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Pennsylvania Workers' Compensation Bulletin

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Kachinski Revived

In Phoenixville Hospital v. Workers' Compensation Appeal Board (Shoap), 81 A.3d 830 (Pa. 2013), the Supreme Court was asked to review whether the Commonwealth Court erred in its interpretation of §306(b) of the Act when it found that substantial gainful employment existed for the claimant based upon two labor market surveys. The employer's vocational expert had identified five jobs within the claimant's physical restrictions that were open and available including one position that was available on May 23, 2007, two that were available on June 18, 2007, a fourth position available on July 9, 2007, and a fifth position available on July 31, 2007. The claimant testified that she received the first labor market survey in July 2007 and applied for the first three positions on July 30, 2007. She was never contacted by any of these prospective employers. The claimant received the second labor market survey in August 2007 and immediately applied for the positions identified but, again, was not offered a position.

In response to the employer's modification petition, the Workers' Compensation Judge found the employer's witnesses credible but also found credible the claimant's testimony that she followed through on all of the job referrals in good faith, but that none of them resulted in an offer of employment. Accordingly the WCJ found that the employer failed to establish its right to a modification of benefits.

The employer appealed to the Workers' Compensation Appeal Board, arguing that by concluding that the claimant had made a good faith but unsuccessful effort to secure one of the five jobs listed in the labor market survey, the WCJ had improperly incorporated one of the Kachinski requirements, which employer argued were no longer relevant in light of Act 57. The WCAB rejected the employer's argument, stating that a fair reading of the WCJ's decision showed that the WCJ used the words "good faith" to show that the claimant made a genuine effort to secure the positions located by the employer's expert. Under §306(b), in order for jobs to "exist" they must exist in reality and be open and available to a claimant. The claimant produced evidence that the jobs were not in actuality available to her and thus did not "exist."

The Commonwealth Court reversed, finding that it was of no relevance that the WCJ had concluded that the claimant had followed through on the job listings in good faith. Because the employer had established that the jobs identified in the labor market survey were open and available at the time the vocational expert conducted his earning power assessment, the Court held that the employer had satisfied its burden of proof under §306(b) and was entitled to a modification of benefits.

On claimant's appeal to the Supreme Court, the court recognized that §306(b) does not require that the claimant be offered a job in order to establish earning power; however, the court noted that other aspects of the employer's burden under §306(b) were ambiguous. The Court focused its analysis on the phrase "*substantial gainful employment that exists*." The Court found that the most reasonable reading of this phrase is that the employer must prove the existence

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COMMONWEALTH COURT CASE REVIEWS

Commonwealth of PA/Department of Transportation v. Workers' Compensation Appeal Board (Noll), No. 819 C.D. 2013, Filed November 6, 2013.

(Recoupment of Overpayment - An employer can recoup overpayments made to a claimant based upon a mistaken interpretation of a WCJ's order so as to prevent unjust enrichment of the claimant.)

Claimant suffered a work injury in June 1995. The injury was accepted via an agreement which provided for payment of five weeks of benefits followed by a suspension. Claimant's weekly compensation rate was $509.00. After claimant's return to work, he held various positions. Initially he returned to his pre-injury job with restrictions, but when he last worked for the employer he was at a lower paying job. On June 3, 2000, employer was no longer able to accommodate claimant and his benefits were reinstated. However, the benefits were reinstated at a lower rate ($433.50). It was employer's position that the lower rate was appropriate as claimant was working at a lower rate of pay when his disability recurred.

Claimant filed a review petition correctly contending that his benefits should be reinstated to $509.00 per week. The Workers' Compensation Judge ordered that the benefits be reinstated at the 1995 injury rate and, finding employer's contest unreasonable, ordered employer to pay claimant's attorney fees in addition to the award *for all past due benefits.* The WCJ also approved a 20% fee to be deducted from claimant's future benefits.

