

<h1>Regulatory Analysis Form</h1> <p>(Completed by Promulgating Agency)</p> <p>(All Comments submitted on this regulation will appear on IRRC's website)</p>		<p><b>INDEPENDENT REGULATORY REVIEW COMMISSION</b></p> <p><b>RECEIVED</b></p> <p>APR 12 2023</p> <p>Independent Regulatory Review Commission IRRC Number: <b>3368</b></p>
<p>(1) Agency Department of Labor and Industry</p>		
<p>(2) Agency Number: 12 Identification Number: 117</p>		
<p>(3) PA Code Cite: 34 Pa. Code §§ 123.101 – 123.105</p>		
<p>(4) Short Title: Impairment Ratings</p>		
<p>(5) Agency Contacts (List Telephone Number and Email Address):                  Primary Contact: Marianne H. Saylor, Esq., Director, BWC – 717-886-9001 – <a href="mailto:masaylor@pa.gov">masaylor@pa.gov</a>                  Secondary Contact: Kimberly Mazin, Deputy Chief Counsel, OCC – 717-886-9169 – <a href="mailto:kmazin@pa.gov">kmazin@pa.gov</a></p>		
<p>(6) Type of Rulemaking (check applicable box):</p> <p><input checked="" type="checkbox"/> Proposed Regulation  <input type="checkbox"/> Final Regulation  <input type="checkbox"/> Final Omitted Regulation</p>		<p><input type="checkbox"/> Emergency Certification Regulation  <input type="checkbox"/> Certification by the Governor  <input type="checkbox"/> Certification by the Attorney General</p>
<p>(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)</p> <p>The Department of Labor and Industry (Department) is amending Subchapter B of Chapter 123 of 34 Pa. Code to replace a repealed provision on Impairment Rating Evaluations (IREs) and conform with Act 111 of 2018 (Act 111) and recent case law. Act 111 repealed section 306(a.2) of the Workers' Compensation Act (Act) and replaced it with section 306(a.3) to require that IRE determinations follow the 6<sup>th</sup> edition (second printing April 2009) 'Guides to the Evaluation of Permanent Impairment' created by the American Medical Association (AMA). The proposed regulation updates those requirements, reduces the threshold impairment rating from 50% to 35%, and clarifies the case law.</p>		
<p>(8) State the statutory authority for the regulation. Include <u>specific</u> statutory citation.</p> <p>The Department proposes these amendments under the authority contained in sections 401.1 and 435(a) of the Act (77 P.S. §§ 710 and 991(a)) and section 2205 of the Administrative Code of 1929 (71 P.S. § 565).</p>		
<p>(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are</p>		

there any relevant state or federal court decisions? If yes, cite the specific law, case, or regulation as well as, any deadlines for action.

This regulation is mandated by state law because the Department's existing regulations concerning impairment ratings are based on the repealed provision of section 306(a.2) of the Act (77 P.S. § 511.2) and are therefore inconsistent with the Act.

In 2016, the Pennsylvania Supreme Court determined that the then-existing provisions of the Act governing IREs were an unconstitutional delegation of legislative authority. *Protz v. WCAB (Derry Area School District)*, 161 A.3d 827 (Pa. 2016). In response, the General Assembly enacted Act 111 of 2018, which repealed section 306(a.2) of the Act and replaced it with section 306(a.3), altering the statutory scheme governing the IRE process. Section 306(a.3) has been found constitutional. *Pennsylvania AFL-CIO v. Commonwealth of Pennsylvania et al.*, 219 A.3d 306 (Pa. Cmwlth. 2019) *aff'd per curiam* (Aug. 18, 2020).

Act 111 changed the IRE process in two ways; it required IRE determinations to be made pursuant to the AMA 'Guides to the Evaluation of Permanent Impairment,' 6th edition (second printing April 2009) and it reduced the threshold impairment rating from 50% to 35%. 77 P.S. § 511.3(1), (2). The Department's existing regulations concerning impairment ratings are based on the now-repealed section 306(a.2) of the Act (77 P.S. § 511.2) and are therefore inconsistent with the Act.

The existing regulations do not specify the edition of the AMA Guides to the Evaluation of Permanent Impairment that must be used to conduct IREs. Additionally, the existing regulations provide that an impairment rating of less than 50% is required to adjust the employee's benefit status from total to partial. 34 Pa. Code § 123.105(d), (e) (relating to impairment rating determination). This is inconsistent with Act 111, which provides that an employee is totally disabled if the impairment rating is equal to or greater than 35%.

In *Gardner v. WCAB (Genesis Health Ventures)*, 888 A.2d 758, 759 (Pa. 2005), the Pennsylvania Supreme Court clarified issues concerning the timing of IREs to obtain an automatic reduction in benefits. The Court held that "once a claimant receives, that is, comes into possession, of 104 weeks of total disability benefits, the insurer has sixty days from that date during which it must request that the claimant submit to an IRE for the purposes of obtaining the automatic relief set forth in 77 P. S. § 511.2(2)." *Id.* at 767-68. However, the failure to request submission to an IRE during this sixty-day time limit does not preclude an insurer from requesting claimant submit to a later IRE, the results of which would not be self-executing, but rather subject to the "traditional administrative process." *Id.* at 768. The Court refers to the traditional administrative process in reference to the former subsection 306(a.2)(5) which, per the Court, "requires an adjudication or agreement under 77 P. S. § 512 before benefits may be modified..." *Id.* at 766; *see also Womack v. WCAB (School Dist. of Philadelphia)*, 83 A.3d 1139, 1146 (Pa. Cmwlth. 2014) (citing *Id.* at 768 (a utilization review matter which referenced the traditional administrative process as stated by *Gardner* as "an adjudication or agreement between the parties.")).

In *Lewis v. WCAB (Wal-Mart Stores, Inc.)*, 856 A.2d 313, 317-18 (Pa. Cmwlth. 2004), Commonwealth Court held that the insurer has "the right to two IREs within a twelve-month period." Furthermore, the employer is not authorized to unilaterally designate an IRE physician; rather, "agreement of the parties or Bureau designation are the sole and exclusive avenues for physician selection." *Id.* at 319.

Finally, in *Johnson v. WCAB (Sealy Components Group)*, 982 A.2d 1253, 1257, 1260 (Pa. Cmwlth.

2009), Commonwealth Court determined Claimant's appeal of the IRE determination (based on the lack of the doctor's qualifications) almost a year after she received a Notice of Change of Workers' Compensation Disability Status was prohibited because she "did not produce the determination mandated by Section 306(a.2)(4) of the Act showing that she met the threshold impairment rating..."

The proposed amendments adjust remaining regulatory sections to conform to Act 111. They also address the appellate court holdings outlined above and create a regulatory scheme consistent with the direction of the courts.

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

The proposed amendments are in the public's best interest because they provide consistency with Act 111 and recent case law, thereby preventing confusion between the regulations and corresponding statute or case law. These changes will also avoid incorrect IRE determinations, lengthy processes, unnecessary litigation resulting from outdated regulations which will prevent clogging of the dockets and result in cost savings to the courts and parties.

The proposed regulation is needed because Pennsylvania's current regulation on IREs is obsolete and is no longer relevant to provide accurate guidance to the physicians performing IREs, workers' compensation judges and staff, Workers' Compensation Appeal Board and staff, appellate courts and administrators, attorneys practicing workers' compensation, the Department's BWC Health Care Services division, and parties seeking and defending against IREs. The Department's existing regulations concerning impairment ratings are based on the repealed provision of section 306(a.2) of the Act (77 P.S. § 511.2) and are therefore inconsistent with the Act.

The persons who will benefit from the proposed amendments include 43 physicians performing IREs, 75 workers' compensation judges and 228 staff, 25 Workers' Compensation Appeal Board members and staff, all appellate courts and administrators, attorneys practicing workers' compensation, the Department's 16 BWC Health Care Services division staff, and parties seeking and defending against an estimated 250 IREs per year, among Pennsylvania's current 5,665,679 workers and 308,968 employers, including 1,135 self-insured employers, and 660 carriers. The parties in workers' compensation cases, rising from around 170,000 injuries reported every year, include employees, self-insured employers, employers, insurance companies issuing workers' compensation policies, and the Department's BWC representing special funds created under the Act.

