[J-161-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, EAKIN, BAER, BALDWIN, JJ.

PAUL DOWHOWER,	:	No. 94 MAP 2006
	:	
Appellant	:	Application for Reconsideration of the Order of the Supreme Court filed April 19, 2006, vacating and reversing the Order of the Commonwealth Court filed on May 13, 2003 at 1667 C.D. 2002.
v.	:	
	:	
WORKERS' COMPENSATION APPEAL BOARD (CAPCO CONTRACTING),	:	826 A.2d 28 (Pa. Cmwlth. 2003)
	:	
	:	ARGUED: December 6, 2006
Appellee	:	

OPINION

MADAME JUSTICE BALDWIN **DECIDED: April 17, 2007**

Appellant, Paul Dowhower (Claimant), sustained a work-related injury on September 13, 1996. On May 29, 1998, a Workers' Compensation Judge (WCJ) issued an order awarding Claimant total disability benefits retroactive to April 18, 1997. Thereafter, Claimant returned to work for a period of time, but later returned to total disability status.

On May 20, 1999, ITT Hartford, the insurer of Claimant's employer, filed a petition requesting that a physician be designated to perform an impairment rating evaluation (IRE) on Claimant in accordance with section 306 (a.2)(1) of the Workers' Compensation Act (Act). 77 P.S. § 511.2(1).[1] R. 10a. The Workers' Compensation Bureau (Bureau)

[1] (1) When an employe has received total disability compensation pursuant to clause (a) for a period of one hundred four weeks, unless
(continued…)

appointed Si Van Do, M.D. to conduct the IRE. Dr. Van Do conducted the IRE on September 1, 1999, and found Claimant to possess an impairment rating of 10%.[2]

Following Dr. Van Do's evaluation, Claimant's employer, Capco Contracting, and its insurer, ITT Hartford, (hereinafter referred to collectively as Employer) filed a Notice of Change of Workers' Compensation Disability seeking to reduce Claimant's disability

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(…continued)

> otherwise agreed to, the employe shall be required to submit to a medical examination which shall be requested by the insurer within sixty days upon the expiration of the one hundred four weeks to determine the degree of impairment due to the compensable injury, if any. The degree of impairment shall be determined based upon an evaluation by a physician who is licensed in this Commonwealth, who is certified by an American Board of Medical Specialties approved board or its osteopathic equivalent and who is active in clinical practice for at least twenty hours per week, chosen by agreement of the parties, or as designated by the department, pursuant to the most recent edition of the American Medical Association "Guides to the Evaluation of Permanent Impairment."
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> (2) If such determination results in an impairment rating that meets a threshold impairment rating that is equal to or greater than fifty per centum impairment under the most recent edition of the American Medical Association "Guides to the Evaluation of Permanent Impairment," the employe shall be presumed to be totally disabled and shall continue to receive total disability compensation benefits under clause (a). If such determination results in an impairment rating less than fifty per centum impairment under the most recent edition of the American Medical Association "Guides to the Evaluation of Permanent Impairment," the employe shall then receive partial disability benefits under clause (b): Provided, however, that no reduction shall be made until sixty days' notice of modification is given.

77 P.S. § 511.2(1).

[2] Section 306(a.2)(2) of the Act precludes a claimant from continuing to collect <u>total</u> disability benefits where the claimant receives an impairment rating of less than 50%. However the claimant would still be eligible for <u>partial</u> disability benefits. 77 P.S. § 511.2(2).

benefits from total to partial. R. 12a. In response, Claimant filed a Petition to Review Compensation Benefits (Review Petition) asserting, inter alia, that Employer did not request that Claimant submit to an IRE in a timely manner. R. 48a-50a. In particular, Claimant contended that section 511.2(1) requires the workers' compensation insurer to request an IRE within 60 days after a claimant has been receiving total disability benefits for a period of 104 weeks. Claimant asserted that in the instant case, Employer filed its IRE request before the expiration of Claimant's 104 weeks of total disability benefits had expired. Therefore, Claimant contended that Employer's IRE request was invalid.

