[J-26-2012] [M.O. - McCaffery, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

PHOENIXVILLE HOSPITAL	:	No. 32 EAP 2011
	:	
	:	Appeal from the Order of Commonwealth
v.	:	Court entered on 06/30/2010 at No. 2188
	:	CD 2009 (reargument denied 08/18/2010)
	:	reversing the Order entered on
WORKERS' COMPENSATION APPEAL	:	10/14/2009 by the Workers'
BOARD (SHOAP)	:	Compensation Appeal Board at No. A08-
	:	1746
	:	
APPEAL OF: ANNETTE SHOAP	:	ARGUED: March 7, 2012

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: November 21, 2013**

As I read the majority opinion, it authorizes claimants defending against modification to rebut employers' expert evidence concerning the availability of suitable employment in the marketplace, adduced per Section 306(b)(2), with evidence of claimants' good-faith efforts to obtain work. In my view, however, the statute rather straightforwardly alters the landscape of modification inquiries by shifting the focus from actual availability of a job to the claimant (which was the focus under the Kachinski regime) to the existence of jobs in the marketplace suitable to claimants' vocational skills and medical restrictions. Further, I agree with Employer that the majority's construction of Section 306(b)(2) circles back to the Kachinski regime, undermining the General Assembly's effort – via the Act 57 amendments to the workers' compensation scheme -- to prospectively redirect modification inquiries away from the previously prevailing concern with claimants' follow-through experience with job referrals.

Initially, the majority devotes a considerable portion of its opinion to demonstrating that Section 306(b)(2) requires evidence of "open" jobs, as opposed to jobs "already filled with existing employees." Majority Opinion, slip op. at 18-22. I agree and merely add that no party to this litigation has challenged this proposition. Indeed, Employer expressly endorses the existing Commonwealth Court precedent on the subject. See Brief for Employer at 14 (indicating that "'exists' means the employer has a position available and the employer is hiring for the position" (citing South Hills Health Sys. v. WCAB (Kiefer), 806 A.2d 962, 969-70 (Pa. Cmwlth. 2002)). The dispute which is presented in this appeal concerns the degree to which expert testimony about open jobs in the marketplace may be rebutted with evidence of claimants' anecdotal experiences.

In a scenario such as the present one, in which an employer seeks to modify benefits from compensation for total to partial disability, modification is appropriate where a claimant has regained a degree of "earning power." 77 P.S. §512.[1] Prior to the Act 57 amendments, the Workers' Compensation Act offered little by way of further guidance concerning the substantive requirements for modification based on an asserted changed in earning power. This void left open many questions, including "whether an employer can sustain his burden of showing available work by demonstrating the existence of jobs in the marketplace, as opposed to demonstrating jobs which have actually been made available to the claimant." Kachinski v. WCAB (Vepco Constr. Co.), 516 Pa. 240, 244, 532 A.2d 374, 376 (1987). The critical

[1] See generally Dillon v. WCAB (Greenwich Collieries), 536 Pa. 490, 503, 640 A.2d 386, 392 (1994) ("'[A]n award of benefits for partial disability may be viewed as a 'partial suspension' of benefits: the causal connection has been established, the employer's liability for the injury has not terminated but the claimant's earning power is such that benefits for total disability are not necessary, benefits for partial disability being sufficient.").

determination of Kachinski was that "actual availability" of work was required, id. at 251, 532 A.2d at 379 (emphasis added), and the Court provided further guidance concerning how such actual availability was to be established. See id.

Act 57, however, by its plain terms, materially alters this previous understanding of the key conception of "earning power" via the explicit directives that earning power "shall be determined by the work the employe is capable of performing" and that it "shall be based on expert opinion evidence . . .." 77 P.S. §512(2) (emphasis added). Thus, the Legislature has now specifically directed that earning power is to be assessed according to jobs in the marketplace, not actual availability of a particular job or jobs to a particular claimant.[2] Such understanding is bolstered by the further prescription, in Section 306(b)(2), that the salient expert opinion evidence includes "job listings with agencies of the department, private job placement agencies and advertisements in the usual employment area." Id.