The amendments will not result in increased costs to the public or private sectors. The proposed amendments are designed to conform the regulations to the Act, as amended, which would reduce confusion and unnecessary litigation caused by outdated regulations. Because the workers' compensation system is funded through assessments on workers' compensation insurance carriers and self-insured employers, any savings realized in the administration of the system may result in savings to the regulated community through lowered assessments. See section 446 of the Act; 77 P.S. § 1000.2 (creating the Workers' Compensation Administration Fund and providing for maintenance of the fund through an annual assessment).

(11) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

Workers' compensation is a state matter. Federal workers' compensation statutes only apply to narrowly defined populations of workers that are not covered by state workers' compensation statutes. Because workers' compensation is wholly a state matter, any federal standards are inapplicable to workers covered by the Act.

(12) How does this regulation compare with those of the other states? How will this affect Pennsylvania's ability to compete with other states?

In virtually all states, the physician is traditionally empowered to rate the severity of impairment in terms of a percentage loss to the "whole person" and according to criteria specific to each disability system. The AMA periodically publishes and updates a physician impairment rating guide (the AMA Guides), but states use varied versions of the AMA Guides. Pennsylvania's existing regulations do not specify the edition of the AMA 'Guides to the Evaluation of Permanent Impairment' that must be used to conduct IREs. Through these regulations, Pennsylvania will use the 6<sup>th</sup> edition (second printing April 2009), which incorporates the definitions and terminology of the International Classification of Functioning, Disability and Health, known more commonly as ICF, while providing a simple means of assessment of activities of daily living (ADLs) as part of the rating process. The 6th edition also has shifted the ratings criteria towards a diagnosis-based approach, ostensibly to improve inter-rater consistency and reliability, making states using it, like this commonwealth, more consistent in IREs, and their determinations more reliable, and less likely to lead to increase litigations and negative economic impacts.

Pennsylvania will be among 13 other states, including Illinois, Arizona, and Oklahoma, that have already upgraded their IREs by adopting the 6th edition that has more consistency between chapters, considers the paradigm shift on what constitutes disability, and uses a diagnosis-based impairments rating, with consideration of individual function, physical examination, and clinical studies. The 6th edition is used in more US states and Canadian provinces than any other version, and the AMA encourages other states lagging to update their physician guides on IREs with the updated, more consistent, and reliable 6<sup>th</sup> edition.

This rulemaking will make Pennsylvania more competitive than states still using the outdated, less reliable, less consistent, and less-scientifically sound older editions. This is because the 6th edition responds to concerns and flaws of previous editions and incorporates clearer definitions and terminology of the ICF. The 6<sup>th</sup> edition also provides states using it with simpler means of assessment of ADLs as part of the rating process, according to physicians and medical researchers like Rondinelli (2009)<sup>1</sup>, and AMA's Kremke and Thron (2012)<sup>2</sup>.

Idaho, Nebraska, Michigan, Missouri, North Carolina, Wisconsin, and Indiana will be less competitive because they do not have statutory IRE systems to compare with Pennsylvania's 'Guides to the

Evaluation of Permanent Impairment' 6th edition (second printing April 2009). Their lack of statutory IRE systems means that choosing an IRE system is left to physicians' discretion which could lead to increased litigation resulting from lack of standard and consensus on a recognized IRE system.

States like Oregon, New Jersey, Florida, and New York (until 2018 when it switched to the 5<sup>th</sup> edition of the AMA Guides) which created their own impairment rating systems that were heavily criticized by medical professionals, and employers for their complexity and resulting increase in litigation will also be less competitive than Pennsylvania.

Other states that use different, older versions of the AMA Guides will likewise be less competitive than Pennsylvania. The rest of the US states use different versions of the AMA 'Guides to the Evaluation of Permanent Impairment.'<sup>3</sup> Colorado and Minnesota still use the 3rd edition, first published in 1988, that rated disability on the sole basis of range of motion. Texas, Arkansas Alabama, West Virginia, Maryland, Delaware, Maine and Washington DC use the 4th edition which uses flawed diagnosis-related estimates that were criticized by medical researchers for their flawed science. California, Georgia, Nevada, Washington, Vermont, New Hampshire, Massachusetts, and Utah adopted the 5th edition which enhanced the criticized IRE calculations used in the 4th edition. Connecticut allows medical doctors to use either the 5th or 6th edition which creates inconsistencies that complicate case processing and lead to litigations over what edition between the two to use.<sup>4</sup>

(13) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

The regulation is amending § 123.102 on IRE requests to delete an obsolete reference to section 306(a.2) of the Act (77 P.S. § 511.2) because section 306(a.2) (relating to IREs) was repealed by Act 111 and replaced by section 306(a.3) of the Act, 77 P.S. § 511.3 (relating to IREs). Apart from updating the Department's existing regulations concerning impairment ratings that are inconsistent with Act 111, as based on the now-repealed section 306(a.2) of the Act (77 P.S. § 511.2), this regulation does not affect any other regulations of the promulgating agency or other state agencies.

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses, and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. ("Small business" is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

The Department engaged in a 30-day public and stakeholder outreach during the drafting process. On 12/18/2020, the Department sought comment from participants in the workers' compensation system by posting a notice of the changes to the regulations in the Dashboard Alert section of the Workers' Compensation Automation and Integration System (WCAIS). WCAIS is the enterprise tool used regularly by employers, workers' compensation insurers (or self-insurers) and legal practitioners to file and manage workers' compensation claims. The public comment period was open until 1/19/2021.

Four comments were received, which the Department has carefully reviewed. At least one comment dealt with a statutory provision that the Department does not have authority to alter. There was also a request to extend the comment period and a request for a copy of the regulation. An additional public

comment period will follow publication of the proposed rulemaking. The Department will review all comments submitted in response to this proposed rulemaking.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

Types and number of persons, businesses, small businesses, and organizations affected:

The amendments will not result in increased costs to persons, businesses, small businesses, and organizations in the public or private sectors. The proposed amendments are designed to conform the regulations to the Act, as amended, which would reduce confusion and unnecessary litigation caused by outdated regulations. The persons who will be otherwise affected by the proposed amendments include 43 physicians performing IREs, 75 workers' compensation judges and 228 staff, 25 Workers' Compensation Appeal Board members and staff, all appellate courts and administrators, attorneys practicing workers' compensation, the Department's 16 BWC Health Care Services division staff, and parties seeking and defending against an estimated 250 IREs per year, among Pennsylvania's current 5,665,679 workers and 308,968 employers, including 1,135 self-insured employers, and 660 carriers. The parties in workers' compensation cases, rising from around 170,000 injuries reported every year, include injured employees, self-insured employers, employers, insurance companies issuing workers' compensation policies, and the Department's BWC representing special funds created under the Act.

How they are affected:

Act 111 changed the IRE process in two ways; it required IRE determinations to be made pursuant to the AMA 'Guides to the Evaluation of Permanent Impairment,' 6<sup>th</sup> edition (second printing April 2009) and it reduced the threshold impairment rating from 50% to 35%. 77 P.S. § 511.3(1), (2). The proposed regulation replaces the Department's existing regulations concerning impairment ratings that are based on the now-repealed section 306(a.2) of the Act (77 P.S. § 511.2) and that are therefore inconsistent with the Act.

The updates to the following sections affect persons, businesses and organizations as follows:

**§ 123.101. Purpose**

This section is amended to delete an obsolete reference to section 306(a.2) of the act (77 P.S. § 511.2). Section 306(a.2) (relating to IREs) was repealed by Act 111, and replaced by section 306(a.3) of the act, 77 P.S. § 511.3 (relating to IREs).

