PENNSYLVANIA WORKERS' COMPENSATION EARNING POWER ANALYSIS: "TOSSING" A "LEGAL SALAD"

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The subject of constant discussion over the last eight years[2], the controversial "Act 57" of 1996 represented the culmination of a three-year effort undertaken by pro-business groups to reduce the cost of Pennsylvania work injuries[3]. One of many changes brought about by the new law was the apparent elimination of the nine-year old *Kachinski*[4] rule – a judicially-created regime that required employers seeking to reduce indemnity liability under the Act, to engage costly and time-consuming job placement efforts for injured workers. In its place, the Legislature created an empirical "Labor Market Survey" regime designed to yield a more objective and less costly assessment of "earning power[5]".

For the ensuing six years the new regime operated at the hearing level, until the Commonwealth Court issued its seminal ruling in *Caso v. Workers' Compensation Appeal Board (School District of Philadelphia)* on January 11, 2002.[6]

The *Caso* decision held that the language of Section 306(b)(2)[7], prohibited an employer or insurer from compelling an injured worker to participate in a vocational interview with a specialist not individually "approved" as qualified by the Department of Labor & Industry.

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[2] See "Pennsylvania Workers' Compensation 'Average Weekly Wage Calculations After Colpetzer and Zerby: Back to Reality'", Andrew E. Greenberg, Pennsylvania Defense Institute, *Counterpoint*, July, 2003.

[3] See Kramer v. Workers' Compensation Appeal Board (Rite Aid), 794 A.2d 953 (Pa. Cmwlth. 2002) citing Township of Lower Merion v. Workers' Compensation Appeal Board (Tansey), 783 A.2d 878 (Pa. Cmwlth. 2001).

[4] Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Company), 516 Pa. 240, 532 A.2d 374 (1987) See companion case, Farkaly v. Workmen's Appeal Board (Baltimore Life Insurance Company), 516 Pa. 256, 532 A.2d 382 (1987).

[5] The phrase "earning power" does not necessarily reflect the earnings the injured worker actually receives following a return to work or what the worker would have received had he or she returned to work following a vocational effort undertaken by the defendant. Rather, the phrase refers to the worker's capacity to generate earnings regardless of his or her actual earnings. See Harle v. Workmen's Compensation Appeal Board (Telegraph Press, Inc.), 540 Pa. 482, 658 A.2d 766 (1995) ("benefits for partial disability are based on the difference between pre-injury earnings and post-injury earning power, not post-injury earnings, although in no case can the difference be greater than the difference between pre-injury earnings and post-injury earnings").

[6] 790 A.2d 1078 (Pa. Cmwlth. 2002), *appeal granted*, ___ Pa. ___, 805 A.2d 526 (2002).

[7] The provision provided in pertinent part "In order to accurately assess the earning power of the empolye, the insurer may require the employe to submit to an interview by an expert **approved by the department** and selected by the insurer") (emphasis supplied).

While brushing[8] aside the role of the Bureau of Workers' Compensation to "explain and enforce the provisions of the Act[9]" which had promulgated regulatory standards[10] to be applied by workers' compensation judges ("WCJ") when asked to assess the qualifications of a proposed vocational expert, the court concluded that vocational qualifications should be reviewed individually at the Department level.

The *Caso* ruling and the cases that followed, precipitated an upheaval of sorts in the workers' compensation community that gave all the appearance of "legal salad" – a *pot pouri* of confusion that for many employers sidelined[11] the Labor Market Survey while the various branches of state government pondered how to proceed - the Supreme Court of Pennsylvania agreed to hear the case on appeal; the Bureau implemented what the Commonwealth Court[12] pejoratively described as a "self-verification" process of "approving" vocational experts, and State Representative, Michael Turzai introduced legislation[13] rescinding the language of Section 306(b)(2) requiring "department approval" of vocational experts.

