

Commonwealth Court Defines a Timely Request for an IRE that Allows for a Modification of Disability Status by Notice Rather than Litigation

When an employer/carrier files a Request for Designation of a Physician to an Perform Impairment Rating Evaluation (IRE), LIBC-766, within the 60-day window following an employee's receipt of 104 weeks of Temporary Total Disability (TTD) benefits, the request is timely and would entitle the employer to an automatic change in disability status if the IRE determines a rating of less than 50 percent. It is not required that the employer also file an IRE appointment, LIBC-765, within the same 60-day window to preserve entitlement to an automatic change of disability status reducing the employee to a partial status.

Under the Pennsylvania Workers' Compensation Act (WCA), Section 306 (a.2) when an employer "requests" an IRE within a 60-day window after 104 weeks of temporary total disability benefits have been paid it gains a distinct procedural advantage of then being able to modify disability status from total to partial, if the impairment is less than 50 percent, by Notice rather than by litigating a Petition for Modification with all of the associated time and expense. In *The Village at Palmerton Assisted Living v. WCAB (Kilgallon)*, No. 334 C.D. 2014; Filed June 12, 2015, the Commonwealth Court finally answers the question of what constitutes a timely in-window "request" for an IRE.

In *Palmerton*, the employer filed a Request for Designation of a Physician to Perform IRE (Designation of IRE Physician), Form LIBC-766. However, this was filed prematurely before 104 weeks of temporary total disability benefits had been paid and would be considered ineffective under the *Dowhower* decision. The Bureau of Workers' Compensation designated a physician, to conduct the IRE. The injured worker's counsel advised that the employee would not submit to the IRE unless ordered to attend. The Bureau informally advised the employer that a second request for physician designation would be denied since the initial request was still pending until completion of the IRE.

The employer's counsel then submitted a letter to the Bureau after 104 weeks of TTD had been paid requesting a re-designation. The employer attached the initial request for physician designation, Form LIBC-766, and the Bureau's prior designation of a physician. The Bureau responded by letter that the initial designation of that doctor would be effective as of the employer's most recent request, thereby putting it within the 60-day window.

After obtaining an order compelling the evaluation, an impairment rating of 11 percent was rendered. The employer then filed a Notice of Change of Workers' Compensation Disability Status, Form LIBC-764, to partial. The injured worker filed reinstatement, review and penalty petitions and the employer filed modification and review petitions seeking IRE based change in disability status.

The Workers' Compensation Judge (WCJ) granted the injured worker's reinstatement petition but denied the remaining petitions filed by the employee, including the penalty petition. The WCJ also denied employer's petitions on the basis that the initial request was untimely and the second request for designation should have been submitted on the appropriate Bureau form, LIBC-766, and not by letter. The WCJ held that the IRE conducted did not permit a unilateral notification of change in disability status and modification could not otherwise be granted due to a lack of medical evidence necessary to do so by petition.

On appeal to the Board, the WCJ was affirmed but for different reasons. The Board determined that both a request for Designation of IRE Physician, Form LIBC – 766, and an IRE appointment, Form LIBC-765, must be filed within the 60-day window. In this instance the LIBC-765 was not issued until after the 60-day window had run and thus the employer was not entitled to an automatic change of disability status. The

WCJ did not err in denying the employer's modification/review petitions and granting the employee's reinstatement petition.

The Commonwealth Court treated the issue differently. It determined that the Board erred in requiring that the Request for Designation of IRE Physician, LIBC-766; the Bureau designation of the physician and the filing of an IRE appointment, LIBC-765, to all occur within the 60-day window in order to modify disability status by notice. The Court referred to language used in the Supreme Court cases of *Gardner* and *Dowhower* and concluded that the date the employer files a Request for Designation of an IRE physician, LIBC-766, determines whether the request is timely and within the 60-day window. The Court also held that the employer need not also file an IRE appointment form within the window to be timely.

In this particular case, the Court determined that the letter from the employer's counsel requesting a re-designation was a sufficient and timely "request" for physician designation.

The Court did not require that the employer submit a new request for designation on Bureau form LIBC-766 in this instance since the Bureau indicated it would be rejected while the original designation was still pending. Thus the Court concluded that the employer's letter, with attached initial request for designation, was timely as submitted, shortly after the 60-day window commenced. Therefore the employer was entitled to an automatic change in disability status by Notice without the need for litigation.

Comment: This case makes clear that a timely request for an IRE is made when an employer files a Request for Designation of an IRE physician, LIBC-766 in the 60-day window after 104 weeks of TTD benefits has been paid. When that is done the procedural advantage of modifying disability status by Notice, rather than through litigation, is preserved. It is not necessary that the IRE appointment notification, Form LIBC-765, also be filed within the 60-day window. Care must be taken to determine when the employee has received 104 weeks of TTD benefits and when the 60-day window begins so the request for Designation of IRE physician, Form LIBC-766, is timely filed. Periods during which the employee has been paid partial based on a wage loss do not count toward the 104 weeks of TTD.

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