**§ 123.102. IRE requests**

Subsection (a) is amended to require the adjustment of an employee's benefits status be automatic and relate back to the expiration of the employee's receipt of 104 weeks of total disability benefits if the evaluation is scheduled to occur during the 60-day period subsequent to the expiration of the employee's receipt of 104 weeks of total disability benefits. This subsection is further amended to indicate that if the evaluation is requested and occurs beyond the 60-day period after the expiration of the employee's receipt of 104 weeks of total disability benefits, then the adjustment of disability status must be achieved

through litigation and, if successful, shall be effective as of the date of the evaluation or as determined by the evaluating physician.

The amendments to subsection (c) confirm the adjustment of disability status shall be automatic and relate back to the expiration of the employee's receipt of 104 weeks of total disability benefits if the insurer requests the IRE during the 60-day period subsequent to the expiration of the employee's receipt of 104 weeks of total disability benefits and the employee fails, for any reason, to attend the IRE, resulting in the performance of the IRE more than 60 days beyond the expiration of the 104 week period.

Lastly, subsection (f) is amended to refer to the correct section of the act based on Act 111 and to again clarify that where an IRE is performed outside the 60-day window after the receipt of 104 weeks of total disability benefits because of the insurer's failure to timely request it must be subject to a modification or other appropriate petition before benefits can be reduced.

#### § 123.103. Physicians

The amendments to subsection (d), paragraphs (1) and (2), require physicians designated by the Department to perform IREs to attend a Departmentally approved training course on the performance of evaluations under the AMA "Guides to the Evaluation of Permanent Impairment," 6<sup>th</sup> edition (second printing April 2009) and provide certification upon passage of a Departmentally approved examination on the performance of evaluations under the AMA "Guides to the Evaluation of Permanent Impairment," 6<sup>th</sup> edition (second printing April 2009), to be consistent with the requirements of Act 111 that impairment rating be determined under the AMA Guides 6<sup>th</sup> edition (second printing April 2009).

#### § 123.104. Initial IRE; designation of physician by department

The title of this section is amended to correctly identify that it deals with the designation of physicians by the Department, not limited to the initial IRE.

This section is amended to delete the first sentence of subsection (b), which incorrectly indicates the Department's duty to designate an IRE physician pertains only to the initial IRE request.

#### § 123.105. Impairment rating determination

Subsection (a) is amended to conform with Act 111 and require that IREs be performed using the 6<sup>th</sup> edition (second printing April 2009) of the AMA "Guides to the Evaluation of Permanent Impairment."

Subsection (c) requires that the Face Sheet be attached to a Report of Medical Evaluation as specified in the AMA "Guides to the Evaluation of Permanent Impairment," 6<sup>th</sup> edition (second printing April 2009).

Subsection (d), including paragraph (1), is amended to reflect the change in the threshold impairment rating required to adjust the employee's benefits status from total to partial from less than 50% to less than 35%. It also reflects the applicability of this section to those evaluations conducted during the 60-day period subsequent to the expiration of the 104-week period, to reflect the changes in case law described above. See also subsection (e) below.

Subsection (d.1) is added to address the timing of IREs and, if appropriate, whether the results of the

IRE are automatic thereby requiring use of Form LIBC-764, "Notice of Change in Workers' Compensation Disability Status" (Form LIBC-764) or can only be achieved through litigation. Specifically, this subsection is amended to clarify that Form LIBC-764 shall be used when the IRE is requested and performed during the 60-day period after the expiration of the employee's receipt of 104 weeks of total disability benefits and results in an impairment rating of less than 35%. This subsection is also amended to require the adjustment of the disability status be achieved through the traditional administrative process, not by completing Form LIBC-764 if the evaluation is requested and occurs beyond the 60-day period subsequent to the expiration of the employee's receipt of 104 weeks of total disability benefits and results in an impairment rating of less than 35%.

Subsection (e) is amended to reflect the change the threshold impairment rating required to adjust the employee's benefits status from total to partial from less than 50% to less than 35%.

Lastly, subsection (f) provides that the employee may appeal the adjustment of benefit status to a workers' compensation judge at any time during the employee's receipt of 500 weeks of partial benefits provided there is a determination that the employee meets the threshold rating that is equal to or greater than 35% impairment under the 6<sup>th</sup> edition (second printing April 2009) of the AMA "Guides to the Evaluation of Permanent Impairment."

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

The main two groups that are required to take action to comply with this regulation are physicians performing IREs and the workers' compensation judges or appellate bodies deciding these petitions. There are currently 43 physicians performing IREs, 75 workers' compensation judges and 228 staff, 25 Workers' Compensation Appeal Board members and staff, all appellate courts and administrators, attorneys practicing workers' compensation, the Department's 16 BWC Health Care Services division staff. Other groups affected are parties seeking and defending against an estimated 250 IREs per year, among Pennsylvania's current 5,665,679 workers and 308,968 employers, including 1,135 self-insured employers, and 660 carriers. The parties in workers' compensation cases, rising from around 170,000 injuries reported every year, include employees, self-insured employers, employers, insurance companies issuing workers' compensation policies, and the Department's BWC representing special funds created under the act.

Act 111 changed the IRE process in two ways; it required physicians to make IRE determinations pursuant to the AMA "Guides to the Evaluation of Permanent Impairment," 6<sup>th</sup> edition (second printing April 2009). It also reduced the threshold impairment rating from 50% to 35%. 77 P.S. § 511.3(1), (2). The Department's existing regulations concerning impairment ratings are based on the now-repealed section 306(a.2) of the Act (77 P.S. § 511.2) and are therefore inconsistent with the Act.

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

The amendments will not result in increased costs to the public or private sectors. The proposed amendments are designed to conform the regulations to the Act, as amended, which would reduce confusion and unnecessary litigation caused by outdated regulations. Because the workers' compensation system is funded through assessments on workers' compensation insurance carriers and



self-insured employers, any savings realized in the administration of the system may result in savings to the regulated community through lowered assessments. See section 446 of the Act; 77 P.S. § 1000.2 (creating the Workers' Compensation Administration Fund and providing for maintenance of the fund through an annual assessment).

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

The amendments will not result in increased costs to the public or private sectors, as the regulation is merely amended to conform to Act 111.

Act 111 requires that all IREs be performed pursuant to the 6<sup>th</sup> edition (second printing April 2009) of the AMA Guides to correct what the Pennsylvania Supreme Court found to be an unconstitutional delegation of legislative authority in its 2016 decision of *Protz v. WCAB (Derry Area School District)*. Act 111 also reduces the threshold for presumption of total disability from 50% to 35%. An employer remains entitled to an IRE following an employee's receipt of 104 weeks of total disability benefits. If such evaluation is scheduled to occur during the 60-day period subsequent to the expiration of employee's receipt of the 104 weeks of total disability benefits, a finding of less than 35% impairment shall work to automatically modify the employee's status to partial disability.

(19) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

The amendments will not result in increased costs to the public or private sectors. The proposed amendments are designed to conform the regulations to the Act, as amended, which would reduce confusion and unnecessary litigation caused by outdated regulations. Because the workers' compensation system is funded through assessments on workers' compensation insurance carriers and self-insured employers, any savings realized in the administration of the system may result in savings to the regulated community through lowered assessments. See section 446 of the Act; 77 P.S. § 1000.2 (creating the Workers' Compensation Administration Fund and providing for maintenance of the fund through an annual assessment).

(20) Provide a specific estimate of the costs and/or savings to the **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

The amendments will not result in increased costs to the public or private sectors. The proposed amendments are designed to conform the regulations to the Act, as amended, which would reduce confusion and unnecessary litigation caused by outdated regulations. Because the workers' compensation system is funded through assessments on workers' compensation insurance carriers and self-insured employers, any savings realized in the administration of the system may result in savings to the regulated community through lowered assessments. See section 446 of the Act ; 77 P.S. § 1000.2 (creating the Workers' Compensation Administration Fund and providing for maintenance of the fund

through an annual assessment).