Employer filed termination and suspension petitions in 2004, which were both denied. In that decision, the WCJ ordered employer to pay "reasonable counsel fees and litigation costs." The WCJ did not make a finding that the employer's contest was unreasonable.

Employer then filed a modification petition based upon job referrals. That petition was also denied. In that round of litigation, the WCJ rejected claimant's contention that employer's contest was unreasonable. Claimant's 20% contingent fee agreement with his attorney was approved.

Employer subsequently realized that it had mistakenly paid claimant's counsel fees *in addition to his benefits* since 2004. Employer filed a review petition requesting recoupment of the overpayment. Employer suggested that the overpayment be recouped from claimant at the rate of $75.00 per week until the entire $30,540.00 it had overpaid was recouped. Claimant argued that the overpayment could not be recouped since it was the result of a unilateral mistake made by employer through no fault of claimant. The WCJ denied the review petition finding that there was no overpayment and further holding that, under Dollar Tree Stores, Inc. v. W.C.A.B. (Reichert), 931 A.2d 813 (Pa. Cmwlth. 2007), only overpayments which resulted from mathematical miscalculations can be recouped. The WCJ also ordered employer to pay claimant's counsel fees on a *quantum meruit* basis for unreasonable contest of the review petition.

On appeal to the Workers' Compensation Appeal Board, the denial of employer's review petition was affirmed, but the WCAB reversed the award of unreasonable contest attorney fees. The WCAB found that although claimant had been overpaid, recoupment was only available where payments are made on a "mistaken belief" that the payments are required, and the employer did not meet that burden of proof in this case.

The parties filed cross appeals. Claimant argued that the WCAB erred when it found that there was an overpayment. Claimant also argued that the WCAB erred in finding employer's contest reasonable. Employer's appeal was based upon its belief that the WCAB erred in finding that recoupment must be denied.

The Commonwealth Court noted that, under §440(b) of the Act, an award of attorney fees charged against the employer must be accompanied by a finding by the WCJ that the employer's contest was unreasonable. The Court also stated that the award of fees must also be based on a *quantum meruit* basis, i.e., based upon the work actually performed by claimant's counsel. The Court stated that simply adding 20% to the claimant's benefits indefinitely is not authorized by the Act. The Court then held that the only *quantum meruit* fee ever awarded in this case was the fee on past due benefits awarded in claimant's original review petition. Indeed, the Court stated that any award beyond that would not have been reflective of a "reasonable sum" for the work performed.

Having held that there was an overpayment (due to the mistaken payment of attorney fees), the Court turned to the issue of recoupment. The Court held that the WCAB erred when it ruled that recoupment is only available where there is a "mistaken belief." Instead, the Court held that recoupment is available when, through a mistake made by the employer, the claimant is unjustly enriched. The Court held that the payments were made here under a mistake in the interpretation of a prior WCJ's order. The Court found that claimant was unjustly enriched as a result of that mistake. The Court remanded the case for a determination of what amount of recoupment per week would be fair and reasonable.

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James Reichert v. Workers' Compensation Appeal Board (Dollar Tree Stores/Dollar Express and Specialty Risk Services, Inc.), No. 42 C.D. 2013, Filed November 8, 2013.

(Modification Petition - An employer does not have the burden in a modification petition to prove the non-existence of available work at its own facility.)

(Earning Power Assessment - A vocational expert need not contact the liable employer to determine if it has any open and available positions prior to conducting a labor market survey.)

Claimant, a truck driver, suffered a work injury on April 2, 2001. On March 30, 2009, employer filed a modification petition alleging that, as of March 10, 2009, work was generally available to claimant within his vocational and physical capabilities.

Before the Workers' Compensation Judge, employer presented testimony of its district manager, who stated that he was familiar with the general positions within employer's retail stores and that all of the positions required considerable physical movement. He stated that he reviewed the IME report, which restricted claimant to light-duty, but that none of employer's available positions would fall within that restriction. On cross-examination, he acknowledged that no one ever asked him to look for a job for claimant and that he was never contacted by employer's vocational expert.

