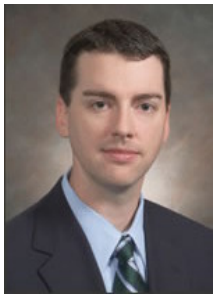
When Does a Claimant Have an Obligation to Begin Pursuing Employment Opportunities?

By: Robert J. Baker, Esquire



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In the context of a workers' compensation claim, the issue of when a claimant has an obligation to begin pursuing employment opportunities? In a recent Decision by the Pennsylvania Commonwealth Court, the answer is clearly the claimant has an obligation to begin pursuing employment opportunities upon receipt of the Notice of Ability to Return to Work.

It is well-settled that a timely Notice of Ability to Return to Work must be issued upon receipt of medical information documenting an employee's change in medical condition.[1] Further, the issuance of a Notice of Ability to Return to Work is a pre-requisite to obtaining a modification or suspension of claimant's benefits.[2]

These principles of law have nonetheless been in conflict with the elements necessary to establish an entitlement to obtain a modification or suspension through a labor market survey. Seemingly, the Courts have taken a renewed interest in the labor market survey process. Recently, the Courts have defined what is considered prompt written notice of the Notice of Ability to Return to Work. See Kleinhagan v. WCAB (KNIF Flexpak Corp.), No. 2009 C.D. 2009 (filed April 22, 2010). Now, the Courts have further explained when a claimant has an obligation to pursue employment in the context of the Notice of Ability to Return to Work.

In Phoenixville Hosp. v. WCAB (Shoap), 2010 Pa. Commw. LEXIS 316 (filed June 30, 2010), the Commonwealth Court explained that pursuant to Section 306(b)(3)(ii)[3] of the Act, a claimant has an obligation to begin pursuing employment opportunities upon being supplied with a Notice of Ability to Return to Work. The obligation to look for work commences before, not after, receiving any earning power assessments or labor market surveys by a vocational expert.

In Shoap, the claimant sustained a work-related injury in nature of left shoulder tendonitis in the course and scope of her employment. Claimant began receiving temporary total disability benefits pursuant to a Notice of Compensation Payable. Claimant's injury description was later amended to include a brachial plexopathy of the left arm. Defendant eventually filed a Modification Petition alleging that work was generally available to claimant within her physical restrictions pursuant to a labor market survey.

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[1] Section 306(b)(3), 77 P.S. § 512(3) states, If the insurer receives medical evidence that the claimant is able to return to work in any capacity, then the insurer must provide prompt written notice, on a form prescribed by the department, to the claimant, which states all of the following: (i) The nature of the employe's physical condition or change of condition. (ii) That the employe has an obligation to look for available employment. (iii) That proof of available employment opportunities may jeopardize the employe's right to receipt of ongoing benefits. (iv) That the employe has the right to consult with an attorney in order to obtain evidence to challenge the insurer's contentions.

[2] Summit Trailer Sales v. WCAB (Weikel), 795 A.2d 1082 (Pa.Cmwlth. 2002), app. denied, 806 A.2d 865 (Pa. 2002).

[3] Section 306(b)(3)(iii), 77 P.S. § 512(3)(iii) states, That proof of available employment opportunities may jeopardize the employe's right to receipt of ongoing benefits.

In support of its petition, defendant presented the testimony of its vocational expert, who met with claimant and conducted a vocational interview. The vocational expert testified that five positions were identified within claimant's physical restrictions established by defendant's medical expert and that the positions open and available in claimant's usual employment area.

Defendant also submitted the testimony of its medical expert, who opined that claimant was capable of returning to sedentary work. Defendant's medical expert also approved job descriptions provided by the vocational counselor as the positions were within claimant's physical restrictions.

Claimant testified that she received a labor market survey with three positions listed as potential employers and applied for each through the completion of an employment application. Claimant testified that she was not contacted by any of the prospective employers, nor was she offered any position, following her completion of the applications. Further, claimant acknowledged that has not sought work independently.

Claimant also presented the testimony of her treating physician, who opined that claimant could not perform the five jobs listed in the labor market survey issued by defendant's vocational expert. Claimant also presented the testimony of her own vocational expert, who did not believe the jobs in question were vocationally appropriate for claimant.

Ultimately, the Workers' Compensation Judge credited the defendant's medical expert to the extent that claimant was capable of sedentary employment, while rejecting claimant's medical expert. The WCJ likewise credited the defendant's vocational expert to the extent that five compatible positions were identified with the work restrictions placed on claimant by defendant's medical expert, were vocationally suited for claimant and were located within the geographical area. The WCJ rejected claimant's vocational expert.

Nonetheless, the WCJ credited claimant's testimony to the extent that she applied to all five jobs that were identified through the vocational assessment and that claimant did not receive an offer of employment. The WCJ found that claimant established that in good-faith, that she followed through on all of the jobs referred to her by defendant and that none of the referrals resulted in an offer of employment. Therefore, the WCJ denied Employer's Modification Petition, which was affirmed on appeal by the Workers' Compensation Appeal Board.

