IN THE
SUPREME COURT OF PENNSYLVANIA

NO. 194 MAP 2003

READING ANTHRACITE COMPANY

Appellant,

v.

WORKERS' COMPENSATION APPEAL BOARD

and

DAVID ZERBY,

Appellees.

BRIEF FOR AMICUS CURIAE, PENNSYLVANIA DEFENSE INSTITUTE IN SUPPORT OF APPEAL OF READING ANTHRACITE CORPORATION

Appeal by Allowance from the Order of the Commonwealth Court dated April 14, 2003 Docketed at No. 812 C.D. 2002 Reversing the Order of the Workers' Compensation Appeal Board dated March 18, 2002 Docketed at A01-1545 Affirming the March 28, 2001 Decision and Order of the WCJ, Granting Claimant's Claim Petition and Defendant's Suspension Petition

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I. STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction over appellant's Appeal of the final Order of the Commonwealth Court of Pennsylvania, pursuant to Section 724(a) of the Judicial Code.

II. STATEMENT OF INTEREST OF AMICUS CURIAE

The Pennsylvania Defense Institute ("PDI") is a statewide association of insurance company executives, self-insured entities and defense counsel that provides a forum for researching and developing public policy and for exchanging ideas on issues of concern to its constituents. The PDI represents its members and constituents in a variety of contexts, including legislative matters and litigation affecting the interests of business groups, self-insured entities and insurers conducting business in the Commonwealth of Pennsylvania.

Through the collective judgment of its Amicus Curiae Committee, the PDI seeks to protect the interests of its constituents through the submission of well-reasoned legal analysis supported by thoughtful consideration of public policy.

III. SCOPE OF REVIEW

This Honorable Court's scope of review on appeal from a decision of an administrative agency is limited to determining whether any constitutional rights have been violated, whether any errors of law have been committed or whether any necessary findings of fact are not supported by substantial evidence. See Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; Davis v. Workmen's Compensation Appeal Board (Swarthmore Borough), 561 Pa. 462, 751 A.2d 168 (2000); Waugh v. Workmen's Compensation Appeal Board, 558 Pa. 400, 737 A.2d 773 (1999).

This Honorable Court has recently expanded the scope of appellate review in cases such as this one by permitting "capricious disregard" analysis where, for example, the workers' compensation judge ("WCJ") below chooses not to consider uncontroverted evidence or chooses not to apply well-settled law. Leon E. Wintermeyer, Inc. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002); See also FOP Conference of Pennsylvania Liquor Control Board Lodges v. Pennsylvania Labor Relations Board, 557 Pa. 586, 735 A.2d 96 (1999).

In terms of its standard of review, this Honorable Court, as an appellate tribunal, may not assess credibility or re-weigh evidence since the authority to do so rests exclusively with the WCJ. Taulton v Workmen's Compensation Appeal Board (USX Corp.), 713 A.2d 142 (Pa. Cmwlth. 1998). In examining questions of law, however, this Honorable Court's standard of review is plenary, Phillips, et. al. v. A-Best Products, et. al., 542 Pa. 124, 665 A.2d 167 (1995); Young v. Young, 507 Pa. 40, 488 A.2d 264 (1985) and, in the context of a statutory construction question, this Honorable Court's role is "to ascertain and effectuate the intention of the legislature; to the extent the legislative definition is not explicit, we may also consider, among other matters, the occasion and necessity for the statute, the circumstances under which it was

enacted, the mischief to be remedied, the object to be attained, the former law, if any, including other statutes upon the same or similar subjects, the consequences of a particular interpretation, the contemporaneous legislative history, and the legislative and administrative interpretations of the statute." Commonwealth of Pennsylvania, Higher Education Assistance Agency, et. al. v. Abington Memorial Hospital et. al., 478 Pa. 514, ___, 387 A.2d 440, ___ (1978), Citing Statutory Construction Act of 1972, 1 Pa.C.S.A. §1921.