Employer also presented testimony from its vocational expert, who stated that he found 9 open positions that were approved by the IME physician as being within claimant's physical capabilities. He acknowledged that he did not directly speak with employer about possible job openings for claimant prior to conducting a labor market survey; but rather, he spoke with SRS, employer's third-party administrator, which confirmed that employer was not able to offer claimant a position consistent with his limitations.

The WCJ found the testimony of employer's witnesses to be credible and granted the petition. The WCJ specifically concluded that employer sustained its burden to prove that, between July 28, 2008 and March 10, 2009, it had no particular job openings that fell within claimant's restrictions.

Claimant appealed to the Workers' Compensation Appeal Board. The WCAB affirmed the WCJ's decision, concluding that employer's district manager's testimony that employer had no position available within claimant's work restrictions as indicated by the IME physician supported employer's *prima facie* burden of proving that it had no suitable and available job positions.

Claimant then filed a petition for review with the Commonwealth Court, arguing that the WCAB should have determined that employer did not meet its *prima facie* burden of proof because it failed to establish the absence of open and available positions with employer. Moreover, claimant argued that, because employer's vocational expert failed to contact employer to determine if employer had any open and available positions prior to conducting the labor market survey, the provisions of Act 57 were not met and, as a result, the labor market survey must be declared void *ab initio*.

The Court disagreed. Under §306(b)(2) of the Act and §123.301 of the regulations, an employer does not have the burden of proving the non-existence of available work at its own facility as a necessary element of its modification petition. To the contrary, a claimant may present evidence that, during the time frame at issue, the employer had a specific job vacancy that the claimant was capable of performing. In that event, the burden shifts to the employer to rebut the claimant's evidence.

Finally, the Court rejected claimant's argument that employer's vocational expert was required to contact employer about open and available position prior to conducting the labor market survey. The Court noted that the relevant case law, the Act and the regulations provide no support for that proposition.

The labor marker survey was found to be valid and proper. The decision of the WCAB was, thus, affirmed.

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John McCafferty v. Workers' Compensation Appeal Board (Trial Technologies, Inc.), No. 208 C.D. 2013, Filed November 21, 2013.

(LIBC Forms - An LIBC-760 may be faxed to the insurer but it must be signed and dated to be valid and all substantive information which comprises the purpose of the form must be provided.)

Claimant filed a claim petition in November of 2009. While the petition was pending, on January 18, 2010, employer's insurer sent claimant a Form LIBC-760, "Employee Verification of Employment, Self-Employment or Change in Physical Condition." The insurer's letter instructed claimant to "sign, date and return" the form within 30 days. Several days after the 30-day deadline, on February 22, 2010, claimant's counsel faxed the LIBC-760 to the insurer, which rejected the form because it was not an original form and because it was not dated.

Claimant's claim petition was granted on July 20, 2010. On August 13, 2010, employer sent claimant a notice of suspension, which was retroactively effective on February 17, 2010, because he had not properly completed and returned the LIBC-760. On August 19, 2010, claimant mailed a second LIBC-760 form to employer, which was dated. Accordingly, employer reinstated benefits August 20, 2010.

Claimant filed penalty and reinstatement petitions relative to the period of February 17, 2010 to August 19, 2010. The Workers' Compensation Judge found the faxed copy of claimant's LIBC-760 unclear and difficult to read. She further observed that the date line next to the signature line had not been completed by claimant. The WCJ found this to be a fatal omission noting that, because an employer may not send an LIBC-760 more frequently than every 6 months, it needs a date to calculate the mailing date for the next form. The WCJ denied the penalty petition and dismissed the reinstatement petition as moot, noting that employer had already reinstated benefits.

Claimant appealed to the Workers' Compensation Appeal Board, which found that transmission by facsimile is an acceptable method of returning a completed LIBC-760, but denied claimant relief because he did not date the form.

