

Employer. Employer acknowledged the injury, in a subsequent Notice of Compensation Payable, as a right mid-foot fracture and calcaneous fracture. Claimant began receiving total disability benefits under the Act.

On April 4, 2002, Employer filed a Request for Designation of a Physician to Perform an Impairment Rating Evaluation (IRE), and an IRE was subsequently performed upon Claimant on November 8, 2002, by Michael D. Wolk, M.D. Dr. Wolk thereafter issued a determination that Claimant's impairment rating was 28%.

On February 1, 2006, Employer filed the Modification Petition at issue seeking to modify Claimant's benefits status² from total disability to partial disability, based in relevant part upon Dr. Wolk's IRE rating. Hearings on Employer's Modification Petition before the WCJ ensued, at which both parties appeared, were represented by counsel, and entered evidence.

Noting Claimant's 28% impairment rating, the WCJ applied Gardner v. Workers' Compensation Appeal Board (Genesis Health Ventures), 585 Pa. 366, 888 A.2d 758 (2005). In so doing, the WCJ emphasized that since Employer's IRE request was not made until after the expiration of the 60-day period following the 104-week total disability period, Employer would have to seek a reduction of Claimant's benefit status through the traditional administrative process, as opposed

² We note that in the transcript of proceedings before the WCJ, Employer clearly stated that it sought only a change in Claimant's status, from total to partial, and did not seek any change in Claimant's actual benefit rate. Original Record (O.R.), Transcript of Proceedings of April 12, 2006, at 6-7. Under Section 306(b)(1) of the Act, a claimant whose disability status is converted to partial becomes subject to a five hundred week cap on potential disability benefits.

(Continued....)

to the automatic self-executing modification provided for in Section 306(a.2) of the Act.³ Given Employer's failure to timely avail itself of the automatic reduction

77 P.S. §512(1).

³ Added by the Act of June 24, 1996, P.L. 350, 77 P.S. §511.2. Section 306(a.2) reads, in relevant part:

Medical examination; impairment rating

(1) 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. 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."

(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.

provided for in Section 306(a.2), and in consideration of Gardner's direction that a traditional administrative process remained the sole avenue for the non-automatic reduction sought, the WCJ concluded that Employer was required to either perform a work availability analysis pursuant to Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.), 516 Pa. 240, 532 A.2d 374 (1987),⁴ or a Labor Market Survey.⁵

The WCJ further concluded that Employer met its burden of proving Claimant's 28% impairment rating, but had not met its burden of proving entitlement to a modification. The WCJ concluded that Employer had failed to show that there was suitable work available to Claimant within his limitations.

⁴ In Kachinski, our Supreme Court set forth the following general procedure governing an employer's entitlement to a modification or suspension:

1. The employer who seeks to modify a claimant's benefits on the basis that he has recovered some or all of his ability must first produce medical evidence of a change in condition.
2. The employer must then produce evidence of a referral (or referrals) to a then open job (or jobs) which fits in the occupational category for which claimant has been given medical clearance.
- 3.) The claimant must then demonstrate that he has in good faith followed through on the job referral(s).
- 4.) If the referral fails to result in a job, then the claimant's benefits should continue.

⁵ Under Section 306(b) of the Act, 77 P.S. §512, an employer may request a modification of benefits based upon earning power. To establish earning power, an employer may (1) offer to a claimant a specific job that is available; or (2) establish earning power through expert opinion evidence of a labor market survey. South Hills Health System v. Workers' Compensation Appeal Board (Kiefer), 806 A.2d 962 (Pa. Cmwlth. 2002). Under a labor market survey, the employer must prove that jobs exist within the claimant's residual capabilities, and must provide evidence of jobs that are actually available. Allied Products and Services v. Workers' Compensation Appeal Board (Click), 823 A.2d 284 (Pa. Cmwlth. 2003).

Accordingly, the WCJ denied and dismissed Employer's Modification Petition, by order dated October 23, 2006.