On April 6, 2000, following a hearing on Claimant's Review Petition, the WCJ concluded that because Employer filed its IRE request prior to the expiration of the 104-week period, the IRE request was untimely. R. 101a-105a. The WCJ found that Claimant's 104 weeks of total disability benefits expired on July 23, 1999. Since the IRE was requested by the Employer on May 20, 1999, before the expiration of Claimant's receipt of 104 weeks of total disability benefits, the WCJ concluded that the request for the IRE was premature and therefore that the IRE itself was invalid. Employer appealed to the WCAB.

On April 18, 2000, Employer requested the Bureau to appoint a physician to have a second IRE conducted on Claimant. R. 58a. The Bureau denied Employer's request. Employer then filed a Modification Petition asserting that the Bureau improperly denied its request to have a second IRE conducted. R. 58a. On September 18, 2000, the WCJ granted Employer's Modification Petition and ordered the Bureau to appoint a physician to conduct a second IRE. Claimant appealed to the WCAB asserting that since Employer's initial IRE had been untimely, Employer was precluded from requesting a second IRE.

On August 23, 2000, Employer filed a Petition for Physical Examination pursuant to Section 314 of the Act, 77 P.S. § 651, asserting that it had requested that Claimant submit to a second physical examination for purposes of obtaining an IRE, and Claimant had failed to comply. On October 3, 2000, the WCJ ordered Claimant to attend the physical

examination. Claimant appealed to the Workers' Compensation Appeal Board (WCAB) asserting, inter alia, that the he was not required to attend the second physical examination because a decision on the timeliness of the initial IRE request was still pending on appeal. R. 59a.

On November 9, 2000, Employer filed a Suspension Petition requesting a suspension of Claimant's benefits since Claimant had failed to comply with the WCJ's order requiring Claimant to attend the second physical examination and IRE. The WCJ dismissed Employer's petition on grounds that the three prior petitions pending on appeal before the WCAB divested him of jurisdiction. Employer filed an appeal of that dismissal.

On June 13, 2002, the WCAB addressed the appeals from all four petitions. The WCAB concluded that because Claimant had already submitted to the initial IRE, Claimant had waived any challenge as to the timeliness of the IRE request. Accordingly, the WCAB reversed the decision of the WCJ that the initial IRE by Dr. Van Do was invalid.

The WCAB then addressed the WCJ's grant of Employer's Modification Petition and order requiring the appointment of a physician to conduct a second IRE. The WCAB concluded that because Claimant had submitted to the initial IRE thereby waiving any claim as to its untimeliness, the initial IRE was valid and the dispute concerning the appointment of a physician to conduct a second IRE was moot. Accordingly, the WCAB vacated the WCJ's order granting Employer's Modification Petition, and dismissed Claimant's appeal. On the same grounds that Claimant had already attended the initial IRE, the WCAB vacated the order of the WCJ requiring Claimant to submit to the second medical examination, dismissing Claimant's appeal as moot. Based on its resolutions of the three prior petitions on grounds of waiver and mootness, the WCAB concluded that Employer's Suspension Petition had accordingly been rendered moot and dismissed Employer's appeal. R. 60a.

The Commonwealth Court determined that the WCAB erred in concluding that Claimant waived his challenge to timeliness by attending the IRE. The court reasoned that Claimant was only aggrieved after he attended the IRE, when Employer sought to reduce his benefits. Therefore, Claimant did not waive the issue of timeliness by waiting until he obtained the results of the IRE to object to its timeliness. However, the Commonwealth Court reasoned that the Workers' Compensation Act did not preclude an employer from filing its IRE request prior to the expiration of the 104 week period. The court determined that Claimant was not prejudiced by the timing of Employer's IRE request, particularly in light of the fact that the actual medical examination did not occur until after 104 weeks. Furthermore, the Court reasoned that following the IRE, Claimant could have filed an appeal directly contesting the change of his disability benefits, and therefore Claimant was not without an adequate remedy. Accordingly, the court affirmed the decision of WCAB. The Commonwealth Court did not address any of the issues surrounding Employer's second IRE request.

