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WC ALERT:
COMMONWEALTH COURT RULES STATUS
CHANGE BASED ON IRE AFTER 60 DAYS REQUIRES PROOF OF
AVAILABLE WORK OR EARNING POWER DETERMINATION THROUGH
LABOR MARKET SURVEY

*Diehl v. Workers' Compensation Appeal Board (IA Construction
and Liberty Mutual Insurance Company)*

On April 28, 2008 the Commonwealth Court filed their Opinion in the case of *Diehl v. WCAB*. The Opinion was authored by Senior Judge Kelley. He was joined by President Judge Bonnie Leadbetter; Judge Simpson filed a Concurring Opinion. The Court reversed the WCAB holding that the "traditional administrative process" anticipated by the Supreme Court in *Gardner v. WCAB* requires that the employer prove work is available through a *Kachinski* analysis or prove earning power through a labor market survey in order to effectuate a status change where the Impairment Rating Evaluation is requested beyond 60 days from payment of 104 weeks of temporary total disability benefits. A Petition for Allowance of Appeal has been filed with the Pennsylvania Supreme Court.

It is well known that Act 57 was passed by the Pennsylvania Legislature in 1996 in part to control escalating workers' compensation costs. Section 306 (a.2) provided a mechanism, the Impairment Rating Evaluation, to cap payment of indemnity benefits. Specifically, when an employee has received 104 weeks of temporary total disability benefits, unless otherwise agreed, within 60 days of the expiration of 104 weeks an employer must request the employee submit to an examination to determine the degree of impairment pursuant to the AMA "Guides to Evaluation of Permanent Impairment." If the impairment is less than 50 percent the employee is deemed partially disabled which results in capping liability for payment of benefits to 9.6 years or 500 weeks. However, the rate of compensation does not change. Section 123.102 (f) of the Act 57 Regulations further provides that a failure to request the evaluation during the 60 day period subsequent to the expiration of 104 weeks of total disability may not result in waiver of the right to compel an Impairment Rating Evaluation. Where the IRE request occurs outside the 60 day window the adjustment of disability status is effectuated as of the date of the evaluation.

In *Gardner v. WCAB (Genesis Health Ventures)* the Pennsylvania Supreme Court affirmed the Commonwealth Court's ruling that if an IRE is not requested within 60 days after receipt of 104 weeks of total disability the employer loses the automatic relief afforded by the statute to change benefit status from total to partial. While the Commonwealth Court in their *Gardner*

ruling issued in 2003 held that if the 60 day window was missed the opportunity was lost forever, the Supreme Court disagreed. The high Court rules that if the self executing status change opportunity was missed, a status from total to partial could still be effectuated through the “traditional administrative process.” They did not, however, elaborate on what that might involve.

The *Diehl* Court interpreted the Supreme Court’s requirement that a post 60 day IRE status change necessitated proof of job availability through a *Kachinski* analysis or proof of earning power through the labor market survey provisions. The Court reasoned that the traditional administrative process necessitates something more than the mere filing of a petition, appearance before a WC Judge, and presentation of the underlying IRE determination. The Court indicates that there is no authority for the proposition that a Modification Petition brought before a Judge does not require either *Kachinski* job development or a labor market survey analysis. The Court was not impressed that a “mere technical filing of paperwork with a potential perfunctory appearance before the WCJ” rises to the level envisioned by the Supreme Court as necessary to satisfy the “traditional administrative process.” Essentially, they do not believe that tradition ever permitted an employer to satisfy its burden of proof on a Petition for Modification so easily. Their interpretation for all practical intents and purposes ends the status change from total to partial based on an Impairment Rating Evaluation of less than 50 percent if that examination was not requested within the 60 day window. It also effectively reinstates their original *Gardner* analysis that an IRE status change is only available when timely requested.

The statutory scheme reflected in Section 306 does appear to draw the distinction between a status change through an Impairment Rating Evaluation which does not impact claimant’s compensation and a status change through proof of earning power or work available which may change the benefit rate. Further, the Supreme Court seemed to appreciate that the Impairment Rating Evaluation is a separate mechanism for impacting exposure for indemnity benefits apart from an earning power analysis or assumption of a job availability burden. Although the Court did not elaborate on what the “traditional administrative process” entailed it could quite readily have held proof of work or an earning power determination was required when it decided *Gardner*. The fact that it did not do so supports the contention that the filing of a petition and appearance before a Judge and possibly presenting the deposition of an IRE doctor can satisfy the administrative requirement and fully protect claimant’s due process concerns.

While we are hopeful that the Supreme Court will accept the case for review and hopeful that they will clarify that the “traditional administrative process” is satisfied by presenting the request to a Workers’ Compensation Judge through the filing of a Petition for Modification, without earning power or job availability proof in the interim it is essential that the files you are handling be carefully diaried and monitored so that an IRE is requested within 60 days of a

claimant's receipt of 104 weeks of temporary total disability. On those cases presently pending on Petitions for Modification where the IRE was requested beyond the 60 day window we will argue that the *Diehl* case is not yet final and thus the Commonwealth Court's burden of proof analysis is not binding. We will also argue that application of the Court's standard is prospective only. Depending on the Judge before whom we are appearing these arguments will be met with varying degrees of success. It may be necessary to consider whether we can supplement our evidence with proof of job availability or an earning power determination.

We welcome the opportunity to discuss this case with you in light of your own files. We will continue to keep you apprised of appellate developments.