Employer timely appealed to the Board. The Board also applied Gardner, and that precedent's interpretation of Section 306(a.2). However, addressing the traditional administrative process required by Gardner for a non-self-executing disability change, the Board concluded that Employer's mere filing of its Modification Petition was adequate as a matter of law, and that Kachinski's burden did not apply where, as here, no actual modification of the benefit rate was sought. The Board further concluded that Employer had established that Claimant had a 28% impairment rating, and thusly satisfied its burden on its Modification Petition and was entitled to a change in Claimant's benefits status to partial disability status as of November 8, 2002. Accordingly, the Board reversed the WCJ's order, and granted Employer's Modification Petition. Claimant now petitions for review of the Board's order.

This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of Board procedures, and whether necessary findings of fact are supported by substantial evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

We first must comment on the parties' briefs in this matter. Claimant's brief lists seven Questions Involved. In his subsequent Argument section, however, Claimant utterly fails to provide this Court with any division of his argument into corresponding sections. Pennsylvania Rule of Appellate

Procedure 2119(a) mandates that “[t]he argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part—in distinctive type or in type distinctively displayed—the particular point treated therein, followed by such discussion and citation of authorities as are deemed pertinent.” Thus, Claimant has violated Pa. R.A.P. 2119(a).

Additionally, 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 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,⁶ 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.

⁶ See, e.g., AT&T v. Workers' Compensation Appeal Board (DiNapoli), 816 A.2d 355, (Pa. Cmwlth.), petition for allowance of appeal denied, 574 Pa. 744, 829 A.2d 311 (2003) (issues set forth by party in the Statement of Questions Involved, that were not addressed in the Argument section of brief, are waived).

Notwithstanding the failures of both parties' briefs, the sole issue herein can be summarized as whether the Modification Petition at issue, under Gardner, satisfies the "traditional administrative process" required for a non-self-executing disability status change without application of the mandates of Kachinski and/or a Labor Market Survey.

On this sole dispositive issue, the WCJ cogently stated:

The Employer has argued that the Gardner, supra, [sic] Decision only requires the Employer to file a Modification Petition, where they are beyond the 60 days, in order to obtain a Modification. However, [this WCJ] finds the Employer's contention in this regard to be without merit. Once an employer has shown a change in the Claimant's physical condition, it is their burden of proof to show the availability of employment with the physical limitation imposed upon the Claimant by his work-related injury. The Employer has not met their burden of proof in this regard, and is not entitled to a Modification of benefits. [This WCJ] finds and concludes that the mere filing of a Modification Petition is insufficient, as a matter of law, to warrant a Modification of the Claimant's benefits to partial disability. The Employer must either perform a work availability analysis pursuant to Kachinski [], or a Labor Market Survey.

WCJ Opinion at 4. We agree.

We note that the Supreme Court in Gardner provides no guidance as to what "traditional administrative process" would apply to non-self-executing disability status claims under the Act. Likewise, the phrase "traditional administrative process" has not been applied, either under the Act or by our Courts' precedents, to any particular procedural path. However, a cursory examination of the Supreme Court's reasoning and procedural scheme in Gardner

indicates that the mere filing of a Modification Petition, supported with IRE results, is not the traditional process anticipated.

There can be no dispute that the Supreme Court's analysis in Gardner first recognizes that Section 306(a.2) expressly and unambiguously establishes a clear scheme for a self-executing reduction of a claimant's disability upon receipt of a IRE, and a timely request for that reduction within the stated time frame of Section 306(a.2). Gardner, 585 Pa. at 382, 888 A.2d at 767-768. There is also no dispute that Gardner interprets Section 306(a.2), when read in conjunction with Section 306(b), as permitting that same reduction if sought beyond Section 306(a.2)'s time frame by resort to a traditional administrative process. Id.

We cannot accept Employer's position, echoed by the Board herein, that the traditional administrative process mandated for a non-self-executing status change required merely the filing of a Modification Petition supported by an authenticated IRE rating in the proceeding before a WCJ, and nothing more. First, we note that neither the Board nor Employer can cite to any established precedents in which a modification procedure did not require a Kachinski or Labor Market Survey analysis, as well as the satisfaction of those respective burdens as a matter of law.

