TR&C Thomson, Rhodes & Cowie, P.C. Attorneys at Law

Pennsylvania Workers' Compensation Bulletin

Two Chatham Center, 10th Floor, Pittsburgh, PA 15219 (412) 232-3400 www.trc-law.com

HARRY W. ROSENSTEEL, Editor MARGARET M. HOCK, Editor

MEDICAL MARIJUANA IN PENNSYLVANIA
LET THE GOOD TIMES ROLL
By Rhonda A. Rudman, Esquire

On April 17, 2016, the Pennsylvania Medical Marijuana Act (MMA) was signed into law. However, even at the outset, it was anticipated that it would take between 18 and 24 months to implement the program. Thus, we are only now beginning to address issues arising from the Act.

Employers and Workers' Compensation carriers are concerned with whether they will be required to pay for medical marijuana prescribed for a work injury. Pursuant to the Pennsylvania Workers' Compensation Act, employers are required to pay for reasonable and necessary medical treatment causally related to a work injury. Where medical marijuana is now legal in Pennsylvania, it appears likely that it may be found to be reasonable by either Utilization Review or a Workers' Compensation Judge.

However, the MMA in Pennsylvania is limited in its scope. A worker cannot legally use medical marijuana for any work injury. Instead, the MMA applies to only serious medical conditions. This is defined as any of 17 enumerated medical conditions. These include very serious and often fatal conditions of cancer, HIV, and MS. For Workers' Compensation purposes, the conditions that will most likely be relevant are (6) "damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity"; (9) neuropathy; (12) post-traumatic stress disorder; and (16) "severe chronic or intractable pain of neuropathic origin" OR "severe chronic or intractable pain in which conventional therapeutic intervention and opiate therapy is contraindicated or ineffective." Pursuant to this definition, it is not anticipated that every Workers' Compensation Claimant will legally receive medical marijuana.

Moreover, even if a worker has a serious medical condition, a worker must comply with the stringent requirements of the Act before their marijuana use can be considered legal. In this regard, a physician must be registered and certified by the Department of Health. Likewise, a patient must obtain a certification from their medical provider as well as an identification card from the Department of Health. Then, the worker must purchase the medical marijuana from a registered dispensary. Significantly, medical marijuana has only been approved in certain forms such as pill, oil, and topical forms as well as forms approved for vaporization and nebulization but not dry leaf or plant form until such forms become acceptable under regulations adopted under Section 1202 of the MMA.

Given this bureaucracy, we have not yet received a case where a Claimant was legally using medical marijuana in Pennsylvania. Instead, our early litigation has involved Claimants who have obtained medical marijuana in other states. Thus, we have argued that it is not reasonable medical treatment in Pennsylvania. However, it is only a matter of time before we see a Claimant obtain medical marijuana legally in this state. Pennsylvania Governor Wolf announced in January that the first dispensary was open for business.

The issue is further complicated by the fact that cannabis remains illegal under federal law. In this regard, U.S. Attorney General Jeff Sessions recently rescinded Obama era policy that discouraged Federal prosecutors from bringing charges where the drug use was legal under state law. Certainly, this could be the basis of an argument that medical marijuana is not reasonable treatment.

(Continued on page 7)

Inside This Issue...

COMMONWEALTH COURT CASE REVIEWS

Carlos Torijano v. Workers' Compensation Appeal Board (In A Flash Plumbing), No. 1686 C.d. 2016, Filed August 30, 2017.

(Suspension—In order to suspend benefits, employer must establish either that work within claimant's restrictions was available or that claimant's loss of earnings was caused by something other than the work injury.)

Claimant was employed as a plumber's helper when he sustained an injury on May 30, 2014, which was accepted as a low back strain. He was released to light duty work by his treating physician on July 1, 2014 and to full duty on August 19, 2014, at which time claimant's exam was completely normal.

Claimant had actually returned to modified duty work on June 11, 2014. He never complained that he was being given work beyond his physical capabilities, but did refuse to comply with his employer's request that he call in before and after jobs so that the employer could make sure that he was getting light duty and keep track of his hours. Claimant's failure to call in led to a reprimand. Claimant was asked to sign a letter confirming the basis for the reprimand, and claimant refused. Thereafter, claimant failed to show up for work.

