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What's Hot in Workers' Comp

Pennsylvania Workers' Compensation

By Francis X. Wickersham, Esquire (610.354.8263 or fxwickersham@mdwcg.com)

Francis X. Wickersham

Commonwealth Court provides guidance for an employer's burden of proof in Labor Market Survey case according to *Phoenixville Hospital v. WCAB (Shoap)*.

Dennis Smith v. WCAB (Supervalu Holdings PA, LLC); 796 C.D. 2016; filed Jan. 5, 2017; Judge Simpson

The Commonwealth Court recently issued a decision that employers can use as a guide for meeting their burden of proof in a labor market survey case. The claimant sustained a work injury in February 2011. The employer filed a modification petition in November 2013, seeking to reduce the claimant's benefits based on the results of a labor market survey.

In connection with the petition, the employer submitted deposition testimony from a vocational counselor, who had interviewed the claimant, performed a transferable skills analysis and identified five positions for the claimant within his vocational and medical restrictions and within his geographic area. The counselor testified that the claimant had a residual earning capacity of $440 per week.

The claimant also testified about applying for the five jobs the vocational counselor identified for him. Of the five, the claimant applied for all of them and was interviewed for two of them. However, no job offers were made to the claimant.

The Workers' Compensation Judge granted the petition, finding that there was nothing in the record to indicate that the five jobs were not open and available at the time the claimant applied for them. On appeal, the Workers' Compensation Appeal Board affirmed, reasoning that the employer's burden was to establish that the positions in the labor market survey were open and actually available to the claimant at the time the survey was conducted.

The claimant appealed to the Commonwealth Court, arguing that the Worker's Compensation Judge and the Appeal Board improperly shifted the burden to him to prove that positions were not available, contrary to the Supreme Court's decision in *Phoenixville Hospital v. WCAB (Shoap)*, 81 A.3d 830 (Pa. 2013). In *Phoenixville Hospital*, the Supreme Court held that jobs identified by an employer's expert witness, which are used as proof of earning power under §306 (b) of the Act, should remain open until such time as the claimant is afforded a reasonable opportunity to apply for them.

The Commonwealth Court agreed that the judge and the Board incorrectly reasoned that it was the claimant's burden to prove that all five jobs were not open. The court noted that in its recent decision of *Valenta v. WCAB (Abington Manor Nursing Home and Rehab and Liberty Insurance Company)*, 1302 C.D. 2016, filed December 7, 2017, they held that an employer bears the burden of proving all facts entitling it to a modification of benefits, including the continued availability of jobs identified as proof of earning power. Considering this, the court found that of the five jobs, only two remained open and available to the claimant—the two for which the claimant received job interviews. Therefore, the court affirmed the decision of the Appeal Board and recalculated the claimant's residual earning capacity based on these two jobs only, which, according to the claimant's own testimony, were open and available. II

The mere presentation of evidence of unsuccessful applications to jobs listed in a Labor Market Survey does not mandate a finding that the positions were not open and available and that the claimant lacked an earning capacity.

Laurie Valenta v. WCAB (Abington Manor Nursing Home and Rehab and Liberty Insurance Company); 1302 C.D. 2016; filed Dec. 7, 2017; Judge McCullough

The claimant sustained a work injury in October of 2010. In January of 2014, the employer/insurer had a Labor Market Survey and Earning Power Assessment performed, pursuant to § 306(b) of the Act, which listed six jobs with a pay range of $320 to $420 per week. The employer filed a modification petition based on the results of the survey and assessment.

Medical and vocational evidence was presented by the claimant and the employer. This included testimony from the claimant's own vocational expert, who testified that the claimant lacked the skills to perform the jobs listed in the survey and assessment. With regard to the claimant's efforts to apply for all six positions, she testified that she applied for all the jobs but was not offered a position.

The Workers' Compensation Judge granted the employer's petition, finding that the claimant had a residual earning capacity of $320 per week. In doing so, he accepted the employer's evidence as more credible than the claimant's. In her appeal to the Workers' Compensation Appeal Board, the claimant argued that the six jobs could not be considered actually open and available if she tried to apply and was unsuccessful. She also argued that she could not have any earning capacity given she had tried to apply but could not obtain any of the positions. The Board affirmed the decision of the judge.

