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Pennsylvania Supreme Court Changes Labor Market Survey Rules

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The Pennsylvania Supreme Court recently issued a decision that may significantly change the ability of an employer to modify or suspend Pennsylvania Workers' Compensation benefits based on a Labor Market Survey. In *Phoenixville Hospital v. WCAB (Shoap)*, the court ruled that evidence that a claimant applied for, but was ultimately not hired for, positions identified in the Labor Market Survey is allowable to show the positions are "not available" under Section 306 (b)(2) of the Pennsylvania Workers Compensation Act (the Act). Thus, the claimant's application for the jobs and the *availability* of the positions is now an issue that must be addressed.

Case History

Workers' Compensation Judge

In the underlying case before the Workers Compensation Judge (the WCJ), the employer submitted vocational testimony regarding five jobs that were approved by an independent medical examination (IME) doctor for the claimant. There were two separate Labor Market Surveys done: an initial survey containing three jobs and a second survey containing two jobs.

In defense of the modification, the claimant testified that upon receipt of the initial Labor Market Survey, she immediately contacted and applied for each of the three identified positions. She further testified that she had never been contacted by any of these prospective employers, but also admitted on cross examination that she had never further inquired about the positions after submitting her employment applications. She also testified she applied for the two positions identified in the second survey immediately after receipt of same. She had telephone interviews with both of those employers and testified, without objection, that she was not qualified for one position. A hearsay objection was sustained with regard to her attempts to testify regarding her telephone interview for the other position.

The WCJ credited the testimony of the employer's IME physician that the claimant was capable of performing any of the five jobs. The judge also accepted as credible the testimony of the vocational counselor that the five jobs were compatible with her restrictions and within her geographic area. The claimant's medical expert and vocational expert were both rejected as less than credible. The WCJ believed the claimant's testimony that she had made a genuine effort to secure any one of

the five jobs identified, but not received any offers of employment. The WCJ specifically found that the claimant had established in "good faith" that she followed through on all of the jobs referred by her employer and none of the referrals resulted in an offer of employment. For this reason, the WCJ denied the Modification Petition.

Appeal to Workers' Compensation Appeal Board

On appeal, the Workers Compensation Appeals Board (the WCAB) rejected the employer's argument that the WCJ erred by incorporating the *Kachinski* standard of "good faith" follow-up into the analysis. The WCAB explained that the WCJ did not use the words "good faith" to set forth a required standard, but to merely show that the claimant had made a "genuine effort to secure" the identified positions. Nevertheless the WCAB upheld the WCJ's ruling and, applying the good faith standard for the positions, held the claimant had demonstrated that the jobs were not, in reality, available to her. The WCAB concluded that the jobs did not "exist" within the meaning of 306(b) and the WCJ correctly denied the Modification Petition.

Appeal to the Commonwealth Court

The Commonwealth Court reversed, explaining that the critical question was not whether the claimant applied for and was offered a job, but whether the jobs were actually open and available to anyone having the claimant's physical limitations and other qualifications *at the time* of the Labor Market Survey.

The Supreme Court and Issues Going Forward

The Pennsylvania Supreme Court allowed for the defense of the Modification Petition with evidence of the claimant's efforts to obtain the jobs identified in the LMS. The court found 306 (b) mandates that an employer prove that a job "exists" by showing the positions identified in the Labor Market Survey "remain[ed] open until such time as the claimant is afforded a reasonable opportunity to apply for them." The court specifically stated that, "if the job is already filled, it does not exist." The court *did not*, however, *define the time period that the job must remain open*. The court relied on the phrase "reasonable time," without defining same.

The good news is that the court specifically would not agree that the failure to obtain the jobs after applying is not dispositive of the earning power inquiry. Thus, the mere testimony that the claimant did not get the job after applying is not, without more, going to defeat the Modification Petition. It is, however, relevant to rebut the employer's burden of showing the availability of substantial gainful employment.

Hearsay Issues

The most troubling aspect of the decision is that this defense relies on the testimony from a third party, the employers identified in the Labor Market Survey. The court does not directly address these hearsay issues involved in the underlying case. Several hearsay objections were sustained with regard to the claimant's discussions about telephone interviews presumably regarding the availability of, and the claimant's qualifications for, the jobs at issue. The case was remanded to allow the claimant to develop evidence that she applied for and failed to obtain the positions in the Labor Market Survey.

The court did not offer any real guidance with regard to the inherent hearsay issues involved with the admissibility of statements of the Labor Market Survey employer's personnel. Several factors may provide proof on this issue, including testimony from the employers regarding discussions with the claimant, affidavits from the employers regarding the availability of the positions, the number of people sought to fill them, the dates that the position is open and whether or not the claimant contacted or applied for any of the positions.

How Long Must Employers Show the Job is Open?

Employers must now be sure that the jobs remain open and available "for a reasonable period." A safe reading of "reasonable period" will likely be from the supplying of the Labor Market Survey to the claimant through the filing of the Modification or Suspension Petition. Employers probably need to have the vocational counselor contact each employer identified in the Labor Market Survey just prior to the hearing to determine if the position has been filled. Some claimants will still not apply for the jobs. However, employers should try to determine whether a claimant intends on presenting this defense as early as possible in the litigation.

If the claimant has contacted the employers or applied for the jobs, the claimant will need to be cross-examined on who he or she contacted and whether he or she submitted an application. [Although during litigation, employment counsel would typically cross-examine a claimant on this issue, in this circumstance, a more detailed inquiry may be required, including finding out specifically what documentation the claimant has to support the defense.] Hearsay objections should be preserved for discussions with the employers regarding the availability of the position and the claimant's qualifications for or ability to obtain the position. Although employers do not need to show the claimant obtained the position, employers need to show the claimant could have obtained the position and it remains available.

The "Recycling" of the Same Jobs by Vocational Counselors

Although not directly related to the issue decided, the decision did address a common practice by vocational counselors, which is the consistent usage of the same positions in multiple Labor Market Surveys. The court specifically comments on the "'absurdity' of an employer identifying one "open" job and using it to establish earning power for a number of eligible claimants, when clearly at most only one of these claimants could actually have the opportunity to achieve substantial gainful employment via this one opening." It is generally common practice for vocational counselors to "recycle" the same jobs that are present in the Labor Market Surveys they perform. Claimants' counsel will likely use this case to exploit this practice, arguing that the vocational counselors must keep finding new jobs. Although these arguments have been raised in the past, now that the Pennsylvania Supreme Court has negatively commented on the practice, these arguments will be strengthened. This will require careful testimony from the vocational expert that the job remains open. This may also require the use of testimony explaining that multiple candidates are being sought for multiple positions on an ongoing basis.

With this decision, the burden of proving earning power through a Labor Market Survey just became more difficult. This is especially true if a claimant attempts to apply for the jobs in the Labor Market Survey and presents evidence that the job has been filled or that they do not otherwise qualify for the job.

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