Meanwhile, there were other indications that *Kachinski,* presumed to be an anachronistic remnant of pre-Act 57 workers' compensation practice, might have survived Act 57 after all, as the Commonwealth Court began to look favorably upon claimant efforts to require the same kind of "job availability" that the old law required.[14]

The defense community's response to *Caso* was fairly uniform. It was argued that in its statutory role[15] the Bureau had properly undertaken to "explain" and "enforce" Section 306(b)(2) through its promulgation of Regulations setting forth specific criteria for WCJs to apply when asked to "approve" a proposed vocational specialist. It was argued that since Section 401.1[16] of the Act declares WCJs to be agents of the Department, the Bureau's

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[8] The Commonwealth Court has shown little, if any, deference to the Bureau's interpretation of Act 57. See Gardner v. Workers' Compensation Appeal Board (Genesis Health Ventures), 814 A.2d 884 (Pa. Cmwlth. 2003) (nullifying the Bureau's Regulation permitting the scheduling of Impairment Rating Examinations more than 60 days after the claimant's receipt of 104 weeks of total disability benefits).

[9] See Section 435, 77 P.S. §991.

[10] 34 Pa. Code§§ 123.202, 123.203 of the Act 57 Regulations, 28 Pa. Bulletin 329 (No. 3, Sat. January 17, 1998).

[11] According to some well-respected observers, *Caso* effectively laid the Labor Market Survey to rest: "[f]or the present, actual job availability [under the *Kachinski* regime] is the only option left to employers and their carriers to reduce workers' compensation costs." See "A Defense Practitioner's View of Struble and Expert Interviews," Daniel V. DiLoretto, Esquire, *The Legal Intelligencer*, (7/24/03).

[12] In an unreported Order issued in Struble v. Workers' Compensation Appeal Board (Rocky Mountain Garage) (6/10/03).

[13] House Bill No. 88.

[14] See South Hills Health Systems v. Workers' Compensation Appeal Board (Kiefer), 806 A.2d 962, (Pa. Cmwlth. 2002) (a Labor Market Survey must do more than simply document the existence of suitable work, but must report work that is available to the injured worker); Allied Products and Services v. Workers' Compensation Appeal Board(Click), 824 A.2d 284 (Pa. Cmwlth. 2003) (while reiterating that the defendant must "convince the fact-finder that positions within the injured worker's residual capacity are actually available," the court recognizes that "[t]here is no longer a requirement that [the defendant] establish the existence of actual job referrals").

[15] Commonwealth of Pennsylvania, Pennsylvania Higher Education Assistance Agency, et. al. v. Abington Memorial Hospital, et. al., 478 Pa. 514, ___, 387 A.2d 440, ___ (1978) quoting Federal Deposit Insurance Corp. v. Board of Finance and Revenue of Commonwealth, 368 Pa. 463, 471, 84 A.2d 495, 499 (1951).

[16] 77 P.S. § 710.

determination that the task of "approving" vocational specialists should be delegated to individual WCJs was particularly appropriate given the WCJ's traditional role as ultimate finder of fact.[17]

The history underlying the enactment of the Labor Market Survey played a significant role in the frayed emotions that followed the *Caso* ruling. The legislative process that yielded Act 57 was highly charged. Organized labor, the insurance lobby and politicians engaged in tense negotiations as business advocates sought to ameliorate what they viewed as the most inequitable and costly features of the Pennsylvania Act[18]. The resulting legislation was certainly provocative – it introduced the concept of "permanency" to Pennsylvania and, as noted, it took dead aim at *Kachinski*.

When the new law became reality, it was presumed that employers would no longer be required to engage in the kind of job placement process that *Kachinski* contemplated, since one of the central features of the Labor Market Survey was its commitment to an empirical assessment of "earning power," which, it was hoped, would reduce the cost of work injuries in three ways. It would eliminate the costly job referral process. It would reduce litigation arising out of job referral efforts. And, it would reduce the payment of indemnity benefits, since the new system would presumably be more effective in suspending or modifying the payment of weekly indemnity benefits.

After *Caso*, however, workers' compensation observers began to re-visit the question of what prompted the drafters of Section 306(b)(2) to require vocational specialists to be "approved."

Some suggested that the "approval" requirement was included in order to protect workers from physical harm brought about by inappropriate job placement efforts undertaken by unqualified vocational experts.[19]

Some, including this author, suggested to the contrary - that the drafters were not motivated by concern for the injured worker's physical well-being since the new regime did not presume to effect job placement and since the claimant's physical ability to work had always been left for the medical experts to assess[20]. Indeed, the Commonwealth Court itself reiterated

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[17] Addressing the legal competence of an expert witness is fundamental to the role of the WCJ as a trial court. Workmen's Compensation Appeal Board v. Jones & Laughlin Steel Company, 22 Pa. Cmwlth. 469, 349 A.2d 793 (1975), citing Moodie v. Westinghouse Electric Corporation, 367 Pa. 493, 80 Pa. Cmwlth. 734 (1951).