Secondly, and most importantly, the traditional administrative process proposed herein by Employer and the Board is, in its essence, a mere technical filing of paperwork with a potential perfunctory appearance before the WCJ, which barely exceeds the self-executing requirements of a timely status reduction request under Section 306(a.2). While such a process may be one simple step beyond self-

executing, it is just as automatic in practical effect as is the self-executing process. Our Supreme Court, in providing guidance on the non-self-executing process anticipated for an untimely status reduction request, stated that under Section 306(a.2) “an insurer may request an employee submit to an IRE beyond the sixty-day window; the consequences of such examination however, **cannot operate to automatically reduce the claimant’s benefits.**” Gardner, 585 Pa. at 382, 888 A.2d at 767 (emphasis added). We will not read the second of the two alternative processes anticipated by the Supreme Court in Gardner to merely require the filing of an extra step of paperwork, with an accompanying appearance before a WCJ for the entry of the IRE results.

As such, we hold that the traditional administrative process anticipated in Gardner, under a Modification Petition such as that at issue *sub judice* under the instant facts, requires Employer to satisfy either the traditional Kachinski work availability analysis and concomitant burden, or the traditional analysis and burden required under a Labor Market Survey approach.

Accordingly, we reverse, and direct the Board to reinstate the WCJ’s order.

JAMES R. KELLEY, Senior Judge

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

AND NOW, this 28th day of April, 2008, the order of the Workers' Compensation Appeal Board dated August 3, 2007, at A06-2563, is reversed. The Workers' Compensation Appeal Board is directed to reinstate the order of the Workers' Compensation Judge in the above-captioned matter.

JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Timothy Diehl,	:	
Petitioner	:	
	:	
v.	:	No. 1507 C.D. 2007
	:	
Workers' Compensation	:	Submitted: November 2, 2007
Appeal Board (IA Construction	:	
and Liberty Mutual Insurance),	:	
Respondents	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

CONCURRING OPINION
BY JUDGE SIMPSON **FILED: April 28, 2008**

I agree with the result reached by the majority. I write separately to note the guidance given by our Supreme Court in Gardner v. Workers' Compensation Appeal Board (Genesis Health Ventures), 585 Pa. 366, 888 A.2d 758 (2005) with regards to a request for impairment rating outside the time frame established by Section 306(a.2) of the Workers' Compensation Act (Act), 77 P.S. §511.2(1).¹

¹ Section 306(a.2) of the Act, Act of June 2, 1915, P.L. 736, added by Section 4 of the Act of June 24, 1996, P.L. 350, provides in pertinent part:

§ 511.2. Medical examination; impairment rating

(1) 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

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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.'

(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.

* * * *

(5) Total disability shall continue until it is adjudicated or agreed under clause (b) [77 P.S. §512] 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.'

(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

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The majority opinion states that the Supreme Court in Gardner provides no guidance as to what “traditional administrative process” would apply to non-self-executing disability status claims under the Act. Maj. Slip Op. at 7-8. On the contrary, our Supreme Court, speaking through then Chief Justice Cappy, states:

This conclusion, however, does not end our task in construing Section 511.2, as the preceding analysis does not address Subsection 6, which also permits an insurer to request a claimant submit to a medical examination geared towards the impairment concept. Unlike Subsection 1, this subsection neither imposes time restrictions upon an insurer’s ability to make the request, nor does it provide for an automatic reduction of benefits based upon the impairment rating. Rather, a reduction of compensation to partial disability when the examination occurs under Subsection 6 is governed by Subsection 5, which requires an adjudication or agreement under 77 P.S. §512 before benefits may be modified, where “total disability or the employee’s condition improves to an impairment rating that is less than fifty per centum.” 77 P.S. §511.2(5).

The General Assembly thus has supplemented the traditional approach for securing a reduction in benefits to partial disability by incorporating the concept of an IRE, providing for a self-executing, automatic modification of benefits where an insurer secures a dispositive impairment rating within a defined time period, under 77 P.S. §511.2(1)-(2), and affording insurers the opportunity to establish an impairment rating

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 (emphasis added) (footnotes omitted).

in other time periods to reduce benefits via the traditional administrative process, under 77 P.S. §511.2(5-6).

Id. at 379-380, 888 A.2d at 766 (emphasis added) (footnotes omitted).

Because the Supreme Court explained the “traditional administrative process” to which it referred, specifically, “an adjudication or agreement under 77 P.S. §512 before benefits may be modified,” I would undertake that analysis. Nevertheless, I would reach the same result as the majority.

ROBERT SIMPSON, Judge