(21) Provide a specific estimate of the costs and/or savings to the **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

The amendments will not result in increased costs to the public or private sectors. The proposed amendments are designed to conform the regulations to the Act, as amended, which would reduce confusion and unnecessary litigation caused by outdated regulations. Because the workers' compensation system is funded through assessments on workers' compensation insurance carriers and self-insured employers, any savings realized in the administration of the system may result in savings to the regulated community through lowered assessments. See section 446 of the Act; 77 P.S. § 1000.2 (creating the Workers' Compensation Administration Fund and providing for maintenance of the fund through an annual assessment).

(22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping, or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

The amendments will not result in increased costs to the public or private sectors. The proposed amendments are designed to conform the regulations to the Act, as amended, which would reduce confusion and unnecessary litigation caused by outdated regulations. Because the workers' compensation system is funded through assessments on workers' compensation insurance carriers and self-insured employers, any savings realized in the administration of the system may result in savings to the regulated community through lowered assessments. See section 446 of the Act; 77 P.S. § 1000.2 (creating the Workers' Compensation Administration Fund and providing for maintenance of the fund through an annual assessment).

(22a) Are forms required for implementation of the regulation?

Subsection (a) is amended to conform with Act 111 and require that IREs be performed using the 6<sup>th</sup> edition (second printing April 2009) of the AMA "Guides to the Evaluation of Permanent Impairment." Subsection (d.1) is added to address the timing of IREs and, if appropriate, whether the results of the IRE are automatic thereby requiring use of Form LIBC-764, "Notice of Change in Workers' Compensation Disability Status" (Form LIBC-764) or can only be achieved through litigation. Specifically, this subsection is amended to clarify that Form LIBC-764 shall be used when the IRE is requested and performed during the 60-day period subsequent to the expiration of the employee's receipt of 104 weeks of total disability benefits and results in an impairment rating of less than 35%. This subsection is also amended to require the adjustment of the disability status be achieved through the traditional administrative process, not by completing Form LIBC-764 if the evaluation is requested and occurs beyond the 60-day period subsequent to the expiration of the employee's receipt of 104 weeks of total disability benefits and results in an impairment rating of less than 35%.

The existing forms used by the parties and the BWC have already been modified to be consistent with

Act 111. The proposed amendments do not require any further modification to the existing forms, and thus do not impose any additional reporting, recording or paperwork requirements on either the Commonwealth or the regulated community.

(22b) If forms are required for implementation of the regulation, **attach copies of the forms here**. If your agency uses electronic forms, provide links to each form or a detailed description of the information required to be reported. **Failure to attach forms, provide links, or provide a detailed description of the information to be reported will constitute a faulty delivery of the regulation.**

The existing forms used by the parties and the BWC have already been modified to be consistent with Act 111. The proposed amendments do not require any further modification to the existing forms, and thus do not impose any additional reporting, recording or paperwork requirements on either the Commonwealth or the regulated community. Below is a list of the existing forms used by the parties and the BWC have already been modified to be consistent with Act 111, and their respective purposes:

**Form LIBC-764** - "Notice of Change of Workers' Compensation Disability Status" – must be completed when the IRE is requested and performed during the 60-day period subsequent to the expiration of the employee's receipt of 104 weeks of total disability and results in an impairment rating of less than 35%. Below is a link to the online form:

<https://www.dli.pa.gov/Businesses/Compensation/WC/claims/wcais/Documents/wcais%20forms/LIBC-764%20print.pdf>

**Form LIBC-765** - "Impairment Rating Evaluation Appointment" – The insurer shall request the employee's attendance at the IRE in writing by completing this form and specify therein 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 employee and employee's counsel, if known.

<https://www.dli.pa.gov/Businesses/Compensation/WC/claims/wcais/Documents/wcais%20forms/LIBC-765.pdf>

**Form LIBC-766** - "Request for Designation of a Physician to Perform an Impairment Rating Evaluation." – must be completed by the insurer.

<https://www.dli.pa.gov/Businesses/Compensation/WC/claims/wcais/Documents/wcais%20forms/LIBC-766.pdf>

**Form LIBC-767**, "Impairment Rating Determination Face Sheet" (Face Sheet) - which sets forth the impairment rating of the compensable injury, must be filed by the physician performing the IRE. The physician shall attach to the Face Sheet the "Report of Medical Evaluation" as specified in the AMA "Guides to the Evaluation of Permanent Impairment." This regulation requires the use of the 6th edition (second printing April 2009).

<https://www.dli.pa.gov/Businesses/Compensation/WC/claims/wcais/Documents/wcais%20forms/LIBC-767%20int.pdf>

(23) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

The amendments will not result in increased costs to the public or private sectors. The proposed amendments are designed to conform the regulations to the Act, as amended, which would reduce confusion and unnecessary litigation caused by outdated regulations. Because the workers' compensation system is funded through assessments on workers' compensation insurance carriers and self-insured employers, any savings realized in the administration of the system may result in savings to the regulated community through lowered assessments. See section 446 of the Act; 77 P.S. § 1000.2 (creating the Workers' Compensation Administration Fund and providing for maintenance of the fund through an annual assessment).

As shown in the table below, the Department does not anticipate any costs or revenue losses by the regulated community or by state and local government.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
<b>SAVINGS:</b>	\$0	\$0	\$0	\$0	\$0	\$0
Regulated Community	\$0	\$0	\$0	\$0	\$0	\$0
Local Government	\$0	\$0	\$0	\$0	\$0	\$0
State Government	\$0	\$0	\$0	\$0	\$0	\$0
Total Savings	\$0	\$0	\$0	\$0	\$0	\$0
<b>COSTS:</b>	\$0	\$0	\$0	\$0	\$0	\$0
Regulated Community	\$0	\$0	\$0	\$0	\$0	\$0
Local Government	\$0	\$0	\$0	\$0	\$0	\$0
State Government	\$0	\$0	\$0	\$0	\$0	\$0
Total Costs	\$0	\$0	\$0	\$0	\$0	\$0
<b>REVENUE LOSSES:</b>	\$0	\$0	\$0	\$0	\$0	\$0
Regulated Community	\$0	\$0	\$0	\$0	\$0	\$0
Local Government	\$0	\$0	\$0	\$0	\$0	\$0
State Government	\$0	\$0	\$0	\$0	\$0	\$0
Total Revenue Losses	\$0	\$0	\$0	\$0	\$0	\$0

(23a) Provide the past three-year expenditure history for programs affected by the regulation.

The only program affected by these amendments is the Workers' Compensation program. Below is the three-year budget history for the operation of entire Workers' Compensation Administration Fund.

Program	FY 18/19 -3	FY 19/20 -2	FY 20/21 -1	Current FY
Budget for WCAF	\$71,215,000	\$70,364,000	\$75,802,000	\$75,802,000


(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

- (a) An identification and estimate of the number of small businesses subject to the regulation.
- (b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.
- (c) A statement of probable effect on impacted small businesses.
- (d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

According to the Center for Workforce Innovation and Analysis, Pennsylvania is home to approximately 282,911 private employers. According to the U.S. Small Business Administration (SBA), 99.9% of businesses in the country are small businesses.

<https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf>. As defined in Section 3 of the Regulatory Review Act, Act 76 of 2012, virtually every Commonwealth business qualifies as a small business. [https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards Effective%20Aug%202019%2C%202019 Rev.pdf](https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards%20Effective%20Aug%202019%2C%202019%20Rev.pdf)

Based on the above definitions, the amendments will not result in increased costs to the public or any of the 282,911 private sector employers or have any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012). The proposed amendments are designed to conform the regulations to the Act, as amended, which would reduce confusion and unnecessary litigation caused by outdated regulations. Because the workers' compensation system is funded through assessments on workers' compensation insurance carriers and self-insured employers, any savings realized in the administration of the system may result in savings to the regulated community through lowered assessments. See section 446 of the Act; 77 P.S. § 1000.2 (creating the Workers' Compensation Administration Fund and providing for maintenance of the fund through an annual assessment).

