

[J-161-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

PAUL DOWHWOWER,	:	No. 94 MAP 2006
	:	
Appellant	:	Application for Reconsideration of the
	:	Order of the Supreme Court filed April 19,
v.	:	2006, vacating and reversing the Order of
	:	the Commonwealth Court filed on May 13,
	:	2003 at 1667 C.D. 2002
	:	
WORKERS' COMPENSATION APPEAL	:	826 A.2d 28 (Pa. Cmwlth. 2003)
BOARD (CAPCO CONTRACTING),	:	
	:	ARGUED: December 6, 2006
Appellee	:	

DISSENTING OPINION

MR. JUSTICE EAKIN

DECIDED: April 17, 2007

I dissent because I believe Claimant waived his objection to the timeliness of the impairment rating examination (IRE) request by attending the IRE September 1, 1999.

The applicable statute states:

When an employe 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.

77 P.S. § 511.2(1) (emphasis added). Although § 511.2(1)'s language requires a claimant to submit to an IRE, the employer is being penalized because it did not request such examination within 60 days "upon the expiration" of the 104 weeks of total disability compensation. The statute is clearly intended to have an employer make the relevant request promptly, yet the employer here is being penalized for acting too promptly. The employer requested the IRE May 20, 1999, which was prior to the July

23 expiration of the 104-week period. Knowing this, Claimant nevertheless attended the IRE September 1, 1999, without objection to the exam, much less the timeliness of the request. Claimant filed a Petition to Review Compensation Benefits in response to employer's Notice of Change of Workers' Compensation Disability, and only then asserted employer requested the IRE too soon; by the time he objected, he had undergone the IRE, thus waiving any objection to the timeliness of the request.

What Claimant has waived is the ability to complain about the timeliness of the request -- having failed to do so until after the exam itself, he has waived any right to contest the early request. What purpose is there to pointing to the premature nature of the notice after the IRE is complete? If there is no objection to the exam itself, how can there be a litigable post-test objection to the premature request for it? To hold the IRE is void because of Claimant's tardy claim that it was requested too soon -- timely conducted, but requested too soon -- is affording Claimant a remedy for which he has no prejudice or damage. It is ironic that Claimant here is the tardy one; he complained too late about Employer giving too much notice, and somehow prevails.

The doctrine of waiver applies to workers' compensation proceedings, and the purpose of the doctrine is to ensure all relevant issues are preserved for the WCJ so there is orderly administration of the workers' compensation process for work-related injuries. See Wellington Foods v. WCAB, 863 A.2d 151, 155 (Pa. Cmwlth. 2004) (Cohn Jubelirer, J., dissenting) (citing Wheeler v. WCAB, 829 A.2d 730, 734 (Pa. Cmwlth. 2003)). Claimant could have refused to attend the IRE when the request was made prematurely; his objection could thus have been adjudicated when it was pertinent. Having failed to do so until after the exam itself, having suffered no prejudice by the early notice, Claimant waived any objection to the timeliness of such request, and I would not address the merits.