurer's failure to request the evaluation within 60 days of the expiration of 104 weeks of total disability may not result in a waiver of the insurer's right to compel the employe's attendance at an impairment rating evaluation</u>. The insurer maintains the right to request and receive an impairment rating twice in a 12-month period.
>
> * * *
>
> (f) The parties may agree to forego an impairment rating evaluation."

27 Pa. Bulletin 1731 (April 5, 1997) (emphasis supplied).

On June 28, 1997, the Bureau published its Proposed Rulemaking which, on the basis of written comments received in response to its initial Statement of Policy, prompted it to clarify and to expand upon its previous interpretation of Act 57 and to effect changes to the interpretations initially published on April 5, 1997.

The second version of the regulation at issue in this case instructed, in pertinent part, as follows:

> "§ 123.102. Impairment Rating Evaluation (IRE) Request.
>
> (a) Commencing 60 days prior to, and continuing up to 60 days after, the expiration of the employe's receipt of 104 weeks of total

> disability benefits, the insurer may request the employe's attendance at an IRE. If the evaluation is requested and performed during this time, the adjustment of the benefit status shall relate back to the expiration of the employe's receipt of 104 weeks of total disability benefits. When the evaluation is performed more than 60 days after the expiration of the employe's receipt of 104 weeks of total disability benefits, the adjustment of the disability status shall be effective as of the date of the evaluation or as determined by the evaluating physician.
>
> (b) Absent agreement between the insurer and the employe, an IRE may not be performed prior to the expiration of the employe's receipt of 104 weeks of total disability benefits.
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> * * *
>
> (f) The insurer's failure to request the evaluation within 60 days of the expiration of 104 weeks of total disability may not result in a waiver of the insurer's right to compel the employee's attendance at an IRE. The insurer maintains the right to request and receive an IRE twice in a 12-month period. The request and performance of IREs may not preclude the insurer from compelling the employe's attendance at independent medical examinations or other expert interviews under § 314 of the Act (77 P.S. § 651)."

27 Pa. Bulletin 3141, 3164 (June 28, 1997) (emphasis supplied).

It will be noted that subsection (f) of the regulation, though amended to a certain degree, continued to instruct that the insurer's failure to request the IRE evaluation during the 60-day period subsequent to the expiration of the employee's receipt of 104 weeks of total disability benefits would not result in a waiver of the insurer's right to compel the employee's attendance at an IRE.

Once again, the Bureau, upon publication for a second time, of the foregoing provision, invited all interested parties to provide written comments regarding its interpretation of Act 57.

On January 17, 1998, the Bureau published its final "Rules and Regulations" which included the final version of the regulation at issue in this case.

In outlining the comments submitted by all interested parties, including the IRRC, the above-referenced stakeholders groups and the referenced organizations and individuals, the

Notice of Final Rulemaking set forth those concerns expressed over its June 28, 1997 version of Section 123.102: (1) the proposed rule's allowance of an IRE to be performed prior to the expiration of 104 weeks of total disability when agreed to by the parties; (2) the proposed rule's allowance of an insurer to request an impairment rating 60 days prior to the expiration of the employee's receipt of 104 weeks of total disability benefits; (3) concerns that the proposed Section 123.102(h) would perhaps allow an insurer to unilaterally suspend benefits following employee's failure to attend an IRE; (4) concerns that proposed Section 123.104(a) inappropriately permitted both the insurer and the injured worker to request Bureau designation of an IRE physician; and (5) concerns that proposed Section 123.105(a) should specifically describe the outcome of an IRE where the examining physician is unable to rate the impairment of the injured employee under the AMA guides. See 28 Pa. Bulletin 329, 336-337 (January 17, 1998).

It appears, therefore, that during the one and a half year period during which the rulemaking process continued, neither the IRRC, nor the Senate Committee on Labor and Industry, nor the House Labor Relations Committee, nor any of the stakeholders, nor any members of the public expressed any concern for or disagreement with the Bureau's interpretation of Section 306(a.2)(1) of the Act - that the insurer's failure to request an IRE evaluation during the 60-day period subsequent to the expiration of the employee's receipt of 104 weeks of total disability benefits would not result in a waiver of the insurer's right to compel the employee's attendance at an IRE.

It is respectfully submitted that the reason not one commentator challenged the Bureau's interpretation of the statute at issue in this matter is because the harsh result necessarily brought about by the Commonwealth Court ruling below was never contemplated by the

legislature or by the affected parties working within the Pennsylvania Workers' Compensation community.