(25) List any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, the elderly, small businesses, and farmers.

There are no special provisions which have been developed to meet the needs of affected groups or persons because the amendments will not result in increased costs to the public or private sectors, or to any minorities, the elderly, small businesses, or farmers. And the proposed amendments are designed to

conform the regulations to the Act, as amended, which would reduce confusion and unnecessary litigation caused by outdated regulations.

The persons affected by the proposed amendments include the 43 physicians performing IREs, 75 workers' compensation judges and 228 staff, 25 Workers' Compensation Appeal Board members and staff, all appellate courts and administrators, attorneys practicing workers' compensation, and the Department's 16 BWC Health Care Services division staff. Other groups affected are parties seeking and defending against an estimated 250 IREs per year, among Pennsylvania's current 5,665,679 workers and 308,968 employers, including 1,135 self-insured employers, and 660 carriers. The parties in workers' compensation cases, rising from around 170,000 injuries reported every year, include employees, self-insured employers, employers, insurance companies issuing workers' compensation policies, and the Department's BWC representing special funds created under the Act.

(26) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

There are no alternative regulatory provisions which have been considered and rejected. The proposed amendments are designed to conform the regulations to the Act, as amended, and recent case law which would reduce confusion and unnecessary litigation caused by outdated regulations.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

- a) The establishment of less stringent compliance or reporting requirements for small businesses;
  - b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
  - c) The consolidation or simplification of compliance or reporting requirements for small businesses;
  - d) The establishment of performance standards for small businesses to replace design or operational standards required in the regulation; and
  - e) The exemption of small businesses from all or any part of the requirements contained in the regulation.
- a) The Department did not consider flexible regulatory methods that will minimize any adverse impact on small businesses because the amendments seek consistency with Act 111 and recent case law, thereby preventing confusion between the regulations and corresponding statute or case law. They adjust remaining regulatory sections to conform to Act 111. They also address the appellate court holdings outlined above and create a regulatory scheme consistent with the direction of the courts. The amendments will not result in increased costs or more stringent compliance to the public or private sectors and will not result in any adverse impact on small businesses.

(28) If data are the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was

considered but not used, please explain why that data was determined not to be acceptable.

Act 111 and recent case law, not data, are the bases for this regulation. Act 111 changed the IRE process in two ways; it required IRE determinations to be made pursuant to the AMA 'Guides to the Evaluation of Permanent Impairment,' 6<sup>th</sup> edition (second printing April 2009) and it reduced the threshold impairment rating from 50% to 35%. 77 P.S. § 511.3(1), (2). The Department's existing regulations concerning impairment ratings are based on the now-repealed section 306(a.2) of the Act (77 P.S. § 511.2) and are therefore inconsistent with the Act.

The proposed amendments only seek consistency with the new requirements of Act 111 and recent case law to prevent confusion between the regulations and corresponding statute or case law. No additional data collection or analysis was deemed necessary to delete an obsolete reference to section 306(a.2) of the Act (77 P.S. § 511.2) and make this regulation compliant and consistent with Act 111 and recent case law.

(29) Include a schedule for review of the regulation including:

- A. The length of the public comment period: 30 days
- B. The date or dates on which any public meetings or hearings will be held: N/A
- C. The expected date of delivery of the final-form regulation: March 2023
- D. The expected effective date of the final-form regulation: Upon notice or publication in the *Pennsylvania Bulletin*
- E. The expected date by which compliance with the final-form regulation will be required: Upon notice or publication in the *Pennsylvania Bulletin*
- F. The expected date by which required permits, licenses or other approvals must be obtained: N/A

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

The Department will closely review IRE complaints it receives concerning IRE determinations made pursuant to the AMA 'Guides to the Evaluation of Permanent Impairment,' 6<sup>th</sup> edition (second printing April 2009) and concerning the reduction of the threshold impairment rating from 50% to 35%. Also, the Department will conduct outreach and educational sessions after publication of the final rulemaking in the Pennsylvania Bulletin. During this outreach and educational sessions, the Department will solicit comments on the regulation and keep track of common themes or issues.

**<sup>1</sup> Source:** [Changes for the new AMA Guides to impairment ratings, Sixth Edition: implications and applications for physician disability evaluations - PubMed \(nih.gov\)](#)

**<sup>2</sup> Source:** [Microsoft PowerPoint - MK AMA Guides SD.pptx \[Read-Only\]](#)

**<sup>3</sup> Source:** [Comparative Analysis of Impairment Ratings From the 5th to 6... : Journal of Occupational and Environmental Medicine \(lww.com\)](#)

**<sup>4</sup> Source:** [Comparative Analysis of Impairment Ratings From the 5th to 6... : Journal of Occupational and Environmental Medicine \(lww.com\)](#)



CDL-1

**FACE SHEET  
FOR FILING DOCUMENTS  
WITH THE LEGISLATIVE REFERENCE BUREAU**

**(Pursuant to Commonwealth Documents Law)**

**RECEIVED**

APR 12 2023

**Independent Regulatory  
Review Commission**

DO NOT WRITE IN THIS SPACE

<p>Copy below is hereby approved as to form and legality. Attorney General</p> <p>BY: <u>Amy M. Elliott</u> (DEPUTY ATTORNEY GENERAL)</p> <p><small>Duplicate signed by Amy M. Elliott Dir. case Amy M. Elliott, onPer cyhema Office of Attorney General, oneCh of Deputy Attorney General, small-cyhmamdtm-rygeneralgov.c11US Date: 2022 / 04 15 08:54 - 04:00</small></p> <p><u>11/4/2022</u> DATE OF APPROVAL</p> <p><input type="checkbox"/> Check if applicable Copy not approved. Objections attached.</p>	<p>Copy below is here by certified to be a true and correct copy of a document issued, prescribed or promulgated by:</p> <p><u>Department of Labor and Industry</u> (AGENCY)</p> <p>DOCUMENT/FISCAL NOTE NO. <u>12-117</u></p> <p>DATE OF ADOPTION:</p> <p><u>Jennifer L. Berrier</u></p> <p>BY: <u>Jennifer Berrier</u></p> <p>TITLE: <u>Secretary</u> (EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)</p>	<p>Copy below is hereby approved as to form and legality. Executive or Independent Agencies.</p> <p>BY: <u>[Signature]</u></p> <p><u>September 7, 2022</u> DATE OF APPROVAL</p> <p><u>Deputy General Counsel</u> (Other Counsel, Independent Agency) (Strike inapplicable title)</p> <p><input type="checkbox"/> Check if applicable. No Attorney General approval or objection within 30 days after submission.</p>
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**PROPOSED RULEMAKING**

**TITLE 34. LABOR AND INDUSTRY**

**PART VIII BUREAU OF WORKERS' COMPENSATION**

**CHAPTER 123. GENERAL PROVISIONS – PART II**

**SUBCHAPTER B. IMPAIRMENT RATINGS**

## PROPOSED RULEMAKING

Title 34. Labor and Industry  
Part VIII. Bureau of Workers' Compensation  
Chapter 123. General Provisions - Part II  
Subchapter B. Impairment Ratings

The Department of Labor and Industry (Department), Bureau of Workers' Compensation (BWC) proposes to amend Subchapter B (relating to Impairment Ratings) of Chapter 123 (relating to General Provisions – Part II) in conformance with the Act of October 24, 2018, P.L. 714, No. 111 (Act 111) and recent case law.

### *Statutory Authority*

The Department proposes these amendments under the authority contained in sections 401.1 and 435(a) of the Workers' Compensation Act (Act) (77 P.S. §§ 710 and 991(a)) and section 2205 of the Administrative Code of 1929 (71 P.S. § 565).