On appeal before the Commonwealth Court, claimant argued that the facsimile provided the date on the transmission line. The Court did not agree, noting that claimant may have signed the form on January 19, 2010 or on February 22, 2010. If signed on January 19th, the verification may have been inaccurate by February 22nd. The signature and date are essential to the unsworn statement. The date is needed to confirm the substance of the statements in the LIBC-760 as of a date certain.

Because the form submitted by claimant did not verify claimant's status at the time the form was completed, it was not completed accurately pursuant to the Act and the suspension was authorized.

The order of the WCAB was affirmed.

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Gregory S. Wingrove v. Workers' Compensation Appeal Board (Allegheny Energy), No. 1151 C.D. 2013, Filed January 3, 2014.

(Impairment Rating Evaluation - Where claimant's disability status is changed from total to partial based upon an IRE and claimant subsequently returns to full disability status for a closed period of time, employer is not required to prove claimant to be once again less than 50% disabled to change his status; rather, the original IRE determination remains binding.)

On July 5, 2005, employer issued a Notice of Change of Workers' Compensation Disability Status to claimant. The notice stated that claimant's disability status was changed from total to partial as of May 1, 2005, based upon an impairment rating evaluation (IRE) performed by Dr. Tucker, who found claimant to have whole body impairment of 11%. The change in status was automatic and self-executing because the IRE was requested within 60 days of claimant's receipt of 104 weeks of benefits.

Four years later, in May 2009, claimant challenged the IRE determination by filing 2 review petitions. The first sought to amend the description of injury on the Notice of Compensation Payable to include various psychiatric conditions. The second challenged Dr. Tucker's IRE because it did not take into account the psychiatric problems.

A third review petition was filed in 2010, alleging that lumbar fusion surgery performed in March 2010 rendered him more than 50% disabled. Employer denied the allegations of all 3 petitions.

During the litigation, the parties entered into a Supplemental Agreement, which reinstated temporary total disability benefits from March 24, 2010 through November 29, 2010, at which time claimant was placed back on partial disability benefits. The parties also agreed that the Supplemental Agreement had no effect on the pending petitions.

The Workers' Compensation Judge granted claimant's petitions, in part. The injury description was amended to include low back conditions and depression, but not the psychosis alleged by claimant. The WCJ concluded that the expansion of the work injuries did not negate the validity of Dr. Tucker's 2005 IRE inasmuch as claimant did not challenge it within 60 days of the Notice of Change in Disability Status. Further, the Supplemental Agreement did not render the 2005 IRE a nullity simply because it reinstated total disability benefits on a temporary basis. Instead, it was claimant's burden to prove that the additional recognized work injuries established a whole body impairment greater than 50%.

Claimant appealed to the Workers' Compensation Appeal Board, which affirmed the WCJ's decision. The WCAB found that, because claimant waited over 4 years to challenge the IRE, it was his burden to prove that the additional injuries rendered him more than 50% impaired. The WCAB held that the Supplemental Agreement did not negate the 2005 IRE because it expressly stated that it had no impact on the pending petitions.

Claimant then appealed to the Commonwealth Court, arguing that, once he became totally disabled on March 26, 2010, it was employer's burden to prove he was partially disabled before there could be a change in his disability status. Second, claimant argued that the IRE provisions of the Act violate the Pennsylvania Constitution.

The Court did not agree, noting that the Supplemental Agreement amending the NCP did not render the 2005 IRE determination invalid. Once 60 days passed from issuance of the notice of change in status, the IRE became fixed and beyond challenge unless the claimant obtains an impairment rating of at least 50% under the AMA Guides. Claimant did not do so

and, hence, failed to meet his burden.

The Court rejected claimant's challenge to the constitutionality of §306(a.2) of the Act, which requires an IRE to be conducted in accordance with the "most recent edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment*." Although the Court agreed that the phrase "most recent edition" is subject to more than one interpretation, the Court found that claimant did not fully develop the argument. As such, the Court did not find §306(a.2) of the Act to be unconstitutional, but clearly left the door open for future consideration of the issue.

