



*Pennsylvania
Workers'
Compensation Bulletin*

Thomson, Rhodes & Cowie, P.C. Two Chatham Center, 10th Floor, Pittsburgh, PA 15219

(412) 232-3400

HARRY W. ROSENSTEEL, Editor

MARGARET M. HOCK, Associate Editor

*COMMONWEALTH COURT
VACATES
DIEHL DECISION*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Timothy Diehl, :
Petitioner :
 :
v. : No. 1507 C.D. 2007
 :
Workers' Compensation Appeal :
Board (IA Construction and Liberty :
Mutual Insurance), :
Respondents :

ORDER

NOW, June 24, 2008, upon consideration of respondents' application for reargument and petitioner's answer, the application is granted. The Opinion and Order of April 28, 2008 in the above matter is vacated.

The Chief Clerk is directed to list this case for reargument on the next available list.

BY THE COURT:

BONNIE BRIGANCE LEADBETTER,
President Judge

As noted in the last edition of the TR&C Workers' Compensation Bulletin, on April 28, 2008, the Commonwealth Court issued the Diehl decision, which essentially precluded employers from taking advantage of the IRE process unless the IRE was requested within 60 days of the claimant's receipt of 104 weeks of total disability benefits. Under Diehl, an employer could not seek to modify the status of a claimant's benefits based solely on the results of an IRE. Instead, employers were required to pursue the "traditional administrative process."

The Diehl Court interpreted this to mean that the employer must satisfy "either the traditional Kachinski work availability analysis and concomitant burden, or the traditional analysis and burden required under a Labor Market Survey approach." In

other words, if the employer missed the 60-day window, the IRE was useless.

The Court's analysis in Diehl was contrary to the general understanding as to what the Supreme Court meant in Gardner when it said that an employer may request an IRE after the 60-day period, but would have to follow the "traditional administrative process" in order to obtain a modification of the claimant's benefit status. Most lawyers and judges agreed that the "traditional administrative process" contemplated by the Gardner Court meant filing a Modification Petition and presenting the report and/or testimony of the IRE physician. Once a whole body impairment of less than 50% was established, no additional evidence was needed from the employer.

Diehl changed that, making it imperative that an IRE be requested within the 60-day window. Failure to request the IRE within that time frame made the IRE an exercise in futility. For that reason, we strongly suggested that steps be taken on each claim to ensure that a red flag goes up when 104 weeks of TTD are re-



ceived, and that an IRE be requested as soon as possible within 60-days thereafter.

Now that the Commonwealth Court has vacated its decision, our advice remains the same. Although the Court's action is a strong indication that the same holding will not be rendered again, there is no guarantee that will be the case. The Court may, once again, hold that vocational placement or an earning power assessment is necessary to modify the status of a claimant's benefits if an IRE is not requested in a timely fashion. The Court held so once; it may do so again. In order to avoid being caught with untimely IREs, make certain to request an IRE within 60 days after the claimant's receipt of 104 weeks of TTD. That will not only enable you to take advantage of the automatic IRE provisions changing the claimant's status from total to partial, it will also allow you to avoid unnecessary litigation expenses.

As set forth in the Court's Order, the Diehl case will be reargued. Ideally, the Court will issue a decision consistent with the prior general understanding of the IRE provisions.

ATTENTION READERS: The editors of the Thomson, Rhodes & Cowie Pennsylvania Workers' Compensation Bulletin invite you to submit questions you may have dealing with workers' compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified workers' compensation attorney.

Send questions to: Harry W. Rosensteel, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219.

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