### *Background*

In 2016, the Pennsylvania Supreme Court determined that the then-existing provisions of the Act governing Impairment Rating Evaluations (IREs) was an unconstitutional delegation of legislative authority. *Protz v. Workers' Compensation Appeal Bd. (Derry Area School District)*, 161 A.3d 827 (Pa. 2016). In response, the General Assembly enacted Act 111 of 2018, which repealed section 306(a.2) of the Act and replaced it with section 306(a.3), altering the statutory scheme governing the IRE process. Section 306(a.3) has been found constitutional. *Pennsylvania AFL-CIO v. Commonwealth of Pennsylvania et al.*, 219 A.3d 306 (Pa. Cmwlth. 2019) *aff'd per curiam* (Aug. 18, 2020).

Act 111 changed the IRE process in two ways; it required IRE determinations to be made pursuant to the American Medical Association (AMA) 'Guides to the Evaluation of Permanent Impairment,' 6<sup>th</sup> edition (second printing April 2009) and it reduced the threshold impairment rating from 50 percent to 35 percent. 77 P.S. § 511.3(1), (2). The Department's existing regulations concerning impairment ratings are based on the now-repealed section 306(a.2) of the Act (77 P.S. § 511.2) and are therefore inconsistent with the Act.

The existing regulations do not specify the edition of the AMA Guides to the Evaluation of Permanent Impairment that must be used to conduct IREs. Additionally, the existing regulations provide that impairment rating of less than 50% is required to adjust the employee's benefit status from total to partial. 34 Pa. Code § 123.105(d), (e) (relating to impairment rating determination). This is inconsistent with Act 111, which provides that an employee is totally disabled if the impairment rating is equal to or greater than 35%.

In addition to the changes made in Act 111, the IRE process has been the subject of a number of appellate court holdings. Cases decided since the regulations were enacted have addressed the timing of IREs and whether the relief, if appropriate, is automatic; whether an employer may designate the IRE physician for the second IRE; and the employee's basis for appeal of the adjustment of benefit status during employee's receipt of 500 weeks of partial disability benefits. Specifically, in *Gardner v. WCAB (Genesis Health Ventures)*, 888 A.2d 758, 759 (Pa. 2005), the Pennsylvania Supreme Court clarified issues concerning the timing of IREs to obtain an automatic reduction in benefits. The Court held that "once a claimant receives, that is, comes into possession, of 104 weeks of total disability benefits, the insurer has sixty days from that date during which it must request that the claimant submit to an IRE for the purposes of obtaining the automatic relief set forth in 77 P. S. § 511.2(2)." *Id.* at 767-68. However, the failure to request submission to an IRE during this sixty-day time limit does not preclude an insurer from requesting claimant submit to a later IRE, the results of which would not be self-executing, but rather subject to the "traditional administrative process." *Id.* at 768. The Court refers to the traditional administrative process in reference to the former subsection 306(a.2)(5) which, per the Court, "requires an adjudication or agreement under 77 P. S. § 512 before benefits may be modified..." *Id.* at 766; *see also Womack v. WCAB (School Dist. of Philadelphia)*, 83 A.3d 1139, 1146 (Pa. Cmwlth. 2014) (citing *Id.* at 768 (a utilization review matter which referenced the traditional administrative process as stated by *Gardner* as "an adjudication or agreement between the parties.")). In *Lewis v. WCAB (Wal-Mart Stores, Inc.)*, 856 A.2d 313, 317-18 (Pa. Cmwlth. 2004), Commonwealth Court held that the insurer has "the right to two IREs within a twelve-month period." Furthermore, the employer is not authorized to unilaterally designate an IRE physician; rather, "agreement of the parties or Bureau designation are the sole and exclusive avenues for physician selection." *Id.* at 319. Finally, in *Johnson v. WCAB (Sealy Components Group)*, 982 A.2d 1253, 1257, 1260 (Pa. Cmwlth. 2009), Commonwealth Court determined Claimant's appeal of the IRE determination (based on the lack of the doctor's qualifications) almost a year after she received a Notice of Change of Workers' Compensation Disability Status was prohibited because she "did not produce the determination mandated by Section 306(a.2)(4) of the Act showing that she met the threshold impairment rating..."

The proposed amendments adjust remaining regulatory sections to conform to Act 111. They also address the appellate court holdings outlined above and create a regulatory scheme consistent with the direction of the courts.

#### *Compliance with Executive Order 1996-1*

The Department engaged in public and stakeholder outreach during the drafting process. The Department sought comment from all participants in the workers' compensation system through its Workers' Compensation Automation and Integration System (WCAIS). WCAIS is the enterprise tool used regularly by every workers' compensation employer, insurer (or self-insurer) and legal practitioner to file and manage workers' compensation claims.

Four comments were received, which the Department has carefully reviewed. At least one comment dealt with a statutory provision that the Department does not have authority to alter. There was also a request to extend the comment period and a request for a copy of the regulation. An additional public comment period will follow publication of the proposed rulemaking. The Department will review all comments submitted in response to this proposed rulemaking.

### *Purpose*

The proposed amendments seek consistency with Act 111 and recent case law, thereby preventing confusion between the regulations and corresponding statute or case law. These changes will avoid unnecessary litigation resulting from outdated regulations which will prevent clogging of the dockets and result in cost savings to the courts and parties.

### *Affected Persons*

The persons affected by the proposed amendments include the physicians performing IREs, workers' compensation judges and staff, Workers' Compensation Appeal Board and staff, appellate courts and administrators, attorneys practicing workers' compensation, the Department's BWC Health Care Services division, and parties seeking and defending against IREs. The parties in workers' compensation cases include injured employees, self-insured employers, employers, insurance companies issuing workers' compensation policies, and the Department's BWC representing special funds created under the Act.

### *Fiscal Impact*

The amendments will not result in increased costs to the public or private sectors. The proposed amendments are designed to conform the regulations to the Act, as amended, which would reduce confusion and unnecessary litigation caused by outdated regulations. Because the workers' compensation system is funded through assessments on workers' compensation insurance carriers and self-insured employers, any savings realized in the administration of the system may result in savings to the regulated community through lowered assessments. See Section 446 of the Workers' Compensation Act; 77 P.S. § 1000.2 (creating the Workers' Compensation Administration Fund and providing for maintenance of the fund through an annual assessment).

### *Summary of Proposed Rulemaking*

#### **§ 123.101. Purpose**

This section is amended to delete an obsolete reference to section 306(a.2) of the Act (77 P.S. § 511.2). Section 306(a.2) (relating to IREs) was repealed by Act 111 and replaced by section 306(a.3) of the Act, 77 P.S. § 511.3 (relating to IREs).

#### **§ 123.102. IRE requests**

Subsection (a) is amended to require the adjustment of an employe's benefits status be automatic and relate back to the expiration of the employe's receipt of 104 weeks of total disability benefits, if the evaluation is scheduled to occur during the 60 day period subsequent to the expiration of the employe's receipt of 104 weeks of total disability benefits. This subsection is further amended to indicate that if the evaluation is requested and occurs beyond the 60 day period

subsequent to the expiration of the employee's receipt of 104 weeks of total disability benefits, then the adjustment of disability status must be achieved through litigation and, if successful, shall be effective as of the date of the evaluation or as determined by the evaluating physician.

The amendments to subsection (c) confirm the adjustment of disability status shall be automatic and relate back to the expiration of the employee's receipt of 104 weeks of total disability benefits if the insurer requests the IRE during the 60 day period subsequent to the expiration of the employee's receipt of 104 weeks of total disability benefits and the employee fails, for any reason, to attend the IRE, resulting in the performance of the IRE more than 60 days beyond the expiration of the 104 week period.

Lastly, subsection (f) is amended to refer to the correct section of the Act based on Act 111 and to again clarify that where an IRE is performed outside the 60-day window after the receipt of 104 weeks of total disability benefits because of the insurer's failure to timely request it must be subject to a modification or other appropriate petition before benefits can be reduced.