Nevertheless, it is Claimant's position (and that of the majority at least as I read its opinion) that the plain meaning and implication of the above prescriptions of Section 306(b)(2) should not be enforced consistently, since the statute proceeds to indicate that partial disability applies if the employee can engage in other substantial gainful employment which "exists" in the relevant employment area. Id. The Legislature's use of the word "exists," however, is wholly consonant with its emphasis upon jobs in the marketplace. In other words, jobs exist if they are proven to exist through credited expert testimony reflecting a labor market survey. The approach to the word "exists" posited by Claimant and the majority digresses toward the Kachinski requirement of

[2] The exception, of course, is the requirement for an employer to offer a suitable job to the claimant if there is one available with the employer. See 77 P.S. §512(2).

actual availability to specific claimants, thus thwarting the legislative redirection of the modification inquiry.

To the degree the word "exists" fosters any ambiguity in Section 306(b)(2)'s otherwise clear and straightforward focus on the job market, principles of statutory construction also support the conclusion that the Legislature intended a job-market perspective to control, as opposed to one centering on actual availability. Turning first to the occasion for the statute, the mischief to be remedied, the object to be attained, and the contemporaneous legislative history, see 1 Pa.C.S. § 1921(c)(1), (3), (4), (7), I appreciate that the Act, as a whole, is intended to benefit the worker. See, e.g., Hannaberry HVAC v. WCAB (Snyder, Jr.), 575 Pa. 66, 73, 834 A.2d 524, 528 (2003). However, the enactment of Act 57 was precipitated primarily by concerns with the rising cost of workers' compensation insurance and the concomitant loss of business to other states. See, e.g., S. Legis. J., 1996 Reg. Sess. 2034 (June 5, 1996) (statement of Sen. Loeper) ("[I]f you talk to people and ask, what is your number one concern in Pennsylvania in conducting business and keeping business and keeping jobs, I think the answer you will hear is the rates of workers' compensation insurance premium costs."). Indeed, Act 57 was introduced as a method of balancing the interests of injured workers with employers' financial concerns. See, e.g., H. Legis. J., 1996 Reg. Sess. 1602 (June 19, 1996) (statement of Rep. Perzel) ("This legislation is reasonable -- it reflects a blending of concern for Pennsylvania's economic position and our historic commitment to workers who are injured on the job."). Notably, several legislators also mentioned that Act 57 would discourage fraud and malingering while at the same time encourage the recipients of workers' compensation benefits to make efforts to return to the workforce and obtain gainful employment such that they can contribute to their own earnings. See, e.g., S. Legis. J., 1996 Reg. Sess. 2159 (June 19, 1996) (statement of

Sen. Loeper) ("[O]ne of the main, key components that we want to look at in the legislation before us today is to provide the payment of benefits only to legitimate claimants."); id. at 2169 ("The primary goal is to get people back to work, back to work on their job or another job instead of staying on workers' compensation."). Similarly, Act 57 was viewed as a means of staunching the exponential growth of litigation and related costs following Kachinski. See, e.g., S. Legis. J., 1996 Reg. Sess. 2160 (June 19, 1996) (statement of Sen. Loeper) ("I think the goal also . . . is to try to reduce costs associated with litigation and the administration of workers' compensation claims."); see generally David B. Torrey, The Commonwealth Court of Pennsylvania and the Workers' Compensation Act: Background and Jurisprudence, Judge Alexander F. Barbieri, and Selected Precedents, 20 WIDENER L.J. 87, 132 (2010) (stating that Kachinski "gave rise to significant litigation, and in most cases . . . the litigation would be protracted as well" (footnote omitted)).

