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

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
v.	:	the Commonwealth Court filed on May 13,
	:	2003 at 1667 C.D. 2002.
	:	
WORKERS' COMPENSATION APPEAL BOARD (CAPCO CONTRACTING),	:	826 A.2d 28 (Pa. Cmwlth. 2003)
	:	
	:	ARGUED: December 6, 2006
Appellee	:	

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: April 17, 2007**

Because appellant Paul Dowhower ("Claimant") was not prejudiced by the timing of appellee Capco Contracting's ("Employer") request that he submit to an Impairment Rating Evaluation ("IRE"), I respectfully dissent.

I joined this Court's holding construing Section 306(a.2)(1) of the Workers' Compensation Act, 77 P.S. § 511.2(1), in Gardner v. Workers' Compensation Board (Genesis Health Ventures), 888 A.2d 758 (Pa. 2005), that once a claimant receives 104 weeks of total disability benefits, an employer has sixty days from that date to request an

IRE for the purposes of acquiring automatic relief pursuant to 77 P.S. § 511.2(2).[1] The Employer's request in this case does not offend the principles we expressed in Gardner.

Section 511.2(1) states in relevant part:

> 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) (footnote omitted). In Gardner, the employer attempted to obtain an automatic reduction in the claimant's benefits by submitting an IRE request over two and a half years beyond the date that the claimant had received total disability benefits for the statutory period of 104 weeks. This Court engaged in statutory interpretation of Section 511.2(1) to determine the precise obligations the section placed on employers seeking an IRE. We found that the language in Section 511.2(1) created a mandatory requirement that an employer seeking an automatic reduction in benefits request an IRE within sixty days from the date a claimant had received total disability benefits for 104 weeks, citing the General Assembly's repeated use of the word "shall." Gardner, 888 A.2d 765-66. This Court noted that, if Section 511.2(1) were deemed "merely directory" and did not impose an obligation on both the employer to request an IRE and the claimant to attend, a claimant could decline to attend the IRE and thus "frustrate the cost-containment objectives of Section 511.2." Id. at 765. Furthermore, the Gardner Court observed that while other

[1] In accordance with 77 P.S. § 511.2(2), an IRE indicating a change in disability status, enables an employer to obtain an automatic reduction in benefit payments within sixty days notice of the modification. An employer may seek modification of benefits at other times, see 77 P.S. § 511.2(6), by requesting that a claimant submit to an independent medical evaluation, but modification as a result of that evaluation will not occur in the absence of an adjudication or agreement of the parties. 77 P.S. § 511.2(5).

sections of the Act[2] permitted an employer to request an evaluation of a claimant's condition beyond the statutory time-frame in Section 511.2(1), relief in such instances could only come through an adjudication if it were determined in an evaluation that claimant's condition had improved. Id. at 766.

An early IRE request (as here) does not pose the same issue as the belated request at issue in Gardner. Just as principles of statutory construction guided us in Gardner, we are obliged to utilize those principles in this matter. Section 1922(1) of the Statutory Construction Act sets forth a presumption that the General Assembly did not intend a construction of a statute that is "absurd, impossible of execution or unreasonable." 1 Pa.C.S. § 1922(1). In my mind, it is absurd to rule against an employer based upon a premature IRE request, and it is particularly absurd to so hold under the particular circumstances in the case *sub judice*. An early request for an IRE does not prejudice a claimant in the same way that a belated request does, so long as the IRE is conducted after the 104-week statutory period, because Section 511.2(1) places claimants on notice as to when they might expect an evaluation and subsequent modification of benefits absent a hearing. Indeed, the Claimant is not particularly prejudiced at all. Claimant could not have been surprised or prejudiced by Employer's request, as it was made approximately two months prior to the ending date that the WCJ determined he had received total disability benefits for 104 weeks, and the IRE was scheduled and took place over a month following Claimant's receipt of benefits for 104 weeks.

Moreover, as this very case illustrates, it is particularly absurd to mindlessly punish an employer because there was a dispute respecting the proper calculation of the 104-week period. In this case, Employer requested an IRE based on credible evidence that Claimant had received benefits for 104 weeks. However, the parties disputed from the start

[2] See 77 P.S. § 511.2(6).

of litigation the beginning date on which Claimant had received benefits with respect to the statutory period. The Workers' Compensation Judge ("WCJ") noted that Claimant had begun receiving total disability benefits starting on April 18, 1997. Despite Employer's argument that the 104-week period from April 18, 1997 ended on April 14, 1999, Claimant's contention that the correct ending date was July 23, 1999 prevailed. The WCJ's reasons for finding Claimant's calculation more persuasive than Employer's calculation are not apparent, but it is obvious that Employer's calculation was fair and not an attempt to circumvent the plain language of Section 511.2(1). In a circumstance like this, it is indeed absurd to invalidate Employer's technically valid IRE request, particularly based on unexplained findings from the WCJ. I cannot see how the purpose of Section 511.2(1) is offended, or the parties harmed, where Employer, according to the WCJ's finding, requested an IRE just prior to the date that Claimant had received total disability benefits for 104 weeks, and the IRE occurred after Claimant had received benefits for the statutory period.

Although this Court was concerned in Gardner that the parties might view the requirements of Section 511.2(1) as optional, our ruling made it clear that an employer must make an explicit request for an IRE before the expiration of the statutory period in Section 511.2(1) and the claimant must attend the IRE. Even assuming that the WCJ's finding with respect to the date that Claimant had received total disability benefits for 104 weeks was correct, allowing an Employer to receive the benefit of automatic statutory relief under the circumstances presented here does not offend this essential lesson. Based on the foregoing reasons, I would find that Employer submitted an IRE request in accordance with the statutory time-frame established in Section 511.2(1). I therefore respectfully dissent.