

**[J-8-2000]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**MIDDLE DISTRICT**

BETHLEHEM STEEL CORPORATION,	:	No. 217 M.D. Appeal Docket 1999
	:	
Appellant	:	Appeal from the Order of the
	:	Commonwealth Court entered 1/27/99 at
	:	1368 C.D. 1998, affirming the order of the
v.	:	Workers' Compensation Appeal Board
	:	entered 4/17/98 at No. A96-4045
	:	
WORKERS' COMPENSATION APPEAL	:	
BOARD (LAUBACH),	:	
	:	ARGUED: January 31, 2000
Appellee	:	
	:	
	:	
	:	
	:	

**CONCURRING OPINION**

**MR. JUSTICE NIGRO**

**DECIDED: October 26, 2000**

I concur in the majority opinion that the Claimant (Laubach) is entitled to reinstatement of total disability benefits when the light-duty job he was capable of performing, which had reduced his benefits to partial, was eliminated for economic reasons. I write separately because I believe that this case can be more expediently disposed of under the four-prong analysis articulated in Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.), 516 Pa. 240, 532 A.2d 374 (1987).

In Kachinski, this Court wrote:

[T]he following procedure [governs] the return to work of injured employees:

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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 the claimant has been given medical clearance, e.g., light work, sedentary work, etc.
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 claimant's benefits should continue.

Id. at 252, 532 A.2d at 374.

The Kachinski prongs are essentially successive steps in a process. Here, with respect to Laubach's initial return to work in the modified-duty position, it is undisputed that Bethlehem Steel satisfied the first two Kachinski steps. It is equally undisputed that Laubach satisfied the third step as he applied for, was hired for, and continued to work in the modified-duty job until the position was eliminated and he was laid off after less than three years on the job. The layoff was due to no fault of Laubach and he can therefore be said to have continually demonstrated the "good faith" effort required by step three. Because step two requires that Bethlehem Steel produce a job that is both actually available and tailored to the claimant's abilities, the elimination of Laubach's modified-duty position, therefore, puts Bethlehem Steel back at step two. It is then Bethlehem Steel's burden to make new job referrals to Laubach in order to shift the burden back to Laubach to make a good faith effort to follow up on the referral(s). Then, pursuant to step four, if the referral(s) does not result in a new job for Laubach, he would continue to receive total disability benefits.

Kachinski is clear that an employer seeking to modify an injured employee's benefits must show two things: change in medical condition and actual availability of a suitable job.

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Thus, absent a revisit to step one, and a showing of further recovery from the work-related injury, Bethlehem Steel is married to the medical determination made at the initial modification hearing that there has been some medical improvement in Laubach's work-related injury. Therefore, Laubach would not be required to return to pre-injury duties. Rather, he would be cleared only for modified duty consistent with his residual incapacity. It is then, pursuant to step two of Kachinski, incumbent on Bethlehem Steel to show that actual suitable work is available consistent with Laubach's medical condition. If there is no such showing, then Laubach is entitled to total disability benefits under Kachinski.

The majority's analysis is well-reasoned and accurate and essentially parallels my suggested alternative. Nonetheless, as there are likely to be endless variations on the theme of burden-shifting in the context of benefit modification fact patterns, I believe that employers and employees alike would do well to look first to Kachinski which provides an accessible roadmap for these types of cases.