More specifically, comments made by legislators concerning the job availability provisions of Act 57, including Section 306(b)(2), evidence the intent to relieve employers of the most burdensome requirements of Kachinski, such that employers would no longer be required to convey job referrals to a claimant and that benefits could be modified even if a claimant did not obtain a job offer. See, e.g., H. Legis. J., 1996 Reg. Sess. 1579 (June 19, 1996) (statement of Rep. Belfanti) (explaining that the language concerning job availability "has now been reduced to where a job might be available in a classified ad" and "does not take into account the job being available for the claimant"); id. at 1594 (statement of Rep. Surra) (noting that injured workers may "lose their compensation because there is some job out there, there is some classified ad out there that says there is a job that they can do whether that worker gets hired or not"). This intent is also reflected in the altered language of another portion of Section

306(b), which imposes upon a claimant "an obligation to look for available employment" following receipt of a return-to-work notice. See 77 P.S. § 512(3)(ii). Under prior law, however, no such obligation existed legislatively, and Kachinski stated expressly that a claimant was not subject to this duty. See Kachinski, 516 Pa. at 250, 532 A.2d at 379.

Moreover, examining the consequences of a particular interpretation, see 1 Pa.C.S. § 1921(c)(6), construing the term "exists" as effectively incorporating the Kachinski litmus of individual claimant experience with job openings undermines the core directives of the statute, namely, that the earning power assessment is to be based on work a claimant is "capable of performing" and expert opinion evidence. 77 P.S. § 512(2). It is far more consistent with the overall purport of Act 57 and the language of Section 306(b)(2) to interpret the passage alluding to employment which "exists" as addressing the claimant's vocational and physical capabilities in correlation with the types of jobs found by a workers' compensation judge to exist in the marketplace through an assessment of the required expert opinion evidence. See 77 P.S. § 512(2) ("Disability partial in character shall apply if the employe is able to perform his previous work or can . . . engage in any other kind of substantial gainful employment which exists in the usual employment area . . ." (emphasis added)).

In this regard, I agree with the Commonwealth Court that, based upon the language of Section 306(b)(2) as well as the Legislature's primary focus on cost-containment, "the fact that Claimant applied for the jobs identified by Mr. Kimmich and did not obtain an offer of employment is immaterial" to the determination of a claimant's earning power. Phoenixville Hosp. v. WCAB (Shoap), 2 A.3d 689, 697-98 (Pa. Cmwlth. 2010). Indeed, the Legislature has limited the factors which a workers' compensation judge may take into account in connection with this assessment by focusing the inquiry on a less personalized evaluation of alternative employment, and, notably, this Court

has stated that calculations of earning power based upon a labor market survey are intended to generate only a "fairly accurate approximation" of "a claimant's 'true' earning power." Riddle v. WCAB (Allegheny City Elec., Inc.), 603 Pa. 74, 83, 981 A.2d 1288, 1293 (2009).

The majority finds that individual experience of claimants and actual availability of particular work to them should be considered, in part, since a claimant must be permitted to adduce evidence that positions identified by an employer's expert already have been filled, or that the requirements of such positions are not actually consistent with the claimant's vocational capabilities and medical limitations. See Majority Opinion, slip op. at 22-24. I agree with the majority that either or both of these circumstances may be relevant; my difference is that I do not believe that the appropriate way to establish them is through a claimant's testimony concerning her actual experience in pursuing identified jobs. Again, this Kachinski-like convention simply is too greatly in tension with Act 57's job-market focus. Moreover, unless claimants are to be permitted to routinely introduce hearsay testimony concerning what they may have learned from prospective employers, they must in any event produce more traditionally admissible evidence concerning the unavailability of a particular job in the marketplace and/or the inconsistency of its requirements with the claimant's vocational capabilities and medical restrictions. See generally Foley, Michael J., Funded Employment and Vocational Rehabilitation Shams Affecting Injured Workers, 2 Ann. 2000 ATLA-CLE 2845 (2000) (discussing the production of evidence related to the fictitious nature of the jobs delineated in a labor market survey or the unsuitableness of such positions in light of the claimant's residual impairment and vocational skills).[3] In my opinion, however, in

[3] I do not suggest that the gathering of such evidence will be simple; I simply observe that we are not the policymakers here, but rather, are charged with effectuating the will of the General Assembly. It is noteworthy that claimants may also discredit the opinions (continued…)

Act 57's wake, testimony concerning the results of Kachinski-like follow-through attempts does not serve as an appropriate method of proof.

