CASE LAW UPDATES
April 2008

<u>Melmark Home v. Workers' Comp. Appeal Bd., (Rosenberg)</u>
2008 Pa. Commw. LEXIS 135

In issuing a NATRW, "prompt written notice" requires an employer to give a claimant notice of the medical evidence it has received within a reasonable time after its receipt, lest the report itself becomes stale. It also requires an employer to give notice to the claimant within a reasonable time before the employer acts upon the information. This necessarily requires an examination of the facts and timeline in each case to determine if the claimant has been prejudiced by the timing of the notice.

Employer filed an April 3, 2006 Modification Petition based on a July 12, 2005 LMS. A NATRW had been issued on November 29, 2005, but the parties disagreed as to whether claimant received any notice before November. The claimant challenged the Modification Petition, arguing that the employer did not provide "prompt written notice" of claimant's ability to return to work per Section 306(b)(3) of the Act. The WCJ, interpreting "prompt written notice" as 30 days, dismissed the Modification Petition. The WCAB affirmed the WCJ decision.

On appeal to the Commonwealth Court, the employer argued that the WCAB erred in interpreting "prompt written notice," as used in 77 Pa. Stat. Ann. § 512(3), to mean a notice given no later than 30 days after receipt of evidence that the claimant was capable of working. The appellate court found that the Act did not define what constituted "prompt" written notice; thus, the WCJ and the WCAB had no basis to declare that any notice given more than 30 days after the employer received the relevant medical evidence violated 77 Pa. Stat. Ann. § 512(3). Because the customary usage of "prompt" did not involve a specific number of days, the WCJ must look to the purpose of the NATRW to determine whether the notice was prompt. As the Commonwealth Court explained, "[a] claimant must have notice that her benefits could be affected *before* the employer attempts to modify benefits. Otherwise, a modification petition would be a claimant's first notice that a doctor has found the claimant capable of work."

Peters Township School District, Petitioner v. Workers' Compensation Appeal Board (Anthony),
945 A.2d 805

The grant or denial of a petition to compel a physical examination, pursuant to § 314(a) of the Act, is within the sound discretion of the Workers' Compensation Judge and a court will not interfere with that decision absent an abuse of discretion.

As is often the case in these matters, claimant suffered a workplace injury. Defendant's IME doctor subsequently requested an EEG (electroencephalogram for those scoring at home) diagnostic test. Claimant's treating doctor said no to the test – claimant took the treating doctor's advice. Employer filed a Sec. 314(a) Physical Exam Petition. The WCJ DENIED the Petition, finding persuasive the treating doctor's opinion (as well as claimant's testimony) that the test was a waste of time. Board affirms WCJ – employer appeals.

In addressing employer's appeal, the Commonwealth Court explained as follows: "As is the case here, where the employer petitions the WCJ to compel an employee to undergo diagnostic testing, it bears the burden to demonstrate the test is ***"necessary, involve[s] no more than minimal risk and [is] not unreasonably intrusive."*** To determine whether a claimant should be compelled to undergo a diagnostic test, the WCJ must balance the goal of "accurately assessing the claimants' injuries [against the goal of] protecting [his or her] right to be free from nonconsensual contact." Id.

Because the WCJ in this case: (1) did not require the employer to prove that the employee actually experienced pseudoseizures, (2) balanced the likelihood of whether the diagnostic test would yield useful information against the employee's right to avoid the intrusion of a 72-hour hospital confinement, (3) effectively assessed the usefulness of the diagnostic test and properly found that the employer failed to meet its burden to prove that the diagnostic test was reasonable and necessary, and (4) found the treating physician's opinion to be more persuasive, the Commonwealth Court affirmed the denial of the employer's Physical Exam Petition.

End result – if claimant refuses to submit to a particular diagnostic test, make sure the WCJ knows that your ability to assess claimant's medical condition relies heavily upon the results of that test.

John Mullen, Petitioner v. Workers' Compensation Appeal Board (Mullen's Truck & Auto Repair),
945 A.2d 813

The term "wage" is often left to the WCJ to define. Here, in the context of the injured worker's dual role as employee and as president and sole owner of the Subchapter S corporate employer, the WCJ was allowed considerable discretion to determine the worker's actual "wages".