On appeal, the defendant argued that the WCJ erroneously concluded that because claimant applied for the jobs contained in the labor market surveys in good-faith and did not receive an offer of employment that her benefits could not be modified. Defendant further submitted that the standard enunciated under Kachinski v. WCAB (Vepco Constr. Co.), 532 A.2d 374 (Pa. 1987), is inapplicable in the instant matter. Lastly, defendant submitted that the instant matter should have been adjudicated pursuant to section 306(b), 77 P.S. § 512 of the Act.[4]

[4] Section 306(b), 77 P.S. § 512, states in relevant part: (2) "Earning power" shall be determined by the work the employe 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. Disability partial in character shall apply if the employe is able to perform his previous work or can, considering the employe's residual productive skill, education, age and work experience, engage in any other kind of substantial gainful employment which exists in the usual employment area in which the employe lives within this Commonwealth… If the employer has a specific job vacancy the employe is capable of performing, the employer shall offer such job to the employe. In order to accurately assess the earning power of the employe, the insurer may require the employe to submit to an interview by a vocational expert who is selected by the insurer and who meets the minimum qualifications established by the department through regulation…(3) If the insurer receives medical evidence that the claimant is able to return to work in any capacity, then the insurer must provide prompt written notice, on a form prescribed by the department, to the claimant, which states all of the following: (i) The nature of the employe's physical condition or change of condition. (ii) That the employe has an obligation to look for available employment. (iii) That proof of available employment opportunities may jeopardize the employe's right to receipt of ongoing benefits. (iv) That the employe has the right to consult with an attorney in order to obtain evidence to challenge the insurer's contentions.

In Kachinski, the Pennsylvania Supreme Court established the procedure to be followed when attempting to return an injured employee to the workforce. More specifically, the Supreme Court delineated the parties' respective burdens as follows: 1. The employer who seeks to modify a claimant's benefits on the basis that he has recovered some or all of his ability must first produce medical evidence of a change in condition; 2. The employer must then produce evidence of a referral(s) to a then open job(s), which fits in the occupational category for which the claimant has been given medical clearance; the claimant must then demonstrate that he has in good faith followed through on the job referral(s); and if the referral fails to result in a job then claimant's benefits should continue. Kachinski, 532 A.2d at 380.

In Shoap, the Court noted that it previously explained that the post-Act 57 enactment of section 306(b)(2) of the Act, altered an employer's burden of proof to obtain a modification of benefits. South Hills Health Sys. v. WCAB (Kiefer), 806 A.2d 962 (Pa. Cmwlth. 2002). See also Edwards v. WCAB (MPW Indus. Serv., Inc.), 858 A.2d 648 (Pa. Cmwlth. 2004). Additionally, the Court concluded that although the jobs must be available, there is no requirement the claimant be offered a job under Act 57, and that the defendant need only establish a claimant's earning power. However, the current matter is distinguishable from Edwards because the claimant in Edwards never attempted to apply for the positions contained in the earning power assessment, whereas the claimant in Shoap did apply for all positions contained in the labor market survey(s).

As in other recent cases involving a labor market survey, the Court in Shoap cited Melmark Home v. WCAB (Rosenberg), 946 A.2d 159 (Pa. Cmwlth. 2008), wherein the Court concluded that upon receipt of the Notice of Ability to Return to Work, a claimant has an obligation to seek employment. This Court also noted that a claimant must have notice that her benefits could be affected before the employer attempts to modify benefits.

In its reversal of the WCAB, the Court concluded that a defendant is not precluded from obtaining a suspension or modification of benefits in situations where the claimant has pursued the jobs contained in the labor market survey weeks after they were identified as open and available by defendant's vocational expert.

Again, the Court referred to section 306(b)(3)(ii) of the Act, which details that a claimant has an obligation to begin pursuing employment opportunities upon being supplied with a Notice of Ability to Return to Work. Further, this obligation to seek employment commences before, not after, claimant's receipt of an earning power assessments or labor market survey by a vocational expert.

Thus, in Shoap, defendant was entitled to a modification of claimant's benefits as claimant did not apply for any of the positions located by defendant's vocational expert until after receiving copies of the earning power assessment. Moreover, the Court relied upon the fact that claimant did not actively pursue her own employment following receipt of the Notice of Ability to Return to Work.

The Court continued by stating,

> It is simply unrealistic to presume that all jobs identified in a labor market survey as open and available on a given date 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. This is particularly true where, as here, the jobs identified are entry level positions where training is provided by the employer. Any prospective employee needs to act quickly when a position becomes available. The converse is also true, however, that with numerous employers located throughout the Commonwealth, similar employment opportunities will regularly become available. Inasmuch as Section 306(b)(2) is meant to provide an approximate value of a claimant's earnings based on her residual capacity, the fact that claimant applied for the jobs identified by [defendant's vocational expert] and did not obtain an offer of employment is immaterial. Similar employment opportunities will become available

> that fit within her residual earning capacity that correspond to her 'earning power.'

Shoap at 22.

The Court continued by stating that section 34 Pa. Code, 123.204, which applies to the reporting requirements of a vocational counselor, is inapplicable because the regulation merely requires a vocational expert to share information with claimant. Further, "aside from the thirty day time period to submit an initial report, there is no set timetable for the vocational expert to complete any earning power assessments" and does not permit a claimant to apply for a position after the fact then use the lack of a job offer as a defense to the litigation that ensues. Id. at 23.

In light of this case, it is apparent that employers now have an argument that claimant's have an obligation to pursue employment immediately upon receipt of the Notice of Ability to Return to Work. A claimant's failure to do so is evidence that a claimant's benefits may be suspended or modified.