

**THE MONTH IN PENNSYLVANIA WORKERS' COMPENSATION:  
JUNE 2010 AT A GLANCE  
BY MITCHELL I GOLDING, ESQ.  
KENNEDY, CAMPBELL, LIPSKI & DOCHNEY  
(W) 215-430-6362**

**APPEAL/REMAND/CREDIT/WCJ**

- The doctrine of waiver is applicable in workers' compensation proceedings. An issue is waived unless it is preserved at every stage of the proceedings. The appellant must bring to the attention of the appellate body its claims of error with some degree of specificity. Section 111.11(a)(2) of the WCAB rules further provide that the Notice of Appeal filed with the Board shall contain:

*“A statement of the particular grounds upon which the appeal is based, including reference to the specific findings of fact which are challenged and the errors of the law which are alleged. General allegations that do not specifically bring to the attention of the Board the issues to be decided are insufficient for appeal purposes..”*

The claimant waived the issue of whether the employer's testimony regarding a disability pension offset was sufficient or calculations were accurate where the claimant only raised the issue on appeal before the Appeal Board of whether the disability annuity claimant was receiving qualified as a pension referenced by Section 204 of the Act.

- A WCJ should restrict remand proceedings to the purpose indicated by the remand order. On remand, the WCJ may receive additional testimony in order to make necessary findings so long as the Appellate Tribunal's order does not contain limiting language. To determine what the WCJ was directed to do within the scope of the remand order, it is necessary to examine the content of the order.

The WCJ exceeded the scope of the remand order where he received additional testimony and ruled upon the sufficiency and accuracy of employer's pension offset calculations though the remand order was limited to the issue of determining whether employer or CompServices was directly liable for the claimant's workers' compensation benefits and for clarification as to whether the claimant was lulled into taking her disability pension based on the mistaken belief that her indemnity benefits would be reduced.

- Although the offset provisions of Section 204(a) enacted by Act 57 only apply to claimants who sustained a work injury after the effective date of Act 57 enacted in

1996, there is no limitation on the amount of pension offset to contributions made prior to the passage of Act 57.

This means that employer's contributions prior to and subsequent to the enactment of Act 57 are included in the calculations of the employer's offset although the offset itself only applies to injuries that occurred after the enactment of Act 57.

- A WCJ does not have jurisdiction to adjudicate claims that benefit under Act 534 or the Heart and Lung Act. Thus any claim for a shortfall in Act 534 benefits cannot be remedied by the WCJ.

*Riley v. WCAB (DPW/Norristown State Hospital) No. 1533 C.D. 2009 (decision by Judge Flaherty, March 17, 2010). 7/10*

## **VOCATIONAL**

- An employer is not precluded from obtaining a modification of benefits, based upon the performance of the labor market survey, where the claimant unsuccessfully pursued the jobs identified in the labor market survey weeks after they were identified as open and available by the vocational expert.
- The enactment by Act 57 of Section 306(b) (2) of the Act altered the employer's burden of proof to obtain a modification of benefits. An employer can obtain a modification of benefits by showing that the claimant can engage in substantial gainful employment in his or her employment area. It has the option of showing earning power through expert opinion evidence including job listings with employment agencies, agencies of the Department of Labor and Industry and advertisements in the claimant's usual area of employment.

The job should be open and available at the time the employer's expert conducts his earning power assessment.

The jobs contained in any labor market survey are not meant to provide an exact calculation of the injured worker's earning power. Rather they are to provide an approximation of his or her potential earning space and her residual capacity to set a payment schedule for partial disability benefits.

It is unrealistic to presume that all jobs identified in the labor market survey that were open and available on the date they were identified by the labor market survey will remain open and available nearly a month or more later when a claimant receives a report of a vocational expert and applies for the jobs contained therein.

Inasmuch as Section 306(b)(2) is meant to provide an approximate value of claimant's earnings based on his or her residual skill, the fact that a claimant may apply for the jobs identified by the vocational expert and did not obtain employment is immaterial.

- The legislature, upon enacting Act 57, replaced the Kachinski approach. By adopting Section (2) of Section 306(b) of the Act, the legislature lowered the Kachinski burden of proof by allowing an employer to obtain modification or suspension of benefits based upon evidence of earning power proved through expert testimony rather than by providing evidence that the claimant had obtained employment.

There is no requirement that the claimant be offered a job under Act 57. The employer need only establish the claimant's earning power. Although the jobs must be available, the Act contains no clear indication that claimants actually receive an offer of employment in order to establish earning power. Rather, the jobs must be available at the time an expert conducts a job survey.

- The sole purpose of Section 306(b) of the Act is to describe the payment schedule for partial disability and provide a formula for calculating an injured employee's benefits. The calculation of earning power under Section 306(b) of the Act only approximates a claimant's "true" earning power.
- Pursuant to Section 306(b)(3)(ii) of the Act, the claimant has an obligation to begin pursuing employment opportunities upon being supplied with a Notice of Ability to Return to Work (LIBC-757). The obligation to look for work commences before, not after, receiving an earning power assessment or labor market survey performed by a vocational expert.
- It was not improper for the claimant's compensation to be modified based upon an averaging of the available positions identified by the labor market survey.

*Phoenixville Hospital v. WCAB (Shoap), No. 2188 C.D. 2009 (decision by Judge Flaherty, June 30, 2010). 7/10*