Indeed, had the legislature intended to limit the transformation of the Pennsylvania Act from a pure "wage loss" statute to a "mixed" statute only in those instances in which the employer issued a perfunctory "request" for IRE within the 60-day time period, the Bureau's Statements of Policy published on April 5, 1997 would have prompted scores of comments from unions, individual employees, The Pennsylvania Trial Lawyers' Association, and representatives from the Pennsylvania House of Representatives and Senate, that the Bureau was blatantly disregarding an essential element of Section 306(a.2) of the Act.

That "hue and cry" never followed the Bureau's April 5, 1997 Statements of Policy or June 28, 1997 Proposed Rulemaking because, as noted, the harsh IRE statute of repose introduced by the Commonwealth Court was never contemplated by the Pennsylvania Legislature.

3. The Unwitting Establishment of Two Classes of Injured Pennsylvania Workers

In this case, The Commonwealth Court has, on the basis of its application of one word set forth in Section 306(a.2)(1) of the Act has created two classes of Pennsylvania workers – one that faces the prospect of an unlimited award of lifetime disability benefits and one that faces the prospect of a limited entitlement to disability benefits of ten years in the absence of any distinction between the two classes in terms of the nature of the work-related injury, the age, gender, and socio-economic status of the injured worker, the date of injury at issue, and the extent of each class of workers' work-related impairment:

	CLAIMANT NO. 1	**CLAIMANT NO. 2**
Gender:	Male	Male
Date of Birth:	1/10/59	1/10/59
Occupation:	Manufacturing Assembler	Manufacturing Assembler
Date of Injury:	6/18/01	6/18/01

Nature of Injury:	Lumbar disc herniation requiring surgical intervention	Lumbar disc herniation requiring surgical intervention
Date of Receipt of 104 Weeks of Disability:	6/18/03	6/18/03
IRE Request Date:	7/18/03	8/19/03
Date of IRE:	7/30/03	N/A
Impairment Rating:	10%	N/A
Average Weekly Wage:	$483.00	$483.00
Disability Rate:	$322.00 per week	$322.00 per week
Employer Exposure:	As of 6/18/03 = $161,000.00	As of 6/18/03 = $569,296.00[9]

The Commonwealth Court ruling below has created two classes of injured Pennsylvania workers to the detriment of Pennsylvania employers – one employer faces an exposure of $569,296.00 in indemnity benefits on the basis of a post-Act 57 injury occurring on June 18, 2001, while another employer confronted with an identical workers' compensation scenario faces a maximum exposure of $161,000.00 – the insurance implications of such a dichotomy are obviously significant.

There is no indication that in considering the remedial changes contemplated by Act 57, the Pennsylvania Legislature intended to create two classes of workers, injured on or after June 24, 1996, or sought to impose what, in the scenario set forth above, would amount to a 350% financial penalty on the employer of Claimant No. 2 simply because it requested, for whatever reason, an IRE on Day 61 rather than on Day 60.

Indeed, had the Legislature intended to impose such a penalty, it most certainly would have included in Section 306(a.2)(l) language warning of the consequences for violating a mandatory statute of repose, such as:

> "Any request made by the insurer more than sixty days following the expiration of the one hundred four weeks, referenced above, will forever bar the insurer from obtaining a medical examination conducted in order to determine the status of impairment under this clause."

[9] The Commonwealth Court ruling below would therefore insist upon a 350% penalty against the employer of Claimant No. 2.

The absence of such language is a persuasive indication that the Legislature did not intend to sanction the harsh result required by the Commonwealth Court's ruling in this case.

Moreover, there does not appear to be any rational basis or any policy consideration explaining or justifying the creation of two such classes of injured workers by the Commonwealth Court.

Indeed, such an interpretation of Section 306(a.2)(1) of the Act would seem to be the kind of "absurd" result that Section 1921(1) of the Statutory Construction Act proscribes. Boettger v. Loverro, 526 Pa. 510, A.2d 712 (1991).

