

CASE UPDATE

Timothy Diehl v. WCAB (IA Construction),
____ A.2d ____, No. 1507 C.D. 2007 (Pa. Cmwlth. Ct. April 28, 2008)

On April 28, 2008, the Commonwealth Court of Pennsylvania determined in *Timothy Diehl v. WCAB(IA Construction)*, ____ A.2d ____, No. 1507 C.D. 2007 (Pa. Cmwlth. Ct. April 28, 2008), the requirements for modification following a “late” (post 104 week) Impairment Rating Evaluation (IRE). The Commonwealth Court in *Diehl* held that in order for employers to change the status of a claimant’s workers’ compensation benefits with an IRE performed after the first 60 days after the receipt of 104 weeks of workers’ compensation benefits (late IRE), employers will need to show a change in claimant’s condition and earning power (Labor Market Survey, job offer, etc.) in order to change the nature of a claimant’s workers’ compensation benefits from total to partial. Thus, in effect, making the late IRE, allowed by the Workers’ Compensation Act (Act) and the Supreme Court in *Gardner v. WCAB(Genesis Health Ventures)*, 585 Pa. 366, 888 A.2d 758 (2005), a nullity.

In *Diehl*, Employer requested that Claimant submit to an IRE after the 60 days after the 104 weeks had expired. The IRE resulted in a twenty-eight percent (28%) impairment rating. As the IRE was not performed within 60 days of Claimant’s receipt of 104 weeks of workers’ compensation benefits, Employer, per the Supreme Court of Pennsylvania’s decision in *Gardner*, filed a Petition to Modify Compensation Benefits (Modification Petition) as Employer was unable to take advantage of the automatic self-executing modification provided for in Section 306(a.2) of the Act due to the fact that its IRE was late. The Workers’ Compensation Judge (WCJ) stated that Employer would have to seek a reduction of Claimant’s benefit status through the “traditional administrative process” and, therefore, concluded that Employer was **required** to either perform a work availability analysis pursuant to *Kachinski v. WCAB(Vepco Construction Co.)*, 516 Pa. 240, 532 A.2d 374 (1987) or a Labor Market Survey (LMS). As the WCJ found that Employer failed to show that there was suitable work available to Claimant within his limitations, the WCJ denied and dismissed Employer’s Modification Petition.

Employer appealed the denial of its Modification Petition to the Workers’ Compensation Appeal Board (WCAB). The WCAB, also applying *Gardner*, held that the *Kachinski* burden did not apply because there was no actual modification of Claimant’s workers’ compensation benefit rate. The WCAB also held that Employer had established that Claimant had a 28% impairment rating. Therefore, the WCAB found that Employer had satisfied its burden of proof regarding its Modification Petition and was entitled to a change in Claimant’s benefits status from total disability to partial disability as of November 8, 2002; thus, reversing the decision of the WCJ. Claimant appealed this Opinion of the WCAB to the Commonwealth Court.

The Commonwealth Court stated in *Diehl* that the mere filing of a Modification Petition after a “late” IRE is not sufficient for an employer to obtain a modification of a claimant’s benefits from total to partial. In arriving at this conclusion, the Commonwealth Court noted that the Supreme Court in *Gardner* did not provide any guidance as to “what ‘traditional administrative process’ would apply to non-self-executing disability status claims under the Act”. Nonetheless, the Commonwealth Court stated that the “mere filing of a Modification Petition, supported with the IRE results, is not the traditional process anticipated”. Therefore, the Commonwealth Court held that the “traditional administrative process” requirement of *Gardner* consists of the filing of a Modification Petition in situations with a “late” IRE and employer’s satisfaction of either the traditional *Kachinski* work availability analysis and its accompanying burden of proof or the analysis and burden required under a LMS approach. In light of its holding, the Commonwealth Court reversed the Opinion of the WCAB.

After *Gardner*, the interpretation by many practitioners of the “traditional administrative process” if the IRE was not performed timely, consisted of: (1) obtaining the IRE; (2) filing the Modification Petition; (3) litigating the Modification Petition by taking depositions wherein the claimant would have the opportunity to challenge the IRE physician’s conclusion regarding his/her impairment due to his/her work injury. It is the belief of this author that had the above happened in *Diehl* instead of the mere filing of the Modification Petition and submission of the IRE report, a different result may have been reached by the Commonwealth Court.

Unfortunately for Employers and insurance carriers, the Commonwealth Court’s decision in *Diehl* renders any IRE performed after the first 60 days of the claimant’s receipt of 104 weeks of workers’ compensation benefits meaningless. In addition, to obtain a late IRE at this point in time will be a waste of resources (i.e. time and money) as the Commonwealth Court in *Diehl* has now placed the burden on employer to show earning power through job offer/availability or LMS, an Independent Medical Examination (IME) and not an IRE is needed (and required to sustain the burden of proof) as IREs do not address whether a claimant can work and in what capacity or whether the claimant can even perform the tasks of a specific job.

What does *Diehl* mean for employers and insurance carriers? At this point in time, late IREs should not be performed for, in doing so, employers and insurance carriers are putting themselves at risk for the assessment of unreasonable contest attorney’s fees. Regarding any outstanding Modification Petitions based upon a late IRE, counsel for employers and insurance carriers should request that the adjudication of these Petitions (before either the WCJ or WCAB) be placed “on hold” until it is determined as to whether *Diehl* has been appealed to the Supreme Court and whether the Supreme Court has agreed to hear this matter (if the Supreme Court does agree to hear the matter, then these cases should remain “on hold” until a decision on the merits is handed down by the Supreme Court). If *Diehl* is not appealed to the Supreme Court or if the Supreme Court refuses to hear the appeal, all pending Modification Petitions based upon a late IRE should be withdrawn. Finally, no requests for IRE’s outside of the self-executing time frame (60 days after the passage of 104 weeks of the receipt of workers’ compensation benefits) should be made. There should be no real harm in holding off on making this request as: (1) the claimant will most likely remain at maximum medical improvement; and, (2) it is doubtful that a claimant at less than a fifty percent (50%) impairment will become a greater than 50% impairment.

On May 14, 2008, the employer in *Diehl*, IA Construction Company and Liberty Mutual Insurance, filed an Application for Reargument with the Commonwealth Court of Pennsylvania.



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