The order of the WCAB was affirmed.

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School District of Philadelphia v. Workers' Compensation Appeal Board (Hilton), No. 598 C.D. 2013, Filed January 7, 2014.

(Medical Expert - In general, a physician is competent to testify as to specialized areas of medicine even though he or she is not a specialist or certified in those areas.)

(Notice of Ability to Return to Work - The notice is required when an employer seeks to change a claimant's status quo on the basis of medical evidence and is not required in a claim petition setting.)

On March 3, 2009, claimant, a second grade school teacher, suffered heart palpitations, headaches, dizziness and nausea as a result of a difficult day in her challenging classroom. Based on advice of her treating physician, claimant did not return to work "due to the school's overly stressful environment." Claimant then treated with a panel physician, who returned her to her regular duties in May of 2009. Claimant worked only 4 days. Employer then issued a Notice of Compensation Denial, rejecting the claim of a work-related injury due to excessive stress.

In June 2009, employer reassigned claimant to teach at another school, which claimant characterized as "quiet" and with "excellent teaching...going on." Nevertheless, claimant did not begin working at that school in September because she was still receiving care for job-related stress.

Shortly thereafter, claimant filed a claim petition alleging that, due to stress from an abnormal working environment, she sustained injuries on March 3, 2009 in the form of a vocal cord injury, aggravation of pre-existing lupus and a heart murmur.

In support of her petition, claimant presented testimony from her treating physician, who admitted she was no longer board certified in internal medicine and was not an expert in psychology, rheumatology, cardiology or otolaryngology. Nevertheless, the Workers' Compensation Judge found the claimant's medical expert to be credible and granted the claim petition. The WCJ, however, suspended compensation as of September 30, 2009, when the job at the other school would have been available.

The Workers' Compensation Appeal Board affirmed that part of the WCJ's decision granting the claim petition, but reversed that part of the decision suspending claimant's benefits.

Employer appealed to the Commonwealth Court arguing that claimant failed to meet her burden of proof, contending that claimant's medical expert was unqualified to testify as to the alleged injuries. The Court disagreed, noting that, in general, a physician is competent to testify as to specialized areas of medicine even though he or she is not a specialist or certified in those areas. Thus, the WCJ did not err in relying upon the opinions of claimant's treating physician. The WCJ's order granting the claim petition was again affirmed.

Employer next argued that the WCAB erred in reversing the WCJ's order suspending claimant's benefits effective September 30, 2009. The Court agreed, despite claimant's position that a suspension was improper inasmuch as a Notice of Ability to Return to Work form was never served on claimant. The Court noted that, in a claim petition, it is the claimant's burden to establish all of the elements necessary to support a claim, including the duration and extent of the alleged disability. Here, claimant's own medical expert agreed that claimant was capable of working, just not under the conditions that existed at the first school. Accordingly, the Court found that claimant could have returned to work at the second school in September. A suspension of benefits was then appropriate despite the failure of employer to issue a Notice of Ability to Return to Work form.

The Court noted that the legislature created the notice to be used as part of the earning power assessment process. It is required when an employer seeks to *change* a claimant's status quo to partial disability by modification or suspension of payment on the basis of medical evidence. The clear purpose of the notice requirement is to compel the employer to share new medical information about a claimant's physical capacity to work and its possible impact on *existing benefits*.

Here, claimant was not receiving benefits and had not yet filed a claim petition at the time she maintains that employer should have provided her with the notice. The Court concluded that employer was not required to provide claimant with a Notice of Ability to Return to Work in "a claim petition setting." Because claimant did not establish that her disability continued beyond September 30, 2009, the requirement for issuance of the notice was not triggered.

The order of the WCAB was

affirmed to the extent it affirmed the WCJ's grant of the claim petition, but reversed to the extent the WCAB reversed the WCJ's suspension of benefits.

