**[J-129-99]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**WESTERN DISTRICT**

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| CHARLES STEVENS | : | No. 46 W.D. Appeal Dkt. 1999 |
| | : | |
| v. | : | Appeal from the Order of the |
| | : | Commonwealth Court entered on |
| | : | 11/23/98 at No. 1035 C.D. 98 reversing |
| WORKERS' COMPENSATION APPEAL | : | the Order of the Workers' Compensation |
| BOARD (CONSOLIDATION COAL | : | Appeal Board entered on 3/11/98 at No. |
| COMPANY) | : | A96-2186. |
| | : | |
| APPEAL OF: CONSOLIDATION COAL | : | 720 A.2d 1083 (Pa. Cmwlth. 1998) |
| COMPANY | : | |
| | : | Argued: September 15, 1999 |

## CONCURRING OPINION

**MR. JUSTICE SAYLOR** **DECIDED: OCTOBER 24, 2000**

The majority reaffirms the standard for reinstatement of benefits announced in Pieper v. Ametek-Thermox Instruments Div., 526 Pa. 25, 584 A.2d 301 (1990), requiring a workers' compensation claimant to establish: (1) that his earning power is once again adversely affected by his disability through no fault of his own; and (2) that the disability giving rise to his original claim continues. Id. at 34, 584 A.2d at 305. According to the majority, this formulation allocates the burden of proof concerning a claimant's good faith in connection with the determination of job availability to the claimant in the first instance in the reinstatement context. Notably, however, such burden is allocated to the employer in connection with its burden of demonstrating job availability in all other contexts, including claim, modification and suspension proceedings. See generally Vista Int'l Hotel v. WCAB (Daniels), 560 Pa. 12, 22 & n.7, 27-28 & n.11, 742 A.2d 649, 654 & n.7, 657-58 & n.11 (2000). The reasoning underlying the decision to shift the

burden to the claimant in the reinstatement context is not well developed in our decisional law and adds a layer of complexity to the workers' compensation scheme that is, in my view, unnecessary. Instead, I would find it preferable to maintain the allocation of the initial burden of proof connected with job availability to the employer in the reinstatement context, as this would establish a clear, consistent rule for workers' compensation jurisprudence. See generally Vista, 560 Pa. at 28 n.11, 742 A.2d at 658 n.11 (stating that "where the claimant has established that a work-related injury is the cause of a loss in earnings capacity (or remains so) during the time period in issue, the employer will generally be charged with the initial burden of establishing job availability for that time period"). Such allocation is fundamentally fair, since "'it is easier for the [employer] to prove [job availability] than for the claimant to prove [non-availability],'" Vista, 560 Pa. at 22 n.7, 742 A.2d at 654 n.7 (quoting Petrone v. Moffat Coal Co., 427 Pa. 5, 12, 233 A.2d 891, 895 (1967)), and once an employer satisfies this initial burden, the burden shifts in all contexts to the claimant to demonstrate his good faith efforts in connection with job performance or referrals. See generally Kachinski v. WCAB (Vepco Constr. Co.), 516 Pa. 240, 252, 532 A.2d 374, 380 (1987). Further, this allocation is consistent with the General Assembly's provision for reinstatement of suspended benefits "at any time during the period for which compensation for partial disability is payable, unless it be shown that the loss in earnings does not result from the disability due to injury." 77 P.S. §772.[1] While I recognize that the Court in Pieper added the "no fault of his own" requirement to the claimant's burden in seeking reinstatement of suspended benefits, I would read such requirement more narrowly than the majority, as reflecting only the enactments and related decisions implicating policy concerns which

[1] The phrase "unless it can be shown" logically should implicate the employer's burden, since claimants would have no reason to show that their loss in earnings is unrelated to the work injury.

militate against the award (or reinstatement) of benefits, such as those identified in Section 301(a) of the Act, 77 P.S. §431 (precluding compensation for intentionally self-inflicted injuries, as well as injuries caused by a violation of law on the part of the claimant).

In all other respects, I join the majority opinion.

Mr. Justice Cappy and Mr. Justice Castille join this concurring opinion.