As the case caption suggests, claimant was both the sole employee and president of a Subchapter S corporation in his own name. When he sustained a 1993 injury, he submitted a Statement of Wages reflecting what he paid himself through the corporation, as an employee. Several years later, claimant's AWW became an issue pursuant to a Review Petition and a Modification Petition filed by employer. Employer was now in possession of claimant's pre-injury W-2, a document which indicated that claimant's income (his net business income) was considerably lower than his stated AWW. The question left to the WCJ was "what defines one's wages – what he pays himself or what he gains from his business?"

In finding claimant's testimony was not credible and rejecting the opinions of claimant's expert, the WCJ issued a decision decreasing claimant's AWW to the amount indicated in the W-2.

Eventual appealing to the Commonwealth Court, the claimant argued that there is nothing in Sec. 309 or the IRS Code that permits the WCJ to conclude claimant's wages are his net taxable income. Citing Section 309(e), Claimant asserted that $66,417 in business expenses must be excluded from the calculation of his pre-injury AWW.

In addressing claimant's arguments, the Commonwealth Court explained that "wage" is a term that should be broadly defined to include periodic monetary earnings and all compensation for services rendered without regard to the manner in which such compensation is computed. Here, because the W-2 was the only statement of record reflecting claimant's income and because claimant's "compensation" was limited by his business expenses, the WCJ was correct in lowering claimant's AWW.

Timothy Diehl, Petitioner v. Workers' Compensation Appeal Board (IA Construction and Liberty Mutual Insurance),
2008 Pa. Commw. LEXIS 182

When the employer misses the 60 day deadline for requesting an IRE, it may not simply obtain a change in benefit status by filing a Modification Petition, submitting the IRE report, and resting. Instead, the court ruled, the employer must carry its burden of proving either actual work availability (the old "Kachinski" rule), or by presenting a Labor Market Survey establishing earning power

---

A bad "Diehl" for employers. As an accomplished Chartwellian has already addressed this case in detail, I present their review for your own…

COURT DECISION MAKES IT TOUGHER TO LIMIT CLAIMANT'S BENEFITS

A significant workers' compensation case was decided last week by the Commonwealth Court concerning the ability of an employer to convert workers' compensation benefits from total to partial after an Impairment Rating Examination (IRE).

Before 1996 a worker with even a minor injury could remain on comp for life. The amendments in 1996 were designed, in part, to "limit" benefits to "only" 104 weeks of total disability followed by 500 weeks of partial disability benefits UNLESS the worker had a *significant* injury. The amendments provided that after 104 weeks of paying total disability benefits, an employer could request an IRE. If the IRE came back with an impairment rating of less than 50% of the "whole person" as determined by the AMA Guides to the Evaluation of Permanent Impairment, the worker would be "limited" to another 500 weeks of benefits. This was the most dramatic change in the 1996 amendments to the Act, and for the first time, gave Pennsylvania employers some protection against endless payments to people with trivial impairments.

Summary of the Diehl case

1. It is more important than ever to request an IRE in a timely fashion.
2. An untimely filed Request for IRE means securing additional, costly vocational evidence to modify claimant's compensation.
3. Avoid using plaintiff's personal injury firms for employer appeals to the Commonwealth Court.

The Act provides that the employer should file the request for an IRE within a 60 day "window" after the expiration of 104 weeks of total disability

benefits. A fight broke out between employers and employees over what would happen if the employer requested the IRE more than 60 days after the expiration of the 104 weeks of total. Initially, it looked like the courts would follow a hyper-technical reading of the Act, and rule that if the employer was late in filing the IRE request, it waived its right to do so, and the worker could remain on total for life, even with an impairment rating of zero. The Supreme Court of Pennsylvania rectified this situation in its decision in Gardner v. Workers' Compensation Appeal Board (Genesis Health Ventures), 585 Pa. 366, 888 A.2d 758 (2005).