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Lancess Womack v. Workers' Compensation Appeal Board (The School District of Philadelphia), No. 1137 C.D. 2013, Filed January 14, 2014.

(Utilization Review - Where a URO is late in issuing its written determination, the employer is not required to bear the consequences and pay for the treatment at issue.)

Section 306(f.1)(6)(ii) of the Act provides:

> Except in those cases in which a workers' compensation judge asks for an opinion from peer review under §420, disputes as to reasonableness or necessity of treatment by a health care provider shall be resolved in accordance with the following provisions:
>
> (i) The reasonableness or necessity of all treatment provided by a health care provider...may be subject to prospective, concurrent or retrospective utilization review at the request of an employe, employer or insurer. The department shall authorize utilization review organizations to perform utilization review under this act….
>
> (ii) The utilization review organization shall issue a written report of its findings and conclusions within thirty (30) days of a request.
>
> (iii) The employer or insurer shall pay the cost of the utilization review.

For purposes of calculating the 30-day review period, a request for utilization review is considered complete upon the URO's receipt of pertinent medical records or 35 days from the assignment of the matter by the Bureau to the URO, whichever is earlier. The URO then has 30 days to render its determination.

Here, employer filed a request for utilization review on September 21, 2010. The URO received the pertinent medical records on October 5, 2010. Under the Act, the URO had 30 days, or until November 4, 2010, to render its determination. The Reviewer, however, did not issue his report until November 15, 2010. The treatment at issue was found to be unreasonable and unnecessary.

The provider under review filed a petition, seeking review of the determination. The Workers' Compensation Judge determined that the treatment was neither reasonable nor necessary. Claimant appealed that decision to the Workers' Compensation Appeal Board, which affirmed the WCJ's decision.

On appeal to the Commonwealth Court, claimant argued that because the Reviewer's UR Determination was not issued within the time frame required in §306(f.1)(6)(ii), the Determination was void and the treatment should be deemed reasonable and necessary. The Court was not persuaded.

The Court noted that it was not the employer who failed to comply with the statutory and regulatory requirements. In fact, the entity which did fail to comply, the URO, was not even a party to the proceedings. While the URO's failure to comply with the Act and the Regulations may put the URO at risk of losing its authorization to conduct UR review, the Court found no support in the Act, the regulations or the case law to impose upon the employer the consequence of vacating the URO's decision as void *ab initio*.

The decision of the WCAB was affirmed.

SUPREME COURT CASE REVIEWS

Kathleen Tooey, Executrix of the Estate of John F. Tooey, Deceased, and Kathleen Tooey in her own right v. AK Steel Corp.; Crown Cork & Seal Co., Inc.,; E.E. Zimmerman Co.; Foseco, Inc.; George V. Hamilton, Inc.; Hedman Mines, Ltd.; Insul Co., Inc.; McCann Shields Paint Co.; Oglebay Norton Co.; Tasco Insulations, Inc.; The Gage Co.; Theim Corp. and its Division Universal Refractories Corp.; and United States Steel Corp., No. 21 WAP 2011, Decided November 22, 2013.

(Exclusivity of Workers' Compensation Act - Claims for occupational disease which manifest outside the 300-week period of limitations prescribed by the Act do not fall within the purview of the Act and, thus, the exclusivity provisions of the Act do not apply to preclude an employee from filing a common law claim against employer.)

John Tooey worked as an industrial salesman of asbestos products from 1964 until 1982, during which time he was exposed to asbestos dust. In December 2007, he developed mesothelioma and died less than one year later.

Tooey's widow filed a tort action against the decedent's multiple employers, who argued that the widow's cause of action was barred by the exclusivity provision of §303(a) of the Act. The widow responded that the Act, the federal and state constitutions, and precedent from the Pennsylvania Supreme Court, permit a tort action against any employer where, as here, a disease falls outside the jurisdiction, scope and coverage of the Act.

The trial court agreed with the widow and denied employers'

motions for summary judgment.

