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EXTRA! EXTRA!

CASO REVERSED!!

Almost two years ago, on January 11, 2002, a three Judge panel of the Commonwealth Court effectively stripped employers of the right to modify a claimant's benefits based upon his or her earning capacity as determined by a vocational expert. Mario Caso v. Workers' Compensation Appeal Board (School District of Philadelphia), 790 A.2d 1078 (Pa. Cmwlth. 2002). Specifically, the Court stated that an "expert" must be "approved" by the Department of Labor and Industry, not by a Worker's Compensation Judge. Because the Department never published a list of "approved" vocational experts, an employer's ability under Act 57 to compel an interview with a vocational expert in order to obtain an earning power assessment was rendered meaningless.

On December 30, 2003, the Supreme Court reversed that decision. In pertinent part, the Court stated:

"We begin our analysis by considering the plain language

of § 512(2). See Ramich v. WCAB, 770 A.2d 318, 322 (Pa. 2001). Upon review, the statute clearly does not require an interviewer to be either pre-approved, certified, or sanctioned by the Department - it only required the interviewer to be "approved." Based on this legislative command to approve experts, the Department, through the Bureau,¹ promulgated regulations concerning the minimum qualifications necessary "to be an expert approved by the Department." 34 Pa. Code § 123.202. Rather than individually qualify interviewers, the Department set a standard; if a person satisfies the qualification requirements, then this person is deemed "approved" by the Department. There is no language from the General Assembly indicating the Department was required to "pre-approve" the interviewers. The interpretation of a statute by those charged with its execution is entitled to great deference, and will not be overturned unless such construction is

clearly erroneous. See Alpha Auto Sales, Inc. v. Department of State, Bureau of Professional and Occupational Affairs, 644 A.2d 153, 155 (Pa. 1994).

Next, we consider whether an interviewer can be "approved" by a WCJ. Obviously, a person failing to meet the Department's standard is not approved; such persons are incompetent to perform the interview, and their opinions are not admissible to show the claimant is capable to perform a specific job. See 34 Pa. Code § 123.302 (insurer may demonstrate claimant's earning power by expert opinion relative to claimant's capacity to work). This approach is consistent with the Department's stated purpose of ensuring "the level of expertise and professionalism required to conduct earning power assessment interviews" 27 Pa. Bull. 3141. As with matters of credibility, issues of competency of experts have long been resolved by the WCJ. See 77 P.S. § 834 ("[A]ll findings of fact shall be based upon suffi-

cient competent evidence."); WCAB v. Jones & Laughlin Steel Corp., 349 A.2d 793, 795 (Pa. Cmwlth. 1975) (WCJ assumes discretionary authority to determine competency of expert). Because competency determinations are a function of the adjudicatory process, the WCJ is authorized to consider the qualifications of an interviewer in light of the Bureau's regulations. See 77 P.S. § 710 (hearings to consider petitions shall be conducted by WCJ)....

"[A]pproved" in this context is the equivalent of "competent."

Claimant also raises a number of policy reasons for pre-approval of interviewers. He contends insurers and employers will avoid the time and cost of an interview with an unqualified interviewer, claimants will be assured a qualified vocational counselor will interview them, and the Department will not be inundated with chal-

lenges to the qualifications of interviewers. However, if an insurer has engaged in bad faith selection of an unqualified interviewer, claimants may seek the imposition of penalties. See 77 P.S. § 991(d). The availability of redress via § 991(d) is sufficient to assure claimants that interviewers are qualified.

*The interpretation of the Department is not so clearly at odds with § 512(2) as to render its interpretation unreasonable. See Alpha Auto, *supra*. Further, the WCJ has the authority to determine whether the inter-*

viewer is qualified in light of the Bureau's regulations. The decision of the Commonwealth Court is reversed and this matter remanded for further proceedings."

Given this decision of the Pennsylvania Supreme Court, employers may once again compel an injured worker to appear for a vocational interview and possibly pursue a modification of that individual's benefits based upon an earning power assessment. Act 57, as it was intended, lives on!!!



¹ The Department is authorized to establish and promulgate regulations to explain and enforce the Act, 77 P.S. § 991(a)(v), and the Bureau is under the authority of the Department, 71 P.S. §§ 62, 72. Therefore, the Bureau may promulgate regulations where the statute only refers to "Department."

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Send questions to: Harry W. Rosensteel, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219.

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