In Gardner, it was held that if the employer "blew the deadline" for filing a request for IRE, the employer would still be able to file such a request late, but would be disadvantaged because it could not get retroactive relief. In such a case, the employer could not effect the change in benefit status unilaterally by simply filing a form. Rather, the employer was required to avail itself of what the Court called "the traditional administrative process", which was commonly assumed to mean a Petition to a Judge. After the decision in Gardner, we thought the issue was put to rest, and that there was a relatively simply way to change benefits even after the IRE deadline by filing a Modification Petition.

The pendulum has now swung back in the other direction. In Diehl v. Workers' Comp. Appeal Bd., (I.A Construction) 2008 Pa. Commw. LEXIS 182 the court held that when the employer misses the 60 day deadline for requesting an IRE, it may not simply obtain a change in benefit status by filing a Modification Petition, submitting the IRE report, and resting. Instead, the court ruled, the employer must carry its burden of proving either actual work availability (the old "Kachinski" rule), or must present a Labor Market Survey establishing earning power.

Why did the court choose the facts of this case, in which the employer only missed the "deadline" for requesting and IRE by about 9 months, to set the comp world on its ear? The answer may be the Court's reaction to the presentation by the attorneys in the Diehl case as much as to the merits of case.[1]

The Commonwealth Court is usually polite and courteous to attorneys and rarely chastises lawyers in published decisions for poor performance. The Judge went out of his way in the Diehl case to note that:

> …neither party sets forth any developed legal argument to this Court, beyond that set forth in the WCJ's and Board's opinions. In essence, Claimant's entire argument can be summarized as "The WCJ was correct, for the reasons he listed," and Employer's may be summarized as "The Board was correct, for the reasons it listed." We emphasize to the parties, in the strongest possible terms, that their respective

[1] The lawyers for the employer/carrier were apparently from a PI firm in Moosic, PA. Lesson No. 1 of the case: Use high-powered workers' compensation **defense** attorneys to pursue comp appeals to the Commonwealth Court, not attorneys from plaintiffs' PI firms.

> arguments to this Court fall far short of the professional standard expected from the bar, in terms of research, legal analysis, and the development of their near nonexistent arguments. Although this Court has the discretion to find that the parties *sub judice* waived their arguments due to their substantial noncompliance with this Court's procedural rules, we will address this matter in light of the straightforward single issue of law presented, under stipulated facts, and in light of the WCJ's and Board's concise analysis. We caution counsel in this matter to strictly adhere to all Rules of Appellate Procedure in any future dealings with this Court, in order to enable our effective appellate review. (emphasis added)

In short, the court was apparently aggravated because it did not believe that the arguments were fully developed in the Briefs. It is unclear, but certainly possible, that the court's decision would have been different if the court had not been distracted into writing a scathing criticism of the attorneys handling the case.

Hopefully, the employer in Diehl will engage a high-powered workers' compensation defense attorney to pursue either a Request for Reconsideration with the Commonwealth Court or a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, or both. If the Supreme Court accepts the case for appeal (the Court is under no obligation to do so), the position of the employer should be bolstered by *amicus curie* briefs filed by key insurance, employer, and municipal representatives.

In the meantime, our first suggestion to clients is to create a diary system and a control system so that in every case in which a worker is on total disability for 104 weeks, the file gets flagged, and a Request for IRE gets filed. If the employer misses the deadline, unless the Diehl decision is reversed, the safest route would be to engage a vocational expert and develop either a Labor Market Survey or proof of work availability, even if the result is only minimum wage part-time and sheltered employment, and then file a Modification Petition. A more daring route would be to argue that Gardner allows an employer to proceed solely on the IRE report, however, this track runs a risk of a resulting unreasonable contest fee against the employer, in light of the Diehl case.

If an employer already has a case in the system in which the IRE was requested more than 60 days after the running of 104 weeks of total disability benefits, the employer's safest route would be to supplement the evidence in such a case with a LMS or proof of work availability. Every case has unique facts, exposures and issues, and we suggest that you consult with a competent workers' compensation **defense** attorney before forming a strategy in any particular case. The attorneys at Chartwell are available for further consultation. Lee Fiederer at 610-666-7700 is coordinating Chartwell's strategy in these Diehl cases and is available to answer any questions that you may have.