IV. ORDER IN QUESTION

ORDER

NOW, April 14, 2003, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed insofar as it held that Section 309(d) should be applied and reversed with regard to the calculation of the average weekly wage. The matter is remanded to the Board for further remand to the WCJ to recalculate Zerby's average weekly wage, based in part on the established average weekly wage for that period of time when Zerby was not receiving wages because of a work-related disability.

Jurisdiction is relinquished.

(Order of Commonwealth Court of Pennsylvania dated 4/14/03)

V. STATEMENT OF QUESTION INVOLVED

1. Whether the Commonwealth Court committed error by creating an ad hoc average weekly wage calculation not sanctioned by Section 309 of the Pennsylvania Workers' Compensation Act.

(Answered in the negative below)

VI. STATEMENT OF CASE

The critical facts in this case are not in dispute. Appellee, David Zerby ("claimant") suffered a low back injury while in the employ of Appellant, Reading Anthracite Company ("defendant") on **May 23, 1996** ("Injury #1")(R. 52a). Following the work incident**,** defendant issued a Notice of Compensation Payable, accepting Injury #1 as compensable and providing total disability benefits at a rate of $465.15 per week, based upon an average weekly wage calculation of $696.22. On August 19, 1996 defendant filed a Suspension Petition alleging claimant's failure to respond in good faith to its August 8, 1996 job offer. (R. 39a). While the parties litigated that Petition, claimant returned to work for defendant on November 7, 1996 in his regular job, without wage loss, only to suffer a **second** work injury nearly one year after Injury #1, on **May 29, 1997 ("Injury #2")**(R. 58a). Initially, defendant issued a Temporary Notice of Compensation Payable in response to Injury #2, providing claimant temporary disability benefits at a rate of $340.95, based upon an average weekly wage calculation of $511.43 (R. 2a). When it was later determined, however, that claimant was capable of returning to work without wage loss, defendant issued a Notice Stopping Temporary Compensation (R. 3a) and a Notice of Compensation Denial form, (R. 4a) prompting claimant to file an original Claim Petition on July 15, 1997. (R. 5a).

The two Petitions were consolidated before a single WCJ.

A. SUMMARY OF WCJ ADJUDICATIONS

In his first Decision and Order circulated March 30, 1999, the WCJ adjudicated defendant's Suspension Petition and claimant's Claim Petition as follows: (1) with respect to "Injury #1" the WCJ granted a suspension of benefits as of November 7, 1996; (2) with respect to "Injury #2" the WCJ granted claimant's Claim Petition providing him total disability benefits at

rate of $421.65 per week on the basis of an average weekly wage of $657.76, calculated in accordance with the methodology set forth in Section 309(d.1) of the Act.

Following a remand Order circulated by the Workers' Compensation Appeal Board on July 25, 2000, the WCJ issued a second Decision and Order on March 28, 2001, in which he ruled that with respect to Injury #2, claimant had an average weekly wage of $657.93, including bonus payments and incentive payments he had earned, once again calculated in accordance with the methodology set forth in Section 309(d.1) of the Act.

B. SUMMARY OF WORKERS' COMPENSATION APPEAL BOARD ADJUDICATIONS

In its first Opinion and Order circulated July 25, 2000, the Workers' Compensation Appeal Board reversed the WCJ's original average weekly wage calculation and remanded the case back to the WCJ with instructions that the Section 309(d.1) calculation include those bonus and incentive payments claimant received prior to Injury #2.

In its second Opinion and Order circulated March 18, 2002, the Appeal Board reversed the average weekly wage calculation set forth in the WCJ's second Decision and Order, concluding that: "Since Claimant was employed by the employer, if not exactly actively engaged in the performance of services, for at least three consecutive periods of thirteen calendar weeks in the fifty-two weeks immediately preceding the injury, even though he was not working due to a different work-related disability for periods during that time, Claimant could not utilize Section 309(d.1) to calculate his average weekly wage. Therefore, Claimant's average weekly wage calculation should be based upon Section 309(d) and we must utilize that section in calculating Claimant's benefits" (R. 154a).

