

Legal Brief



Decision Clarifies Employer's Burden in Modifying Workers' Comp Wage Loss Benefits

Prior to the 1996 amendments to the Pennsylvania Workers' Compensation Act, an employer seeking to reduce an employee's wage loss benefits was required to produce evidence of an open job fitting the employee's physical limitations. The employee was only then required to demonstrate good faith in following through on the job referral.

The 1996 amendments eliminated the requirement to offer a job to the claimant and allowed benefits to be reduced through the use of an "Earning Power Assessment." The assessment is performed by a vocational expert and establishes an injured employee's "earning power," which is defined, in part, as follows:

"Earning power" shall be determined by the work the employee is capable of performing and shall be based upon expert opinion evidence, which includes job listings with agencies of the department, private job placement agencies and advertisements in the usual employment area.

The Ruling

The Commonwealth Court's recent decision in *Phoenixville Hospital v WCAB (Shoap)*, No. 2188 C.D. 2009 appears to simplify an employer's burden in modifying wage benefits through the use of earning power assessments. There, the employer filed a Modification Petition seeking to reduce the claimant's wage benefits based upon an Earning Power Assessment showing claimant to have an average weekly earning power of \$347.41. The employer presented medical testimony establishing claimant was capable of engaging in sedentary work. The employer then presented testimony from a vocational expert who conducted an earning power assessment and identified five jobs that

fell within the claimant's sedentary restriction and provided an average weekly wage of \$347.41.

The claimant presented medical testimony indicating claimant could not perform the five jobs identified by the vocational expert. The claimant also testified that she applied for all five jobs and was not hired.

The Workers' Compensation Judge found the employer's medical and vocational experts to be credible, but also found the claimant to have acted in "good faith" in following up on the job referrals and that none of the jobs resulted in an offer of employment. For these reasons, the judge found in favor of the claimant and denied the employer's Modification Petition.

On appeal, the Commonwealth Court noted the 1996 Amendments lowered the employer's burden of proof. The Amendments allow an employer to obtain a reduction of wage benefits on evidence of earning power proved through expert testimony, rather than evidence that the claimant obtained or could have obtained employment in the absence of bad faith conduct.

The Court went on to state: "Today we are ... asked to determine whether a job not only exists, but is available to claimant for the purposes of Section 306(a) of the Act when she applies for each individual job contained in a labor market survey and does not receive an offer of employment where the employer's expert testimony is credited that the jobs were open and available at the time he identified the employment opportunities. We determine that Employer is not precluded from obtaining a modification of benefits where, as here, claimant pursued the jobs contained in the labor market survey weeks after they were identified as

open and available..."

In Conclusion

Previously, a claimant could challenge or refute the findings of an Earning Power Assessment by contacting each employer identified in the assessment, applying for the job, then subsequently testifying that the job was not available because he or she did not receive an offer of employment. In today's job market, entry level positions can become available and filled within a very short period of time.

The Court's recent decision recognizes it is simply unrealistic to presume that all jobs identified in an Earning Power Assessment as open and available on a given date will remain open and available nearly a month or more later when the claimant receives the report from the vocational expert. It is now clear that the employer's burden is only to show availability at the time of the vocational expert assessment.

For more information on workers' compensation claims, please contact John W. Draskovic at 814/870-7653 or jdraskovic@mijb.com.

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