### **§ 123.103. Physicians**

The amendments to subsection (d), paragraphs (1) and (2), require physicians designated by the Department to perform IREs to attend a Departmentally approved training course on the performance of evaluations under the AMA "Guides to the Evaluation of Permanent Impairment," 6th edition (second printing April 2009) and provide certification upon passage of a Departmentally approved examination on the performance of evaluations under the AMA "Guides to the Evaluation of Permanent Impairment," 6th edition (second printing April 2009), to be consistent with the requirements of Act 111 that impairment rating be determined under the AMA Guides 6<sup>th</sup> edition (second printing, April 2009).

### **§ 123.104. Initial IRE; designation of physician by Department**

The title of this section is amended to correctly identify that it deals with the designation of physicians by the Department, not limited to the initial IRE.

This section is amended to delete the first sentence of subsection (b), which incorrectly indicates the Department's duty to designate an IRE physician pertains only to the initial IRE request.

### **§ 123.105. Impairment rating determination**

Subsection (a) is amended to conform with Act 111 and require that IREs be performed using the 6<sup>th</sup> edition (second printing April 2009) of the AMA "Guides to the Evaluation of Permanent Impairment."

Subsection (c) requires that the Face Sheet be attached to a Report of Medical Evaluation as specified in the AMA "Guides to the Evaluation of Permanent Impairment," 6<sup>th</sup> edition (second printing April 2009).

Subsection (d), including paragraph (1), is amended to reflect the change in the threshold impairment rating required to adjust the employee's benefits status from total to partial from less than 50% to less than 35%. It also reflects the applicability of this section to those evaluations conducted during the 60-day period subsequent to the expiration of the 104-week period, to reflect the changes in case law described above in the Background section. See also subsection (e) below.

Subsection (d.1) is added to address the timing of IREs and, if appropriate, whether the results of the IRE are automatic thereby requiring use of Form LIBC-764, "Notice of Change in Workers' Compensation Disability Status" (Form LIBC-764) or can only be achieved through litigation. Specifically, this subsection is amended to clarify that Form LIBC-764 shall be used when the IRE is requested and performed during the 60 day period subsequent to the expiration of the employee's receipt of 104 weeks of total disability benefits and results in an impairment rating of less than 35%. This subsection is also amended to require the adjustment of the disability status be achieved through the traditional administrative process, not by completing Form LIBC-764, if the evaluation is requested and occurs beyond the 60 day period subsequent to the expiration of the employee's receipt of 104 weeks of total disability benefits and results in an impairment rating of less than 35%.

Subsection (e) is amended to reflect the change the threshold impairment rating required to adjust the employee's benefits status from total to partial from less than 50% to less than 35%.

Lastly, subsection (f) provides that the employee may appeal the adjustment of benefit status to a workers' compensation judge at any time during the employee's receipt of 500 weeks of partial benefits provided there is a determination that the employee meets the threshold rating that is equal to or greater than 35% impairment under the 6th edition (second printing April 2009) of the AMA "Guides to the Evaluation of Permanent Impairment."

#### *Reporting, Record-Keeping and Paperwork Requirements*

The existing forms used by the parties and the BWC have already been modified to be consistent with Act 111. The proposed amendments do not require any further modification to the existing forms, and thus do not impose any additional reporting, recording or paperwork requirements on either the Commonwealth or the regulated community.

#### *Sunset Date*

A sunset date is not appropriate for this proposed rulemaking. The BWC will periodically monitor this proposed rulemaking and submit amendments as needed.

#### *Effective Date*

These proposed amendments will be effective on notice or publication of the final-form regulation in the *Pennsylvania Bulletin*.

*Contact Person*

Interested persons are invited to submit written comments, suggestions or objections regarding the proposed rulemaking to Marianne H. Saylor, Esquire, Director, Bureau of Workers' Compensation, 651 Boas Street, 8<sup>th</sup> Floor, Harrisburg, PA 17121, [masaylor@pa.gov](mailto:masaylor@pa.gov) within 30 days after publication of this proposed rulemaking in the *Pennsylvania Bulletin*.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on \_\_\_\_\_, 2022 the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Labor and Industry Committees. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Department, the General Assembly and the Governor of comments, recommendations or objections raised.

Nancy Walker  
*Acting Secretary*

*Fiscal Note:*

Annex A

Title 34. Labor and Industry  
Part VIII. Bureau of Workers' Compensation  
Chapter 123. General Provisions –Part II

Subchapter B. Impairment Ratings

§ 123.101. Purpose

This subchapter interprets section 306 [(a.2)] **(a.3)** of the act [(77 P. S. §511.2)] **(77 P. S. § 511.3)** 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. IRE requests

(a) During the 60-day period subsequent to 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 scheduled to occur during this 60-day time period, the adjustment of the benefit status shall **be automatic and** relate back to the expiration of the employe's receipt of 104 weeks of total 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.] **If the evaluation is requested and occurs beyond the 60-day period subsequent to the expiration of the employe's receipt of 104 weeks of total disability benefits, the adjustment of the disability status must be achieved through the traditional administrative process such as by filing a Petition for Modification and, if successful, 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.

(c) When an insurer requests the employe's attendance at an IRE during the 60-day period subsequent to the expiration of the employe's receipt of 104 weeks of total disability benefits and the employe fails, for any reason, to attend the IRE, when the failure results in the performance of the IRE more than 60 days beyond the expiration of the 104-week period, the adjustment of disability status shall **be automatic and** relate back to the expiration of the employe's receipt of 104 weeks of total disability benefits.

(d) The employe's receipt of 104 weeks of total disability benefits shall be calculated on a cumulative basis.

(e) The insurer shall request the employe's attendance at the IRE in writing on Form LIBC-765, "Impairment Rating Evaluation Appointment," and specify therein 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 employe's counsel, if known.

(f) Consistent with section 306[(a.2)] **(a.3)(6)** of the act [(77 P. S. §511.2)] **(77 P. S. § 511.3)**, the insurer's failure to request the evaluation during the 60-day period subsequent to the expiration of the employe's receipt of 104 weeks of total disability benefits [may] **does** not result in a waiver of the insurer's right to compel the employe's attendance at an IRE, **however the results of the evaluation may only be used to reduce benefits through the traditional administrative process such as by filing a Petition for Modification.**

(g) 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 employee's attendance at independent medical examinations or other expert interviews under section 314 of the act (77 P. S. § 651).

(h) The employee's failure to attend the IRE under this section may result in a suspension of the employee's right to benefits consistent with section 314(a) of the act.

§ 123.103. Physicians

\* \* \* \* \*

(d) In addition to the requirements of subsections (a) and (b), physicians designated by the Department to perform IREs shall meet training and certification requirements which may include, but are not limited to, one or more of the following:

(1) Required attendance at a Departmentally approved training course on the performance of evaluations under the AMA "Guides to the Evaluation of Permanent Impairment[.]" **6<sup>th</sup> edition (second printing April 2009).**

(2) Certification upon passage of a Departmentally approved examination on the AMA "Guides to the Evaluation of Permanent Impairment[.]" **6<sup>th</sup> edition (second printing April 2009).**

(3) Other requirements as approved by the Department.

§ 123.104.[Initial IRE; d]Designation of physician by Department

(a) The insurer is responsible for scheduling the initial IRE. Only the insurer may request that the Department designate an IRE physician.

(b) [The Department's duty to designate an IRE physician pertains only to the initial IRE.]  
A list of Departmentally approved IRE physicians will be available upon request.

(c) The request to designate a physician shall be made on Form LIBC-766, "Request for Designation of a Physician to Perform an Impairment Rating Evaluation."

(d) Within 20 days of receipt of the designation request, the Department will designate a physician to perform the IRE.

(e) The Department will provide the name and address of the physician designated to perform the IRE to the employe, the insurer and the attorneys for the parties, if known.

§ 123.105. Impairment rating determination

(a) When properly requested under § 123.102 (relating to IRE requests), an IRE shall be conducted in all cases and an impairment rating determination must result under the [most recent] **6th** edition (**second printing April 2009**) of the AMA "Guides to the Evaluation of Permanent Impairment."

