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E-Flash Update

The "New Diehl"

Proof of Earning Capacity Not Required for Post-Window IRE's

In its April 22, 2009 published opinion in *Diehl v. WCAB*, the Commonwealth Court has ruled that the "traditional administrative process" for pursuing a modification of Claimant's benefit status based upon a post-window, less-than-50% impairment rating **does not entail/require proof of earning capacity**, as had been previously held by the trial judge and by a three-member panel of the Commonwealth Court in its earlier decision of April 28, 2008. Rather, it was held this week, the "traditional administrative process," prescribed in 2005 by the Supreme Court in *Gardner v. WCAB* relative to post-window IRE's, means the filing of a modification petition, followed by the presentation of evidence (i.e., the IRE report and/or expert testimony) in support of the impairment rating. Again, proof of earning capacity via a job offer, *Kachinski*-type workup or labor market survey is not required in this context. Indeed, the court in its new opinion pointed out that such requirements would render meaningless the statutory IRE provisions. (The court did not mention, although it certainly is the case, that for post-window IRE's such requirements would also take us back to the pre-Supreme Court *Gardner* world.) Judge Smith-Ribner filed a dissenting opinion.

Please bear in mind that the filing and prosecution of a modification petition following a post-window IRE can be avoided if the parties are able to reach an agreement on the impairment rating and, especially in cases with relatively low ratings (that Claimant may not be inclined to challenge), such an agreement should always be pursued. When Claimant will not agree to a specific percentage, consideration should be given to proposing an agreement to an impairment rating of "less than 50%" (although the employer/carrier may thereby lose, via the doctrines of *res judicata* and/or collateral estoppel, whatever benefit the specific numeric rating may confer in future proceedings). Decisions on this issue must be made on a case-by-case basis.

Bear in mind that a modification of benefit status based upon an IRE does **not** affect the Claimant's benefit **rate**. Rather, the effect is limited to a conversion of benefit status from temporary total to temporary partial, with benefits for the latter being limited to a total of 500 weeks.

We believe that the Commonwealth Court, sitting *en banc* and having vacated the contrary result generated by its three-member panel a year ago, has now reached the correct decision on this issue. We will advise you should there be any further appellate activity.

If you would like more information about *Diehl v. WCAB*, please contact Colin Vroome at (215) 587-1095 or cvroome@postschell.com.

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