Employer filed a suspension petition. The Workers' Compensation Judge credited employer's testimony as to why claimant is not working. Claimant was not fired. The WCJ found that claimant was upset over the reprimand and voluntarily quit. The WCJ concluded that employer met its burden of establishing that work was available to claimant and that claimant did not return of his own volition. Accordingly, the WCJ granted employer's suspension petition.

Claimant appealed to the Workers' Compensation Appeal Board, which affirmed.

Claimant then sought review by the Commonwealth Court, arguing that the WCAB erred in suspending his benefits because employer offered no medical evidence to establish that, as of the date he allegedly quit, he was capable of returning to his pre-injury job or that any suitable light duty was available.

The Court noted that, in order to suspend benefits, the employer must establish ***either*** that work within the claimant's restrictions was available ***or*** that the claimant's loss of earnings was caused by something other than the work-related injury. Here, claimant's argument ignores the latter means by which an employer may meet its burden. Where it is established that the claimant's loss of earnings is no longer the result of the work-related disability, the employer is not required to establish the availability of an alternative job within the claimant's medical restrictions. Pennsylvania Courts have consistently held that an employer does not need to demonstrate that a claimant is physically able to work or that available work has been referred to a claimant where the claimant has voluntarily retired or withdrawn from the workforce.

The WCJ made factual findings that accommodations for claimant's physical limitations had been made by employer and that claimant had not been requested to exceed those limitations. More significantly, however, is the fact that claimant left his job because of the reprimand. This fact is critical. When a loss of earnings is related to a factor other than the work injury, the claimant's benefits must be suspended.

The order of the WCAB was affirmed.

****

Thomas Haslam v. Workers' Compensation Appeal Board (London Grove Communication), No. 1655 C.D. 2016, Filed September 1, 2017.

(Utilization Review—The proper procedure to address the scope of a claimant's acknowledged work injury is a Review Petition, not a Request for Utilization Review.)

(Compromise & Release—Where Agreement provides that employer remains responsible for medical expenses relative to acknowledged work injury, employer must present evidence that the challenged treatment was beyond the scope of the Agreement to avoid liability.)

Claimant sustained a work-related injury on February 16, 1998, which was accepted by his employer pursuant to a Notice of Compensation Payable. A Supplemental Agreement was entered into by the parties on January 29, 2001, which modified claimant's benefits given his return to work with a loss of injury. The injury listed on the Supplemental Agreement as "R & L Foot Fracture." Thereafter, in 2008, the parties entered into a Compromise & Release Agreement and settled the indemnity portion of the claim for $110,000. The Agreement provided that employer would remain liable for medical expenses related to the acknowledged work injury.

Employer filed a UR request, seeking review from January 6, 2014 and ongoing of "any and all compound medication" provided by Dr. Frank. The UR was assigned to Dr. Drass, who opined that the compound medications were reasonable and necessary expenses related to the acknowledged work injury.

Employer then filed a UR Review Petition, challenging the determination of Dr. Drass. Employer argued that the condition for which claimant was being treated by Dr. Frank, i.e., RSD/CRPS, was not expressly accepted by employer in the Compromise & Release Agreement.

Shortly thereafter, claimant filed a Review Medical Petition, alleging an incorrect injury description and worsening of his condition. He requested recognition of the RSD/CRPS as being related to his work injury.

Hearings were held before a Workers' Compensation Judge, at which employer presented the UR report of Dr. Drass. The report noted the diagnosis of Dr. Frank as "neuropathic pain of both feet" and further diagnosed the claimant with "RSD/CRPS of the lower extremities with increasing depression secondary to situational anxiety, low back pain, chronic lower extremity pain." Based on these diagnoses, Dr. Drass deemed the claimant's use of compound antineuropathic cream to be reasonable and necessary.

Claimant provided a report from Dr. Frank, who also diagnosed the claimant with RSD/CRPS and opined that the treatment involving the compounded medications is appropriate and necessary.

The WCJ found the reports of both physicians to be credible and persuasive. The WCJ denied employer's UR Review Petition and granted claimant's Review Medical Petition. Employer appealed to the Workers' Compensation Appeal Board.