It simply cannot be argued reasonably that the decision of the employer of Claimant No. 1 above – for whatever reason – to request an IRE examination on August 19, 2003, rather than on August 17, 2003 – compromised, or prejudiced the interests of Claimant No. 2 in any manner whatsoever. The decision to request an IRE on August 19, 2003, did not preclude Claimant No. 2 from obtaining medical treatment for the work injury at issue, nor did it preclude the Claimant No. 2 from receiving his weekly entitlement to disability benefits pending the scheduling and performance of the requested IRE, nor did it affect Claimant No. 2's ability to seek vocational re-training or to expand the nature of the work injury at issue through litigation before a WCJ or to seek any other relief contemplated by the Act or the regulations promulgated thereunder.

Indeed, the inconsequential character of the IRE "request" itself is highlighted when one views its application in the context of a reasonable hypothetical fact pattern:

HYPOTHETICAL: On June 18, 2001, claimant, a 34-year old male, employed by a Philadelphia-based contracting company, assigned to a large commercial construction project as a scaffolding laborer suffers severe injury that date following a 30 foot fall from a construction elevator. As a consequence of the work incident, he suffers multiple injuries including a skull

fracture that causes him to develop chronic neurological abnormalities prompting severe memory lapses and seizures. Despite a series of surgical procedures of the brain, the claimant thereafter continues to experience seizures resulting in lengthy periods of unconsciousness. On June 11, 2003 following his receipt of 103 weeks of disability benefits, claimant suffers from a particularly severe seizure that requires hospitalization and a 70-day coma. On August 21, 2003, the claimant regains consciousness and is eventually released by the hospital on September 1, 2003. Knowing that the claimant was unconscious as a result of his work-related injury during the 60-day period following the claimant's receipt of 104 weeks of disability benefits, and knowing that claimant continues to suffer from the evolving effects of his work-related injury[10], the employer does not "request" that he participate in an IRE.

Before proceeding further, the PDI believes that it is important to consider that the "request" contemplated by Section 123.102(e) of the Act 57 does not envision a non-specific, perfunctory exercise, but rather calls for substantial administrative action that includes the following: (a) the submission of a written request on a specific Bureau form entitled "Impairment Rating Evaluation Appointment"; (b) a specification as to the date, time, and location of the evaluation; and (c) the name of the physician scheduled to perform the evaluation.

Mindful of those requirements attendant to a "request" for IRE, the PDI respectfully urges that a practical application of that section of the regulation to the Hypothetical set forth above reveals the superfluous nature of the 60-day statute of repose presumed by the Commonwealth Court's ruling below, since any practical consideration for how IRE must be

[10] The Hypothetical could be modified in any number of ways. The claimant could have been forced to undergo surgery at the conclusion of the 103rd week for a work-related condition or non-work-related condition, or could have been involved in a severe automobile accident during that period of time, or could have been required to travel out of the country during the 60-day period. Or, the claimant's work injury had not evolved into a traumatic condition, but could have involved a slow healing period that rendered him ineligible for an assessment under the AMA Guides. There are endless examples detailing how a strident application of Section 306(a.2)(1) would render the IRE regime unworkable.

performed under the AMA Guides would quickly dispel any notion that the submission of an IRE "request" can or should be accomplished on a mechanical basis.

Obviously, it would not be practical or possible in Hypothetical set forth above to "request" the claimant to participate in an IRE on a particular date, at a particular time and with a particular doctor. Rather, the kind of perfunctory application of Section 306(a.2)(1) advanced by the Commonwealth Court below renders the "request" dispensable since it not only serves no practical purpose, but necessarily fails in any number of instances to afford the employer the financial relief Act 57 seeks to provide.

There is simply no logical basis for the Commonwealth Court's presumption that each and every work injury occurring in the Commonwealth of Pennsylvania will evolve over the course of 104 weeks to a level of recovery amenable to a permanent impairment assessment under the AMA Guides, nor is there any legislative indication that such a uniform approach was contemplated in 1996.

Again, such an interpretation of Section 306(a.2)(1) of the Act would seem to be the kind of "absurd" result that Section 1921(1) of the Statutory Construction Act proscribes. Boettger v. Loverro, supra.

Rather than offering any policy consideration supporting its application of Section 306(a.2)(1) of the Act, the Commonwealth Court has confined its analysis to the notion that the language of Section 306(a.2)(1) of the Act is necessarily "mandatory" and not simply "directive."

This, despite the fact that in any number of other contexts, both this Honorable Court and the Commonwealth Court have traditionally resisted the temptation to restrict the analysis to an oversimplified understanding of the meaning of an isolated word.