On or about April 1, 2001, claimant filed a Petition for Review with the Commonwealth Court of Pennsylvania (R. 23a) assigning error to the Appeal Board's application of the Section

309(d) methodology to "Injury#2" while urging that "employer/carrier failed to meet its burden of proof by presenting substantial competent evidence that it 'maintained an employment relationship with Claimant during the 52 weeks preceding his injury." (R. 160a).

C. SUMMARY OF COMMONWEALTH COURT ADJUDICATION

In an Opinion and Order dated April 14, 2003, the Commonwealth Court affirmed in part and reversed in part the Appeal Board's March 18, 2002 adjudication, ruling that although the Appeal Board had correctly applied Section 309(d) to the facts in the case - since claimant remained employed by the employer during the 52 week period immediately preceding his Injury #2 - the application of that provision was inappropriate because it yielded an unrealistic assessment of earnings in light of absences claimant had incurred during the 52 weeks preceding Injury #2, resulting from his disability attributable to Injury #1. The court ruled that in such cases, the most accurate measure of the average weekly wage for Injury #2 is the average weekly wage calculation originally performed for Injury #1. In so ruling, the court relied upon the language of Section 423 of the Act, reasoning that since no evidence was presented below establishing that the average weekly calculation for Injury #1 was materially incorrect, that calculation should supply the average weekly wage calculation for Injury #2: "To summarize, in cases where Section 309(d) applies, use of the previously established AWW is required by Section 423 and is more reflective of the reality of employee's earnings" thereby requiring that its earlier decision in Merkle v. Workers' Compensation Appeal Board (Hofmann Industries) 796 A.2d 1034 (2002) be overruled. (See Appendix "A" at pp. at 12-13); (R. 173a-174a)[1]

[1] The court noted that the claimant in Merkle "did not argue, in the alternative, that, even if employed, the resultant calculations produced an artificially low wage that was note truly reflective of his AWW and, in fact, served to penalize him." It is unclear to the PDI whether claimant advanced such a position below in this case.

In so ruling, the court embraced its holding in Colpetzer v. Workers' Compensation Appeal Board(Standard Steel), while distancing itself somewhat from the equitable basis for that ruling. (R. 172a, 173a-174a)(See Appendix "A" at pp. 11, 12-13).

On May 22, 200, defendant filed a Petition for Allowance of Appeal with this Honorable Court, assigning error to the Commonwealth Court's application of an average weekly wage calculation methodology not sanctioned by Section 309 of the Act. (R. 117a).

By Order dated July 18, 2003, this Honorable Court granted defendant's Petition for Allowance of Appeal and consolidated this matter with Colpetzer (Nos. 646 MAL 2002, & 63 MAP 2003, granted April 22, 2003).

VII. SUMMARY OF ARGUMENT

The Commonwealth Court's employment of the average weekly wage calculation methodology set forth in Zerby / Colpetzer should be rescinded since it constitutes an ad hoc methodology not sanctioned by the Pennsylvania Legislature in Section 309 of the Act. Moreover, it encourage the kind of case-by-case average weekly wage analysis that Act 57 of 1996 sought to eliminate and its ignores the realistic vagaries of the workplace that necessarily affect earnings over the course of one year, including economic, professional and familial occurrences.

VIII. ARGUMENT

A. SINCE THE AD HOC AVERAGE WEEKLY WAGE CALCULATION EMPLOYED BY THE COMMONWEALTH COURT BELOW IS NOT A STATUTORY METHODOLOGY SANCTIONED BY SECTION 309 OF THE ACT, THE CALCULATION SHOULD BE RESCINDED

The PDI is mindful that the policy underlying Section 309 parallels the basic goal of the Act – to compensate the injured worker for loss of earning capacity resulting from a work-related injury. Triangle Building Center v. Workers' Compensation Appeal Board (Linch), 560 Pa. 540, 746 A.2d 1108 (2000).