[18] Many of the most critical features of Act 57, including changes in Section 309 apply only to injuries occurring on and after June 24, 1996.

[19] Echoing concerns raised by Judge Jiuliante's supersedeas ruling in Struble - that under the Bureau's regulatory approach, the injured worker faces the prospect of being injured after returning to work in a position to which he should not have been referred, Mr. DiLoretto observed that "[i]t was envisioned that the department would develop a licensure procedures to protect injured workers from unnecessary risk while embracing the humanitarian purposes of the act by providing injured workers with accurate information that would facilitate a return to the work force" See "A Defense Practitioner's View of Struble and Expert Interviews" supra.

[20] See "A Legal 'Salad': Earning Power Analysis in Pennsylvania's Workers' Comp Law," Andrew E. Greenberg, *Pennsylvania Law Weekly*, 26 PLW 1284.

in *Allied Products and Services v. Workers' Compensation Appeal Board (Click)*[21] that a vocational specialist cannot presume to address the claimant's physical ability to work, but that a qualified medical expert bears that responsibility: "while the treating physician need not pre-approve each possible alternate position, some qualified witness must persuade the fact-finder that an injured worker can perform the work."

It was suggested, therefore, that the drafters of Section 306(b)(2) created the "approval" requirement in order to afford the injured worker protection against the residual procedural voids left by the presumed displacement of *Kachinski*.[22]

It was presumed, therefore, that since the new regime would not require actual job referrals, the old *Kachinski* "job referral letter," which included a mandatory recitation of the injured worker's physical capabilities, would no longer be issued. In order to fill that void, the drafters apparently created the "Notice of Ability to Return to Work" form under Section 306(b)(3), which provides the injured worker with much of the same information that the old *Kachinksi* job referral letter provided.

In addition, the advent of Act 57 included an amendment to Section 314, empowering insurers or employers to compel injured workers to attend vocational interviews. So, it was suggested, having created a new intrusion upon the worker, the drafters invoked Bureau approval of the interviewer in order to assure that the process would involve a legitimate exercise conducted by a skilled professional[23] and not by a lay person[24].

Lending credence to such a policy consideration was the plain language of Section 306(b)(2) which seemed to suggest that the roadblock erected by *Caso* was limited to the vocational interview itself – the new intrusion, and not to the entire Labor Market Survey regime.

The statute provides that "'earning power' shall be determined by the work the employe is capable of performing and shall be based on expert opinion evidence which includes job listing with agencies of the department, private job placement agencies and advertisements in the usual employment area.[25]" Indeed, the statute does **not** require that the analysis be performed by a vocational "expert approved by the department," or that the insurer or employer first obtain a sanctioned vocational interview before proceeding with an earning power analysis.

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[21] 824 A.2d 284, (Pa. Cmwlth. 2003).
[22] See "A Legal 'Salad': Earning Power Analysis in Pennsylvania's Workers' Comp Law," Andrew E. Greenberg, *Pennsylvania Law Weekly*, 26 PLW 1284.
[23] Under the old regime, the courts seemed to allow "job developers" who were not vocational experts, to locate and refer jobs to injured workers. Heisey v. Workmen's Compensation Appeal Board (R.R. Donelly & Sons Co., ___ Pa. Cmwlth. ___, 634 A.2d 782 (1993).
[24] See "A Legal 'Salad': Earning Power Analysis in Pennsylvania's Workers' Comp Law," Andrew E. Greenberg, *Pennsylvania Law Weekly*, 26 PLW 1284.
[25] 77 P.S.§ 512(2).