Indeed, it is well-settled in Pennsylvania that words such as "shall," that lay persons might immediately construe as contemplating a "mandatory" legislative injunction will in various instances be interpreted as a non-mandatory legislative "directive." McQuiston's Adoption, 238 Pa. 304, 86 A. 205 (1913); Deibert v. Rhodes, 291 Pa. 550, 140 A. 515 (1928); Baldwin Appeal, 153 Pa. Sup. 358, 33 A.2d 773 (1943); Pennsylvania Railroad Company v. Board of Revision of Taxes, 372 Pa. 468, 93 A.2d 679 (1953); Pritchard v. Willistown Township School District, 394 Pa. 489, 147 A.2d 380 (1959); Mullen v. Dubois Area School District, 436 Pa. 211, 259 A.2d 877 (1969); West Penn Power Company v. Pennsylvania Public Utility Commission, 104 Pa. Cmwlth. 21, 521 A.2d 751 (1987); Department of Transportation, Bureau of Driver Licensing v. Claypool, 152 Pa. Cmwlth. 332, 618 A.2d 1231 (1992); Philadelphia Gas Works/City of Philadelphia v. Commonwealth of Pennsylvania, 741 A.2d 841 (Pa. Cmwlth. 1999); Shanango Valley Regional Charter School v. Hermitage School District, 756 A.2d 1191 (Pa. Cmwlth. 2000); School District of Philadelphia v. Independent Charter School, 774 A.2d 798 (Pa. Cmwlth. 2001).

Indeed, whether a particular statutory provision will be construed as "mandatory" or as "directory" will not be viewed as dependent upon its form, but upon the intention of the legislature, as ascertained from an assessment of the nature and objective of the entire statute as well as the consequences that might result from construing it as either "mandatory" or simply "directory." See Deibert v. Rhodes, supra.; Pritchard v. Willistown Township School District, supra. *citing* McQuiston's Adoption, supra., Pleasant Hills Borough v. Carroll, 182 Pa. Super. 102, 125 A.2d 466 (1956); Baldwin Appeal, 153 Pa. Super. 358, 33 A.2d 773 (1943).

In McQuiston's Adoption, supra., this Honorable Court explained that "if…it appears that by construing the language of the act…as mandatory, the purpose of the act would be so seriously impaired as to amount to a defeat in purpose; while, on the other hand, if construing it as simply directory its efficiency is preserved, the latter construction is to prevail."

In this case, as noted, over the long regulatory course that followed the enactment of Act 57, no legislative indication was ever given by any interested party, that Section 306(a.2)(1) of the Act sought to create the kind of dichotomy necessarily flowing from the Commonwealth Court ruling below. Rather, it appears irrefutable that by construing the pertinent language of the Statute at issue as mandatory, the fundamental purpose of Act 57 to transform the Pennsylvania Workers' Compensation Act from a pure "wage loss" statute to a "mixed" statute combining elements of a wage loss provision with those of a permanent impairment provision would be so serious impaired as to constitute an elimination of the essential feature of the remedial law.

If, by construing the pertinent provision at issue as simply directory, the injured worker would suffer no compromise whatsoever and the integrity of the desired permanent impairment component of the new law would not only be preserved but would be promoted.

The PDI respectfully submits that when viewed in accordance with this Honorable Court's traditional approach to the often difficult process of distinguishing between a "mandatory" provision and a "directory" provision, there can be no question that when viewed on a macro basis, Section 306(a.2)(1) of the Act falls into the latter category.

IX. CONCLUSION

The Pennsylvania Defense Institute wishes to thank this Honorable Court for considering the views and concerns it has respectfully submitted in this important appellate proceeding. With the goal of advancing the fundamental policy underlying Act 57 of 1996, the Pennsylvania Defense Institute respectfully urges this Honorable Court reverse the Commonwealth Court ruling below, thereby affording all Pennsylvania employers and insurers with a full and fair opportunity to administer claims under Section 306(a.2) of the Act.

Respectfully submitted,

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Dated: July 28, 2004

CERTIFICATE OF SERVICE

I, Andrew E. Greenberg, Esquire, do hereby certify that an original and twenty-five (25) copies of the Brief for Amicus Curiae, Pennsylvania Defense Institute in Support of Appeal of Rite Aid Corporation, were served upon the Supreme Court of Pennsylvania at the address noted below, and that true and correct copies were served on the following on **July 28 2004**, via first-class U.S. Mail, postage pre-paid, at the following addresses:

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