Employers filed an interlocutory appeal with the Superior Court, which reversed, reasoning that §303(a) "does not deny access to the courts, rather it limits recovery as contemplated by the legislative scheme."

The widow then filed a petition for allowance of appeal with the Supreme Court, which granted review to determine, *inter alia*, whether, under §301(c)(2), the definition of "injury" excludes an occupational disease that first manifests itself more than 300 weeks after the last occupational exposure to the hazards of such disease, such that the exclusivity provision of §303(a) does not apply.

In support of her position, the widow argued that the pertinent language of §301(c)(2) - "whenever occupational disease is the basis for compensation, for disability or death under this act, it shall apply only to disability or death resulting from such disease and occurring within 300 weeks after the date of employment in an occupation or industry to which he was exposed to hazards of such disease" - the "it" in the phrase "it shall apply" refers to "this act" and not to the "basis of compensation." Thus, it was argued that §301(c)(2) should be read as follows: "whenever occupational disease is the basis for compensation, for disability or death under this act, this act shall apply only to disability or death resulting from such disease and occurring within 300 weeks after the last date of employment."

The Supreme Court agreed, citing to the humanitarian objectives of the Act. The Court acknowledged that §301(c)(2) was intended to prevent stale claims and prevent speculation over whether a disease is work related years after an exposure occurred. Nevertheless, the Court stated that allowing an employee to seek recovery for occupational disease-based injuries at common law when the disease does not manifest within 300 weeks of the last employment-based exposure does not, in and of itself, defeat the intent of §301(c)(2). Rather, employers, like any other entity not covered by the Act, will be subject to traditional tort liability requiring a showing by the plaintiff of, inter alia, negligence on the part of the employer, and employers will retain all of their common law defenses.

The decision of the Superior Court was reversed.

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of jobs that are actually open and potentially available. The Court explained that the statutory concept of substantial gainful employment that exists would be meaningless unless the jobs identified by the employer's vocational expert remained open until such time as the claimant is afforded a reasonable opportunity to apply for them. Otherwise, the Court posited, an employer could identify one "open" job and use it to establish earning power for a number of eligible claimants when only one claimant could actually secure that one job. The Court distinguished the Kachinski requirements by noting that, under Kachinski, the employer must *refer* a specific job to claimant; whereas, under its interpretation of §306(b), the employer would only be required to *identify* specific jobs. However, the Court went on to state that evidence that the claimant pursued but failed to obtain gainful employment with the employers identified by the expert witness was undeniably relevant to rebut the employer's argument. It further noted that a claimant must be afforded the opportunity to submit evidence that he or she did not obtain employment because the position was already filled by the time the claimant had a reasonable opportunity to apply for it. In the event a job is already filled, it does not "exist." The Court further held that the Kachinski "good faith: requirement applies with equal force to the parties' duties and burdens under §306(b). Accordingly, the Court found that WCJ did not stray beyond the limits of §306(b) by making a relevant finding that the claimant had made a good faith attempt to obtain the five positions identified in the labor market surveys.

The Court's decision in this case essentially revives the Kachinski requirements. Sections 306(b)(1) and (2), as amended by Act 57, require only that the employer show substantial gainful employment exists in the usual employment area where the claimant lives in order for a claimant's benefits to be modified. Although the Supreme Court attempted to distinguish the Kachinski requirement that an employer *refer* a claimant to specific jobs from the Act's requirement that the employer merely *identify* specific jobs, the Court is now basically requiring that employers refer specific open positions to claimants. The Court has made a claimant's unsuccessful, good faith effort to apply for the identified positions a means to defeat the employer's modification petition. The Court did not address the fact that a job may indeed be open and available at the time the vocational expert completes his search, but filled and unavailable when the claimant receives the report approximately a month or so later. Thus it seems that with this decision, in order to modify a claimant's benefits, employers will have to again meet the elements set forth in Kachinski.

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Send questions to: Harry W. Rosensteel, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219, hwr@trc-law.com.

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