On April 19, 2006, this Court granted Claimant's Petition for Allowance of Appeal and vacated and reversed the order of the Commonwealth Court based on the decision in Gardner v. WCAB (Genesis Health Ventures), 585 Pa. 366, 888 A.2d 758 (2005).[3] Thereafter, Employer filed an Application for Reconsideration and an Application for Supersedeas, both of which we granted. The instant opinion is written to address the issues raised in the Application for Reconsideration.

In its Application for Reconsideration, Employer contends that the Commonwealth Court was correct in determining that Employer's initial IRE request was not made in an untimely manner. Employer asserts that this Court in Gardner established only that once a claimant has received total disability payments for 104 weeks, an insurer must request an

[3] Dowhower v. WCAB (Capco Contracting), 587 Pa. 132, 897 A.2d 1164 (2006).

IRE no later than 60 days after the expiration of the 104 weeks. However, Employer asserts that Gardner does not preclude an insurer from requesting an IRE before the expiration of 104 weeks of total disability, and therefore Gardner is inapplicable herein. Furthermore, Employer asserts that in the instant case the actual medical examination was conducted by Dr. Van Do after the expiration of the 104 weeks, therefore the medical examination itself and its associated subsequent impairment rating were timely.

The Workers' Compensation Act reads, in pertinent part, as follows:

> When an employe has received total disability compensation pursuant to clause (a) for a period of one hundred four weeks, unless otherwise agreed to, the employe shall be required to submit to a medical examination which shall be requested by the insurer within sixty days upon the expiration of the one hundred four weeks to determine the degree of impairment due to the compensable injury, if any.

77 P.S. § 511.2(1). Following the medical examination, if the claimant receives an impairment rating of equal to or greater than 50 percent, the claimant is presumed to be totally disabled, and will continue to receive total disability benefits. However, where the claimant receives an impairment rating of less than 50 percent, the claimant's benefits are reduced automatically to partial disability benefits, upon 60 days notice. 77 P.S. § 511.2(2); Gardner, 585 Pa. at 373, 888 A.2d at 762.

In Gardner, we determined that Section 511.2(1) imposes mandatory and not directory or permissive obligations on an insurer who is seeking to obtain the automatic, self-executing reduction of a claimant's benefits. Therefore, where an employer seeks to obtain an automatic reduction of a claimant's benefits from total to partial, the employer's insurer must, during the 60-day period subsequent to the expiration of the employee's receipt of 104 weeks of total disability benefits, request the employee's attendance at an IRE.

Because the language of section 511.2(1) is mandatory, an insurer may only request an IRE once a claimant has come into possession of 104 weeks of total disability benefits. In the instant case, Employer's request that Claimant submit to an IRE was made before the expiration of the 104 week period. Employer's request in the instant case was therefore premature. Accordingly, we vacate the order of the Commonwealth Court and remand this case for further proceedings as explained herein.

Employer argues that even if the time limits of section 511.2(1) are mandatory, Claimant waived any objections to the timeliness of Employer's IRE request by attending the IRE. Additionally, Employer asserts that while the IRE request was made before the expiration of the 104 week period, the medical examination was conducted after the 104 week period, and therefore Employer substantially complied with the requirements of section 511.2(1). As we indicated in Gardner, section 511.2(1) imposes a mandatory obligation on the insurer to request an IRE within the time limits specified. "A mandatory provision is one the failure to follow which renders the proceeding to which it relates illegal and void." In re Nomination Papers of American Labor Party, 352 Pa. 576, 579, 44 A.2d 48, 50 (1945); Mullen v. Bd. of Sch. Dirs of DuBois Area Sch. Dist., 436 Pa. 211, 218, 259 A.2d 877, 881(1969); Pennsylvania State Police, Bureau of Liquor Control Enforcement v. General Davis, Inc., 537 Pa. 319, 323, 643 A.2d 670, 672 (1994). Where statutory provisions are mandatory, we have held as a general rule that they cannot be waived, and substantial compliance is not sufficient. In re Nomination Papers of American Labor Party, 352 Pa. at 581, 44 A.2d at 50; Commonwealth v. Lukens Steel Co., 402 Pa. 304, 308, 167 A.2d 142, 144 (1961). Accordingly, in the instant case, because the IRE request did not comply with the requirements of section 511.2(1), the IRE itself is void.