The claimant then appealed to the Commonwealth Court. The court said this was a case of first impression regarding the rights of claimants and employers under § 306(b) of the Act after the Supreme Court's decision in *Phoenixville Hospital v. WCAB (Shoap)*, 81 A.3d. 830 (Pa. Cmwlth. 2013). The claimant took the position that because she applied for the jobs listed on the survey/assessment but did not get a job, the employer failed to prove an earning capacity. The employer argued that while the claimant's testimony that she applied unsuccessfully was relevant, it was not dispositive. The court noted that the claimant presented evidence attempting to show that the survey/assessment was based upon incorrect information in that the jobs were not open and available because she attempted to apply for all of them, but was either turned down, told the job was unavailable or unable to reach the contact person. The court indicated that this was precisely the sort of testimony that *Phoenixville Hospital* mandated claimants be permitted to present. In the court's view, the Workers' Compensation Judge evaluated the claimant's testimony but did not find it sufficient to show that the employer had not met its burden. The court rejected the claimant's argument that the presentation of evidence of unsuccessful applications to jobs listed in a survey/assessment required a finding that the positions were not open and available and that she lacked any earning capacity. According to the court, the evidence was relevant but not determinative with regard to the earning power inquiry. **II**

News from Marshall Dennehey

We are pleased to announce that at our annual shareholder meeting held last month, **Angela DeMary** (Mt. Laurel, NJ) and **Andrea Cicero Rock** (Philadelphia, PA) were elected as shareholders of the firm. Angela focuses on New Jersey workers' compensation, and Andrea focuses on Pennsylvania workers' compensation.

Kacey Wiedt (Harrisburg, PA) and **Audrey Copeland** (King of Prussia, PA) convinced the Commonwealth Court to affirm the order of the Workers' Compensation Appeal Board in our client's favor as the claimant's modification and review petition was time-barred. The court reasoned that the claimant's claim for specific loss injury benefits was barred by the three-year statute of limitations of Section 413(a) of the Act, 77 P.S. §§ 771-772.

Tony Natale (Philadelphia, PA) successfully defended a national underwater construction company in a case that applied a new principle of first impression in the Commonwealth of Pennsylvania. The claimant, employed as an underwater diver, was injured in the Commonwealth but had no other jurisdictional nexus to Pennsylvania. He was injured in a motor vehicle accident on his way to a dive site. Evidence showed that, although the claimant was classified as a travelling employee, he was expected to be on the job site for several weeks and, therefore, was commuting to and from the job site while stationed at a company-sponsored hotel. He sustained serious injuries during the motor vehicle accident and alleged he was in the course and scope of employment while commuting from his hotel to the dive site, thus entitling him to full workers' compensation medical and indemnity benefits. Tony successfully argued that the claimant was not in the course and scope of employment at the time of injury. The claim petition was denied and dismissed.

Tony Natale (Philadelphia, PA) successfully defended a local university in a hostile jurisdiction on a course and scope of employment defense. The claimant was a very credible employee who was seriously injured while on a horseback riding excursion at a continuing medical education seminar. While attendance at the seminar was part of the claimant's job, the case evidence focused on whether the horseback riding extracted the claimant from the course and scope of employment. Tony presented fact witnesses from the university who testified that activities undertaken by the claimant outside of the scheduled CME classes (despite fostering camaraderie among the participants) were not within the claimant's course and scope of employment. The Workers' Compensation Judge accepted Tony's arguments, and the claim petition was denied and dismissed.

Tony Natale (Philadelphia, PA) successfully defended a nationally renowned manufacturer of furniture covers, home décor and mattress pads in the litigation of a review petition to add a cervical disc herniation and surgery to the nature of injury accepted in the case. The litigation had wide ramifications since the same claimant attempted to reinstate workers' compensation benefits based on an accepted shoulder/arm injury a year earlier, but she failed in her attempts to reinstate to total disability. As result, the claimant travelled to Florida and underwent cervical disc surgery, claiming it was part of the same work-related injury. Tony proffered medical evidence to

support the fact that the surgery and disc herniation were not caused by the work injury and that the medical bills and disability associated with the surgery were likewise not work related.

Judd Woytek (Allentown, PA) was successful in defending claim and penalty petitions on behalf of our client. The claimant alleged a lower back injury. Judd argued that the claim should be denied because the claimant failed to report the injury on the day it happened, was terminated from his employment for cause several days later and failed to seek medical treatment for the alleged injury for almost three months, when he was referred to a doctor by his attorneys. The Workers' Compensation Judge agreed with Judd's arguments and found the claimant's testimony to be replete with inconsistencies and not credible. The judge also discredited the claimant's medical expert based, in part, upon the fact that his diagnosis of an aggravation of pre-existing lumbar degenerative disc disease never once appeared in his medical records. The claim and penalty petitions were denied and dismissed.

Ashley Talley (Philadelphia, PA) obtained a defense verdict on claim and joinder petitions involving seven employers and insurance carriers. The claimant was a union painter with over 27 years of industry experience, having worked on various bridges in the tristate area. He was under contract with our client, a large painting company, before leaving employment in 2013. A claim petition was filed approximately three years later, alleging that in the course of his one-year employment with our client, he sustained a disabling occupational disease in the form of silicosis, calcific mediastinal adenopathy, chronic granulomatous disease, and chronic interstitial lung disease as a result of the exposure to and inhalation of sand blasting materials. Joinder petitions were filed against the claimant's prior employers, all of whom denied liability for the claim. Ashley was successful in arguing that the claim petition was barred by the statute of limitations by presenting medical and factual evidence demonstrating that the claimant knew of a potential work-related condition but failed to file his claim within the three-year statute of limitations. The claim petition was denied and dismissed. ||