(b) To ascertain an accurate percentage of the employe's whole body impairment, when the evaluating physician determines that the compensable injury incorporates more than one pathology, the evaluating physician may refer the employe to one or more physicians specializing

in the specific pathologies which constitute the compensable injury. Any physician chosen by the evaluating physician to assist in ascertaining the percentage of whole body impairment shall possess the qualifications as specified in § 123.103(a) and (b) (relating to physicians). The referring physician remains responsible for determining the whole body impairment rating of the employe.

(c) The physician performing the IRE shall complete Form LIBC-767, "Impairment Rating Determination Face Sheet" (Face Sheet), which sets forth the impairment rating of the compensable injury. The physician shall attach to the Face Sheet the "Report of Medical Evaluation" as specified in the AMA "Guides to the Evaluation of Permanent Impairment[.]" 6<sup>th</sup> edition (second printing April 2009). The Face Sheet and report shall be provided to the employe, employe's counsel, if known, insurer and the Department within 30 days from the date of the impairment evaluation.

(d) If the evaluation is requested and performed during the 60-day period subsequent to the expiration of the employe's receipt of 104 weeks of total disability benefits and results in an impairment rating of less than [50]35%, the employe shall receive benefits partial in character. To adjust the status of the employe's benefits from total to partial, the insurer shall provide notice to the employe, the employe's counsel, if known, and the Department, on Form LIBC-764, "Notice of Change in Workers' Compensation Disability Status," of the following:

- (1) The evaluation has resulted in an impairment rating of less than [50]35%.
- (2) Sixty days from the date of the notice the employe's benefit status shall be adjusted from total to partial.

(3) The adjustment of benefit status does not change the amount of the weekly workers' compensation benefit.

(4) An employe may only receive partial disability benefits for a maximum of 500 weeks.

(5) The employe may appeal the adjustment of benefit status to a workers' compensation judge by filing a Petition for Review with the Department.

**(d.1) If the evaluation is requested and occurs beyond the 60-day period subsequent to the expiration of the employe's receipt of 104 weeks of total disability benefits, and results in an impairment rating of less than 35%, the adjustment of the employe's disability status can only be achieved through the traditional administrative process such as by filing a Petition for Modification. This adjustment cannot be achieved by completing Form LIBC-764, "Notice of Change in Workers' Compensation Disability Status."**

(e) If the evaluation results in an impairment rating that is equal to or greater than [50]35%, the employe shall be presumed to be totally disabled and shall continue to receive total disability compensation. The presumption of total disability may be rebutted at any time by a demonstration of earning power in accordance with section 306(b)(2) of the act (77 P. S. § 512(b)(2)) or by a subsequent IRE which results in an impairment rating of less than [50]35%.

(f) At any time during the receipt of 500 weeks of partial disability compensation, the employe may appeal the adjustment of benefit status to a workers' compensation judge by filing a Petition for Review, **provided there is a determination that the employe meets the threshold impairment rating that is equal to or greater than 35% percent impairment under the AMA "Guides to the Evaluation of Permanent Impairment," 6<sup>th</sup> edition (second printing April 2009).**



COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF LABOR AND INDUSTRY

April 12, 2023

George D. Bedwick, Chairman  
Independent Regulatory Review Commission  
333 Market Street, 14<sup>th</sup> Floor  
Harrisburg, PA 17101

**Re: Notice of Proposed Rulemaking**  
Department of Labor and Industry  
34 Pa. Code, Part VIII, Ch. 123; No. 12-117

Dear Chairman Bedwick:

Enclosed is a proposed rulemaking package consisting of a Face Sheet, Preamble, Annex A and Regulatory Analysis Form.

The Department of Labor and Industry is submitting this rulemaking to amend Part VIII, Chapter 123 of 34 Pa. Code to update regulations regarding Impairment Rating Evaluations.

Written comments, recommendations or objections should be directed to Marianne H. Saylor, Director, Bureau of Workers' Compensation, 651 Boas Street, 8<sup>th</sup> Floor, Harrisburg, PA 17121, email address [masaylor@pa.gov](mailto:masaylor@pa.gov).

The Department's staff will provide your staff with any assistance required to facilitate your review of this proposal.

Sincerely,

A handwritten signature in cursive script that reads "Nancy A. Walker".

Nancy A. Walker  
Acting Secretary

cc w/encl: The Honorable Akbar Hossain, Secretary of Planning and Policy  
William L. Trusky, Executive Deputy Secretary  
Gerald Mullery, Deputy Secretary for Compensation and Insurance  
Neil Cashman, Director of Legislative Affairs  
Haley Salera, Policy Director  
Benjamin Holt, Chief Counsel  
Kelly K. Smith, Executive Deputy Chief Counsel  
Kimberly D. Mazin, Deputy Chief Counsel  
Marianne Saylor, Director, Bureau of Workers' Compensation

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE  
REGULATORY REVIEW ACT

I.D. NUMBER: 12-117  
SUBJECT: Impairment Ratings  
AGENCY: DEPARTMENT OF LABOR & INDUSTRY

TYPE OF REGULATION

**RECEIVED**

X Proposed Regulation

APR 12 2023

Final Regulation

Independent Regulatory  
Review Commission

Final Regulation with Notice of Proposed Rulemaking Omitted

120-day Emergency Certification of the Attorney General

120-day Emergency Certification of the Governor

Delivery of Tolled Regulation

a. With Revisions

b.

Without Revisions

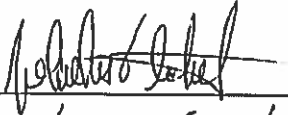
FILING OF REGULATION

DATE

SIGNATURE

DESIGNATION


4/12/23



HOUSE COMMITTEE ON LABOR & INDUSTRY

MAJORITY CHAIR Representative Jason Dawkins

4/12/2023



MINORITY CHAIR Representative Ryan Mackenzie

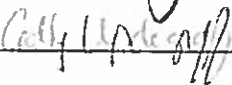
4/12/23



SENATE COMMITTEE ON LABOR & INDUSTRY

MAJORITY CHAIR Senator Devlin Robinson

4/12/22



MINORITY CHAIR Senator John Kane

INDEPENDENT REGULATORY REVIEW COMMISSION

ATTORNEY GENERAL (for Final Omitted only)

LEGISLATIVE REFERENCE BUREAU (for Proposed only)

November 9, 2022



## Madison Brame

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**From:** Bulletin <bulletin@palrb.us>  
**Sent:** Wednesday, April 12, 2023 2:41 PM  
**To:** Mueller, Janet (LI-OCC)  
**Cc:** Leah Brown; Mazin, Kimberly (LI-OCC)  
**Subject:** [External] Re: Documents for Publication - 12-117 Proposed Regulation

***ATTENTION:** This email message is from an external sender. Do not open links or attachments from unknown senders. To report suspicious email, use the [Report Phishing button in Outlook](#).*

Good afternoon Janet!

Thank you for submitting this proposed rulemaking. It is scheduled for the April 22<sup>nd</sup> issue of the Bulletin. Once the edited file and galley are returned, I will forward that to you for your review!

Have a great evening!

Leah

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**From:** Mueller, Janet (LI-OCC) <jamueller@pa.gov>  
**Sent:** Wednesday, April 12, 2023 2:26 PM  
**To:** Bulletin <bulletin@palrb.us>  
**Cc:** Leah Brown <lbrown@palrb.us>; Mazin, Kimberly (LI-OCC) <kmazin@pa.gov>  
**Subject:** Documents for Publication - 12-117 Proposed Regulation

Hello,

Attached is the PDF for Regulation 12-117 with the Preamble and Annex A in Word format for publication.

Please confirm publication date of April 22, 2023.

Thank you!

Jan Mueller | Legal Office Administrator 1  
PA Department of Labor & Industry | Office of Chief Counsel  
651 Boas Street | Harrisburg, PA 17121  
Phone: 717.787.4186 | Fax: 717.787.1303  
[www.dli.pa.gov](http://www.dli.pa.gov)

**RECEIVED**

APR 12 2023

Independent Regulatory  
Review Commission