Employer next asserts in its Application for Reconsideration that this Court's order reversing the Commonwealth Court's order allows important issues to escape review. Specifically, Employer contends that neither the WCAB nor the Commonwealth Court

addressed the validity of Employer's request to have Claimant submit to a second IRE. Employer contends that even though its initial IRE request was untimely and invalid, it had every right to request that Claimant attend the second IRE. Since the WCJ ordered Claimant to attend the second IRE, and Claimant failed to do so, Employer contends that Claimant's benefits should have been suspended.

Employer argues that the subject of the second IRE is particularly relevant in light of this Court's decision in Gardner. Employer argues that in Gardner, this Court held that the failure to request an IRE within 60 days after a claimant has received 104 weeks of total disability benefits does not preclude the insurer from requesting than the employee submit to a subsequent IRE pursuant to 77 P.S. § 511.2(6).[4]

In Gardner, we noted that an insurer's failure to request that an employee submit to an IRE within the 60 days following the expiration of 104 weeks of total disability does not preclude the insurer from requesting that an employee submit to an IRE at a later time. We held in Gardner that section 511.2(6) permits an insurer to request that the claimant submit to an IRE outside of the section 511.2(1) requirements. However, pursuant to section 511.2(5), such an IRE will not generate the self-executing, automatic reduction of a claimant's benefits permitted by section 511.2(2). Rather, a reduction of compensation to partial disability after the expiration of the section 511.2(1) time limits requires an

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[4] (6) Upon request of the insurer, the employe shall submit to an independent medical examination in accordance with the provisions of section 314 to determine the status of impairment: Provided, however, that for purposes of this clause, the employe shall not be required to submit to more than two independent medical examinations under this clause during a twelve-month period.

77 P.S. § 511.2.

adjudication or agreement before benefits may be modified. 77 P.S. § 512(5)[5]; Gardner, 585 Pa. at 379, 888 A.2d at 766.

In the instant case, Employer requested Claimant's attendance at the second IRE after the sixty days following the 104 week period had expired. The WCJ subsequently ordered Claimant to attend the second IRE, and Claimant failed to comply. Thereafter, Employer sought suspension of Claimant's benefits for Claimant's failure to attend the IRE. Because the WCAB found that Employer's initial IRE was valid, the WCAB declined to address the validity of the second IRE request. Nor did the Commonwealth Court address the issues concerning the validity of the second IRE as it concluded that the initial IRE was timely. Accordingly, in light of our holding herein that Employer's initial IRE was untimely rendering the initial IRE void, we remand to the Commonwealth Court for consideration of the issues surrounding Employer's second and subsequent IRE requests. The grant of Employer's Application for Supersedeas remains in effect pending the resolution of the remaining issues on appeal.

Former Justice Newman did not participate in the consideration or decision of this case.

Mr. Chief Justice Cappy and Messrs. Justice Saylor and Baer join the opinion.

Mr. Justice Castille files a dissenting opinion.

Mr. Justice Eakin files a dissenting opinion.

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[5] (5) Total disability shall continue until it is adjudicated or agreed under clause (b) that total disability has ceased or the employe's condition improves to an impairment rating that is less than fifty per centum of the degree of impairment defined under the most recent edition of the American Medical Association "Guides to the Evaluation of Permanent Impairment."

77 P.S. § 511.2.