The WCAB determined that the Compromise & Release Agreement precluded claimant from expanding the description of the work injury. The WCAB agreed that employer "remained responsible for all reasonable and necessary medical expenses relative to the acknowledged injuries." However, the WCAB found that claimant's RSD/CRPS diagnosis was not acknowledged by the Compromise & Release Agreement. Thus, it determined that employer was not responsible for the medical expenses relative to the RSD/CRPS diagnosis. Claimant then sought review by the Commonwealth Court.

The Court noted that employer does not contend that the challenged treatment is not a reasonable and necessary treatment for claimant's pain. Rather, employer argues that should not be liable for treatment for RSD/CRPS because in the Compromise & Release Agreement employer only accepted responsibility for "fractured right and left feet." The argument failed. The UR process is not the proper method to determine the causation of an injury or condition. The UR process is tailored to the narrow questions of medical necessity and reasonableness, and is not the proper vehicle for an employer to litigate the question of whether a particular injury or condition is within the scope of an injury acknowledged in a Compromise & Release Agreement. The WCAB erred by reversing the WCJ's decision denying employer's UR Petition.

Claimant argued before the Court that the WCAB erred in two ways: 1) in determining that claimant was precluded from expanding or modifying the description of his injury in the Compromise & Release Agreement, and 2) in determining that claimant's treatment for pain was beyond the scope of the treatment employer agreed to pay for in the Compromise & Release Agreement.

The Court noted that, once a valid Compromise & Release Agreement is approved, it is final, conclusive and binding on the parties. It may be set aside only upon a clear showing of fraud, deception, duress, mutual mistake or unilateral mistake caused by fault of the opposing party. Otherwise, the Agreement may not be amended.

Here, there is no allegation or evidence of fraud, deception, duress or mistake. Thus, there is no basis to set aside or amend the Compromise & Release Agreement. The WCAB was correct in concluding that claimant could not expand or modify the description of injury acknowledged in the Agreement.

However, the WCAB did err in determining that the treatment at issue was beyond the scope of the Compromise & Release Agreement. The document describes claimant's injury as "various injuries and bodily parts including but not necessarily limited to fractured right and left feet." Employer agreed to pay for all reasonable and necessary medical expenses that are related to the acknowledged work injury. Employer did not agree to pay only for medical treatment of claimant's fractured feet; employer agreed to pay for all reasonable and necessary medical expenses *related* to claimant's fractured feet.

The Court stated that there is an obvious connection between the claimant's injury and his pain. In order for employer to avoid responsibility for the medical expenses resulting from treatment of the pain in claimant's feet, employer must prove that the treatment is for an injury that is distinct from the acknowledged injury. No such evidence was presented to the WCJ. Employer merely argued that RSD/CRPS is not specifically acknowledged in the Compromise & Release Agreement. This argument, without supporting medical evidence, is insufficient to show that the RSD/CRPS is a distinct injury beyond the scope of the Compromise & Release Agreement.

Accordingly, the decision of the WCAB was reversed.

****

Volpe Tile and Marble, Inc., v. Workers' Compensation Appeal Board (Redelheim), No. 118 C.D. 2017, Filed September 29, 2017.

(Supersedeas Fund Reimbursement—Reimbursement from the Fund is contingent upon a determination that compensation was not payable, not that compensation should have been paid by a different carrier.)

The claimant suffered a work injury in July 2006 for which Nationwide Insurance (hereinafter "Nationwide") was the responsible insurance carrier. He received benefits until suspended when he returned to work. In December 2007, the claimant sustained a second injury while still with the same employer. At the time of the second injury, Liberty Mutual was the insurance carrier.

The claimant filed a reinstatement petition against the employer alleging a recurrence of the original injury. Counsel for the employer and Nationwide filed a joinder petition, alleging that claimant sustained a new injury in December 2007, thereby making Liberty Mutual the responsible carrier. In October 2010, the Workers' Compensation Judge found the injury to be a recurrence and charged Nationwide with responsibility for the claimant's benefits.