In the broader frame, the majority appears to take no issue with the understanding that Section 306(b), on its terms, reflects a job-market litmus for determining earnings power. According to the essential purport of the majority opinion, however, such framework effectively binds only employers, not claimants. See Majority Opinion, slip op. at 22 (sanctioning the admission into evidence of the "claimant's actual experience with the employers identified in the employer's labor market surveys"). Thus, the majority posits, claimants may treat the labor-market evidence as, essentially, a series of Kachinski-like job referrals. See id. at 21 (stating that the employer's expert evidence serves "as a mechanism for providing the claimant with notice of the existence of these jobs, which thus provides a serious opportunity to secure employment"). The majority believes these then may tested, as under the Kachinski regime, by claimants undertaking job interviews and adducing evidence of the actual unavailability of jobs to them. Via reductio ad absurdum logic, the majority posits, the alternative is to accept that an employer could identify a single open job to establish the earnings power of a multitude of claimants, although only one claimant could actually obtain this employment. See Majority Opinion, slip op. at 23.

From my point of view, the bulk of the majority's rationale is simply too disharmonious with the legislative focus upon the job market manifested in Section 306(b)(2) to control. Further, the nature of a labor market survey is broader than the pinpointing of a single job in the marketplace, and no workers' compensation judge

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(…continued)
of an employers' vocational experts by vigorous cross-examination or the presentation of other testimony concerning the underlying factual basis of the expert's opinion, so long as such testimony is within the fair scope of Section 306(b)(2).

would credit, nor would the WCAB or the appellate courts sustain, a modification attempt in the unreasonable scenario envisioned by the majority.

To the degree the majority may regard my position as depriving claimants of the opportunity to demonstrate facts in opposition to modification efforts, it is elemental that evidence of facts must be relevant to be admissible. See Pa.R.E. 402. Given that Section 306(b)(2) redirects the focus of the salient aspect of the earnings power assessment to the job market, evidence of the unavailability of particular jobs to a particular claimant (based on whatever myriad range of considerations which individual, discrete employers may deem pertinent to their hiring decisions) is simply no longer relevant under the statutory scheme.[4]

Finally, I agree with the Commonwealth Court that no remand is necessary in this case. The WCJ credited the testimony of Employer's medical and vocational experts and discredited the contrary testimony of Claimant's experts. See Shoap v. Phoenixville Hosp., No. 2556743, slip op. at 3-4, ¶¶18-19, A-5-6 (Pa. Dept. Labor & Indus., Aug. 29, 2008). Indeed, the WCJ specifically concluded that Employer established that the jobs listed in the labor market survey "were compatible with Claimant's residual functional capacity for work and vocationally suitable for Claimant." Id. at 4, ¶2, A-6. Thus,

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[4] The exception is evidence that the requirements of particular jobs which may have been identified by an employer's experts exceed the claimant's vocational capabilities and medical limitations, as discussed in the text above.

Again, this case involves purely statutory interpretation, and my position rests largely on a plain-meaning interpretation of Section 306(b)(2). Accordingly, I do not address whether Section 306(b)(2) comports with constitutional norms. I observe only that, to the degree the Legislature has taken and/or takes progressively greater measures curtailing benefits in furtherance of the cost-containment objective, I have no doubt that constitutional challenges will ensue.

Employer carried its burden to demonstrate that Claimant possessed earning power as defined in Section 306(b)(2) such that her benefits should be modified.

Mr. Justice Eakin joins this dissenting opinion.