Support for such a reading of Section 306(b)(2) came on July 17, 2003, when the Commonwealth Court issued a decision in *Wheeler v. Workers' Compensation Appeal Board (Reading Hospital and Medical Center)*.[26]

The *Wheeler* case involved a hospital valet who suffered a work-related low back injury that disabled him for nearly four years. After an examining physician released him to return to work in a full-time, sedentary capacity, he agreed to participate in an interview with defendant's vocational specialist, who thereafter performed a Labor Market Survey. On the basis of the data generated by the survey, defendant filed a petition seeking a modification of disability benefits. The petition was ultimately disallowed by the WCJ who, though accepting defendant's medical and vocational evidence as credible, felt constrained to dismiss the evidence on the basis of *Caso*, which had been circulated by the Commonwealth Court following the close of the evidentiary record in *Wheeler*. On appeal the Commonwealth Court reversed the WCJ's disallowance, concluding that claimant could not rely upon *Caso* because he had voluntarily participated in the vocational interview that preceded defendant's Labor Market Survey. In so holding, the court seemed to limit its *Caso* ruling to the interview process. The court observed that a Labor Market Survey may be undertaken even in the absence of a sanctioned vocational interview: **"[u]nder the plain language in Section 306(b)(2), a vocational interview by an expert approved by the Department is optional, not mandatory, to assess the claimant's earning power."**

In other words, the court seemed to acknowledge that despite *Caso*, a strict reading of Section 306(b)(2) still allowed the employer to assess earning power under the Act 57 regime, even without a vocational interview.[27]

It seemed, therefore, that despite the "salad" that *Caso* had engendered, the Act 57 method remained a viable option for assessing earning power under the Act.

Ironically, the "salad" was emphatically "tossed" by all three branches of state government during the last week of December, 2003.

On December 23, 2003, Governor Rendell signed into law Representative Tarzai's House Bill No. 88, which effectively ended the debate by re-writing the pertinent language of Section 306(b)(2) to provide that: "[i]n order to accurately assess the earning power of the employe, the insurer may require the employe to submit to an inter by a vocational expert who is selected by the insurer and meets the minimum qualifications established by the department through regulation." One week later on December 30, 2003 the Supreme Court reversed the Commonwealth Court in *Caso* reasoning that: (1) nothing in Section 306(b)(2) requires that a vocational specialist be "pre-approved" by the department; (2) the interpretation of the statute by the entity charged with the responsibility for doing so – the Bureau – should not be overturned since its interpretation was not clearly erroneous or unreasonable; and (3) the statute's requirement that the prospective vocational interviewer be "approved" requires that

[26] ___ A.2d ___, (Pa. Cmwlth. 2003).
[27] The court's ruling seems at odds with the dicta in Summit Trailer v. Workers' Compensation Appeal Board (Weikel), referenced in Footnote 12 above.

the individual be "competent" – the assessment of which the assigned WCJ is authorized to adjudicate as the ultimate fact finder.

So, it seems, vocational interviews will now proceed in full force while workers' compensation practitioners prepare for the next Labor Market Survey battle, which will likely focus upon the claimant's response to the Survey.

Presumably the claimant's bar will urge that the injured worker should be permitted to challenge a Labor Market Survey by demonstrating that he or she acted in good faith in response to the Survey or by proving that the jobs identified by the Survey were not available to at the time of the Survey or by the time the claimant became aware of the Survey. Or, the claimant will argue that the vocational specialist did not afford him or her with an opportunity to attempt to procure the position or that the vocational person failed to consult the prospective employer in order to determine whether the claimant would have been an acceptable candidate for employment.

As noted above, the Commonwealth Court has already ruled that a claimant can thwart a Labor Market Survey by demonstrating that he attempted unsuccessfully to obtain the position identified by the Survey, or by demonstrating that the jobs contemplated by the Survey were not available at the time they were identified[28]. While the court has suggested that it has no intention of resuscitating *Kachinski* [29] its willingness to consider the issue of "job availability" in connection with a Labor Market Survey portends a judicial pronouncement that the Labor Market Survey is not an objective empirical assessment of earning power, but necessarily requires that subjective job placement efforts be undertaken by the employer seeking to reduce indemnity payments to the injured worker.

It should be interesting, so stay tuned.

[28] See South Hills Health Systems v. Workers' Compensation Appeal Board (Kiefer), 806 A.2d 962, (Pa. Cmwlth. 2002) (a Labor Market Survey must do more than simply document the existence of suitable work, but must report work that is available to the injured worker).

[29] Allied Products and Services v. Workers' Compensation Appeal Board(Click), 824 A.2d 284 (Pa. Cmwlth. 2003) (while reiterating that the defendant must "convince the fact-finder that positions within the injured worker's residual capacity are actually available," the court recognizes that "[t]here is no longer a requirement that [the defendant] establish the existence of actual job referrals").