Nationwide appealed to the Workers' Compensation Appeal Board and sought supersedeas. Supersedeas was denied and Nationwide paid benefits to the claimant. While the appeal was pending on its merits, the claimant entered into Compromise & Release Agreements with both carriers for all future benefits, but the appeal remained pending as to benefits paid up to the date of the Compromise & Release Agreement. Eventually, the WCAB reversed the WCJ and found that the claimant suffered a new injury in December 2007. Accordingly, Liberty Mutual was ultimately found to be responsible for the benefits paid to claimant (by Nationwide) from December 2007 up to the date of the Compromise & Release Agreement. The case was remanded to the WCJ to determine the AWW and compensation rate payable for the 2007 injury.

The WCJ simply dismissed the remand petitions as moot given the Compromise & Release Agreements previously approved. No appeal was taken from the WCJ's dismissal. Subsequently, Nationwide filed an Application for Supersedeas Fund Reimbursement for the benefits it paid (and for which it was found not to be responsible) during the period from December 2007 until the date of the Compromise & Release Agreements in 2012. Reimbursement was denied by the WCJ who heard the case and the WCAB affirmed on the basis that Nationwide did not satisfy the criteria for Fund reimbursement since the ultimate decision in the case was that benefits were payable to the claimant (albeit from a different carrier).

On appeal to the Commonwealth Court, Nationwide argued that it proved that the benefits at issued were "not payable" since it was relieved of liability for the payment and Liberty Mutual resolved any liability it would have had for such payment via the Compromise & Release Agreement. The Court rejected Nationwide's argument, holding that the ultimate decision in this case did NOT extinguish the liability to the claimant for the benefits at issue; it only switched which carrier was responsible. Accordingly, the requirement under Section 443 of the Act that,"***…upon the final outcome of the proceedings, it is determined that such compensation was not, in fact, payable…"*** was not met.

The decision of the WCAB was affirmed.

****

Mandeep Rana v. Workers' Compensation Appeal Board (Asha Corporation), No. 1401 C.D. 2016, Filed September 29, 2017.

(Course and Scope—An injured worker who is usually a stationary employee may be deemed a traveling employee if asked to work at a different location and, thus, may be entitled to the presumption that he was in the course and scope of employment when his injury occurs en route to that different location.)

Claimant worked for the employer as a "manager-in-training." The employer owned three Dunkin' Donut stores in Pennsylvania. The claimant primarily worked in the Wyncote, PA location, but by all testimonial accounts, would also sometimes need to respond to operational issues which arose at one of the other two stores. On November 10, 2010 claimant received a call from the employer at 10 p.m. indicating that a kitchen employee in the Hatfield, PA store fell ill. Claimant had already worked his regular shift that day but he agreed to go and investigate the situation *in lieu* of his employer having to do so. *En route* to the Hatfield store he was involved in an automobile accident which led to his death two days later. On August 14, 2012 claimant's parents filed a fatal claim petition as dependents of the claimant.

Numerous issues and defenses were raised in the case, but the only issue decided in the case dealt with application of the going and coming rule. A WCJ eventually awarded benefits to the claimant's parents, and ordered the payment of indemnity benefits and all medical bills including reimbursement of a large DPW lien. In so doing, the WCJ found that claimant was furthering the affairs of the employer when the accident occurred, and that he was on a special mission for the employer at the time of

his injuries.

The defendant employer appealed to the WCAB raising a laundry list of issues. However, the WCAB dealt only with the going and coming rule issue raised by the employer. The WCAB reversed the decision of the WCJ finding that the claimant was performing his regular job duties when the accident occurred, thus applying the going and coming rule.

The Commonwealth Court reversed the WCAB holding that, while claimant was a stationary employee with regard to his duties at the Wyncote store, he was a traveling employee with regard to any duties he may have at the other two locations, as he was not routinely asked to work in those locations. As a traveling employee the claimant was entitled to the presumption that he was in the course and scope of employment when the injury occurred *en route* to the Hatfield store, and the employer presented no evidence that claimant had strayed from his job duties to rebut that presumption. The Court went on to note that, even if they had found claimant to be a stationary employee, it was clear from the record that he was on a special mission for the employer as he had already completed his own shift that day, and he was going to the Hatfield location *in lieu* of his employer having to make that trip. The Court did remand the case for consideration of a myriad of other issues originally raised by the employer in its appeal to the WCAB.

****

Laurie Valenta v. Workers' Compensation Appeal Board (Abington Manor Nursing Home and Rehab and Liberty Insurance Company), No. 1302 C.D. 2016, Filed December 7, 2017. **(Modification—Earning Power Assessment—An employee may present evidence that he or she made efforts to obtain work that formed the basis of the employer's earning power assessment, and the Judge must consider the claimant's evidence as relevant, but the Judge is not necessarily bound by that evidence.)**

Claimant suffered multiple injuries at work on October 2, 2010 for which she was receiving wage loss and medical benefits. The employer had the claimant examined independently by an orthopedic surgeon (Eugene Chiavacci, M.D.) in October of 2013. Dr Chiavacci released the claimant to full time sedentary work. In January of 2014 the employer engaged a vocational expert (Robert Smith) to perform a labor market survey and an earning power assessment. Upon receipt of Mr. Smith's report, which assigned an earning power of $320 to $420 per week to the claimant, the employer filed a modification petition under Section 306(b) of the Act in an effort to reduce claimant's wage loss benefits.

The employer presented the testimony of Dr. Chiavacci and Mr. Smith in support of its petition. In opposition to the petition the claimant presented her own testimony, testimony of her treating doctor (Dean Mozeleski, M.D.) and testimony of her own vocational expert (Carmine Abraham). Dr. Mozeleski opined that the claimant was only capable of part time sedentary work. Ms. Abraham opined that, for various reasons, the six positions upon which Mr. Smith relied to assign an earning power were not vocationally appropriate for the claimant. Finally, claimant testified that she applied, or attempted to apply, to all six positions referred to her by Mr. Smith, and was not offered any of the jobs. She stated that she actually completed an application for two of the jobs but no offer was made. She testified that she repeatedly called for one of the positions and the line was always busy. For two of the positions she contacted the potential employer only to find out that the jobs were no longer open. For the final position she stated that the contact person she was given was not with the potential employer, and although she left her name and contact information, no one else ever contacted her.

The WCJ found the testimony of Dr. Chiavacci and Mr. Smith to be credible, and rejected the testimony of the claimant and her witnesses as lacking credibility. Based upon the credible evidence of record, the WCJ modified the claimant's wage loss benefits. The WCAB affirmed the decision of the WCJ.

On appeal, the claimant, relying primarily upon the Supreme Court's decision in *Phoenixville Hospital v. WCAB (Shoap)*, argued that her testimony concerning her efforts to apply for the six positions referred by Mr. Smith, and specifically the fact that she was not offered any of the positions, should be sufficient to defeat the employer's petition. The Court went through a thorough analysis of the employer's burden in these cases. The Court noted that the employer must first show that the claimant is physically capable of work at some level, and that the employer has no jobs for which the claimant is qualified. The Court stated that the employer must then demonstrate an earning power by proving that substantial gainful work "exists" in the claimant's usual Pennsylvania employment area, which work is vocationally appropriate for the claimant. The Court found that the employer satisfied that burden through the testimony of Dr. Chiavacci and Mr. Smith. The Court then stated that once the employer satisfies these burdens, the claimant may present evidence under *Phoenixville Hospital* relative to her efforts to obtain the referred work. If the claimant

can show that she made a reasonable effort to apply and the jobs located by the vocational expert were not actually open, then that evidence is relevant and must be considered by the WCJ. However, the Court noted that while the claimant's testimony concerning her efforts to obtain the referred jobs is relevant, it is not dispositive. In other words, the WCJ must consider the evidence, but he is not thereby bound to deny the petition. The WCJ may reject that evidence as lacking credibility as he did in this case.

****

Gerard Grimm, on behalf of Katherine A. Grimm, Deceased v. Workers' Compensation Appeal board (Federal Express Corporation), No. 1982 C.D. 2016, Filed January 4, 2018.

(Fatal Claim Petition—Section 307 of the Act provides that no compensation shall be payable to a widower unless he was living with his deceased spouse at the time of her death or was then dependent upon her.)

Katherine Grimm was an employee of Federal Express who died on February 2, 2012 as a result of a heart attack suffered while delivering packages for the employer. At the time of her death, Mrs. Grimm was married with three children, but legally separated from her husband (hereinafter referred to as "claimant"). The couple separated in August or September of 2010 at which time Mrs. Grimm filed for divorce. The divorce was not final, but the couple lived in separate residences from the time of the separation up to Mrs. Grimm's death. The evidence of record showed that the only support the claimant received from his deceased wife at the time of her death was health insurance, which the decedent maintained for the entire family through the employer. Claimant rented his own townhouse and paid all of his other living expenses himself. The evidence also demonstrated that the claimant actually paid for most of the children's expenses, as well as utilities for the marital residence. The couple did file joint tax returns as that tax status benefited both parties.

The claimant filed a fatal claim petition seeking widower's benefits from the employer. By Agreement for Compensation, the employer did agree to pay benefits for the children until they were out of college, as well as funeral expenses of up to $3,000.00. However, the issue of benefits for the claimant was put before the WCJ. Upon collecting the evidence, the WCJ denied benefits to the claimant noting that Section 307(7) of the Act states that: "[n]o compensation shall be payable under this section to a widow[er], unless he was living with his deceased [spouse] at the time of [her] death, or was then actually dependent upon [her] and receiving from [her] a substantial portion of [his] support." The WCJ noted that the couple was living apart from one another when the decedent died, at that the only support decedent lent to claimant was health insurance, which the WCJ found did not rise to the level of "a substantial portion of his support." The WCAB affirmed that decision.

The claimant appealed the decisions of the WCJ and WCAB. In his appeal, the claimant raised three arguments. First, the claimant argued that the WCJ should have found (given the remedial purposes of the Act) that the couple were still living together for purposes of the Act, since they were not legally divorced, still filed joint tax returns and still jointly owned the marital residence. This finding would afford claimant with the presumption of dependency. The Court rejected that argument noting that the totality of the circumstances here revealed that the couple was no longer in a marital relationship since the decedent had filed for divorce, opened her own bank account and continuously lived in a separate residence after the separation. Next claimant argued that he was actually dependent upon the claimant since she provided health insurance for him as well as the children. Claimant contended that he could not obtain the same quality of health insurance without the decedent, and that this expense constituted 25% of the family's overall monthly expenses. The Court rejected the claimant's argument noting that the WCJ considered this evidence but found that the health coverage did not rise to the level of substantial support. Indeed, the WCJ found that claimant lent more support to decedent than the she did to him, and the WCJ was the finder of fact. Accordingly, the Court found that substantial evidence supported the WCJ's finding, and even though there was contrary evidence, that was all that was required. Finally, claimant argued that the joint tax returns (which were in evidence) demonstrated that the total contribution of the decedent to the family income was roughly 25% to 40% when the health insurance and her earnings were taken into account. He argued that in prior cases, support as minor as money for food and cigarettes was found to constitute substantial support. However, the Court noted that the issue was whether claimant was dependent upon decedent, and could not be based merely upon that type of calculation. The Court noted that in this case the evidence actually demonstrated that claimant lent more support to decedent than he lent to her.

****

Dennis Smith v. Workers' Compensation Appeal Board (Supervalu Holdings PA, LLC),

(Continued from page 1)

Medical Marijuana

The other issue to consider is whether medical marijuana provides a more cost effective alternative to expensive narcotics and/or compound creams. Certainly, we are all cognizant of the opioid epidemic. Accordingly, many in Pennsylvania are optimistic that medical marijuana may provide a safer and more cost effective treatment alternative to opioids.

No. 796 C.D. 2016, Filed January 5, 2018.

(Modification of benefits based upon earning power under §306(b)(2) – Employer bears the burden of producing evidence of available work which "exists"; Claimant may offer evidence of his or her attempts to obtain the jobs identified in the earning power assessment.)

The claimant sustained an injury to his head and neck at work in February 2011. The claim was accepted via an NCP as a cervical sprain/strain. In November 2013 the employer filed a Petition to Modify benefits based upon an earning power evaluation.[1] After conducting hearings and gathering the evidence, the WCJ assigned to the case modified the claimant's benefits, relying upon the testimony of the treating physician and the vocational counselor (Nikki Davies) who prepared the earning power evaluation. Benefits were modified using an average of the potential earnings for the five jobs located by Ms. Davies. The five positions located were: Dispatcher at St. Moritz Security Services; alarm dispatcher at Vector Security; dispatcher at AAA; and two security guard positions with Am-Guard. In his decision the WCJ held that claimant had made application for the five jobs located by Ms. Davies, and was even interviewed for two of the jobs. He found that there was no evidence of record to show that the jobs were not still available when claimant applied. The W.C.A.B. affirmed the decision of the WCJ.

During the course of the litigation claimant testified that he had made attempts to apply for each of the five positions located by Ms. Davies. For the job as a dispatcher at St. Moritz Security Services, the claimant stated that he submitted a resume on line but was never contacted by that employer. Claimant stated that he submitted a resume to Vector Security but was never contacted. Claimant testified that he spoke to a woman at AAA and submitted a resume per her instructions, but again was never contacted thereafter. With regard to the security guard positions at Am-Guard, claimant testified that he completed an application and was actually interviewed. However, the interview did not lead to a job offer. The claimant also offered testimony that the five positions located were outside of his vocational abilities for various reasons such as lack of keyboarding skills and lack of prior experience at the type of work described.

On appeal to the Commonwealth Court claimant made two arguments in support of a reversal. First, claimant argued that the evidence offered by the employer did not satisfy its burden of proof for a modification of benefits, as claimant testified that he never worked in the type of jobs located and Ms. Davies was relying solely upon her transferrable skills analysis. Claimant also noted that he had also applied for other jobs on his own (apart from the five located by Ms. Davies) and was not offered any positions, further demonstrating that he had no earning power. The Commonwealth Court rejected this argument noting that it was essentially a substantial evidence argument, and there was substantial evidence of record which the WCJ credited and upon which the WCJ relied.

The second argument raised by claimant was based upon the Supreme Court's decision in *Phoenixville Hospital v. W.C.A.B. (Shoap)*, 81 A.3d 830 (Pa. 2013). Under the *Phoenixville* case the Supreme Court held that the jobs upon which an earning power is based must be available to the claimant for a reasonable period after they are located so as to afford claimant the chance to apply and perhaps obtain the employment. In that case, the Supreme Court noted that evidence from the claimant that he timely applied but was told no job existed was relevant to the issue of whether the jobs located actually "existed." He argued that the WCJ and Board improperly shifted the burden of proof to him in this case by requiring him to show that the jobs were *not* available when he applied (as opposed to requiring the employer to show that they were still available). The Court rejected the claimant's argument citing to their recent decision in *Valenta v W.C.A.B. (Abington Manor)*, No. 1302 C.D. 2016, filed 12/7/2017). The Court stated that while a claimant is free to offer evidence of his/her attempts to obtain the jobs referred to in an earning power evaluation, that evidence may be used against her/him in the overall evaluation of the case. Here the evidence showed that for at least two of the jobs the claimant was interviewed, which the Court felt was evidence that those two jobs were still open when claimant applied. The Court then modified the Decision of the WCJ basing the modification *only* upon the two jobs for which claimant was interviewed.

TR&C | Thomson, Rhodes & Cowie, P.C.

Attorneys at Law

ATTENTION READERS: The editors of the Thomson, Rhodes & Cowie Pennsylvania Workers' Compensation Bulletin invite you to submit questions you may have dealing with workers' compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified workers' compensation attorney.

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

The Bulletin is a quarterly publication reviewing recent trends in Pennsylvania Workers' Compensation Law. All original materials Copyright 1993-1995 by Thomson, Rhodes & Cowie, P.C. The contents of this Publication may be reproduced, redistributed or quoted without further permission so long as proper credit is given to the Thomson, Rhodes & Cowie Pennsylvania Workers' Compensation Bulletin.

The Thomson, Rhodes & Cowie Pennsylvania Workers' Compensation Bulletin is intended for the information of those involved in the workers' compensation system. The information contained herein is set forth with confidence, but is not intended to provide individualized legal advice in any specific context. Specific legal advice should be sought where such assistance is required.

Prior issues are available on our web site at http://www.trc-law.com or upon request. Please direct inquiries to Harry W. Rosensteel, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, Pennsylvania 15219, (412) 232-3400, hwr@trc-law.com.