The PDI further recognizes that in order to accomplish that goal, Section 309 seeks to assess the injured worker's "pre-injury ability to generate future earnings," and "to reasonably reflect the economic reality of a claimant's recent pre-injury earning experience" by focusing upon her past performance over a recent period of time, thereby creating "a reasonable picture of pre-injury earning experience for use as a projection of potential future wages and, correspondingly, earnings loss." Id.

The PDI is mindful that before June 24, 1996, the old Section 309 afforded workers' compensation practitioners **ten** average weekly wage **methodologies** and included a stated determination to afford the injured worker the benefit of the most favorable of those.

In order to maximize the claimant's compensation rate, the old statute required that a series of alternative methodologies be performed for each claim, including the following: (1) the Method Six, "exceptional causes" calculation set forth in the second paragraph of Section 309(d) which allowed the WCJ to base the calculation upon an isolated work week payment for the injured worker who had been employed for less than 13 weeks before the work injury and whose co-employees earned wages that did not fairly ascertain the injured employee's wages;

(2) the Method Eight, "exceptional causes" calculation applied to seasonal workers; (3) the Method Nine, "mandatory alternative" calculation to Methods One through Eight under the fourth paragraph of Section 309(e) which required that the injured employee be assigned a "daily wage," multiplied by a universal five-day work week and (4) the Method Ten, "second mandatory alternative" calculation, which required that the injured workers' average weekly wage equal or exceed "one-thirteenth of his highest calendar quarter wage amount in the first four of the last five completed calendar quarters immediately preceding the date of his injury…."

Under the old regime, the Pennsylvania courts construed Section 309 in strict fashion, while promulgating the following general rules of average weekly wage calculation: (1) consistent with the plain language of the provision, the average weekly wage calculation had to be based upon the employee's earnings "at the time of injury." Ringgold School District v. Workmen's Compensation Appeal Board (Belak), 96 Pa. Cmwlth. 111, 507 A.2d 876 (1986) citing 77 P. S. §582 ; Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.), 516 Pa. 240., 532 A.2d 373 (1987); Thomas v. Workmen's Compensation Appeal Board, 672 A.2d 368 (Pa. Cmwlth. 1996); Williams v. County of Alleghany, 55 Pa. Cmwlth. 432, 423 A.2d 1097 (1980); (2) the calculation could not consider the employee's prospective earnings, Markle v. Workmen's Compensation Appeal Board (Caterpillar Tractor Co.), 541 Pa. 148, 661 A.2d 1355 (1995); (3) the calculation could not be performed using a non-statutory methodology, Kashuba v. Workers' Compensation Appeal Board (Hickox Construction), 713 A.2d 169 (Pa. Cmwlth. 1998) and (4) the Section 309 methodologies were not subject to case-by-case modification Borroughs v. Workmen's Compensation Appeal Board (Brookvale Mfg. Co.), 73 Pa. Cmwlth. 459, 458 A.2d 648 (1983).

By the early 1990s, Section 309 was drawing heavy criticism from business groups and the insurance industry who complained that the law was weighted too heavily in favor of the worker, Borroughs v. Workmen's Compensation Appeal Board (Brookvale Mfg. Co.), 73 Pa. Cmwlth. 459, 458 A.2d 648 (1983), in a number of respects: (1) the statute included too many methodologies, most of which were overly complicated; (2) the standard methodology for hourly workers allowed an isolated 13 week pay period to artificially "spike" the employee's weekly wage, resulting in unreasonable calculations that encouraged employees to remain out of work and (4) the two mandatory "alternative calculations" set forth in Sections 309(d) and 309(e) oftentimes resulted in similar unreasonable assessments, particularly, in the case of the first alternative calculation which, as noted, required that each worker be assigned a "daily" wage, multiplied by 5 – on the basis of the traditional five-day work week - even where the worker had never worked such a schedule. See Sheesley v. Workmen's Compensation Appeal Board (Brant), 106 Pa. Cmwlth. 227, 526 A.2d 450 (1987) ("We are, of course, cognizant of the fact that the claimant's average weekly wage as computed in accordance with the optional calculation of Section 309(e) exceeds his actual remuneration").

In 1993, with the enactment of what is commonly referred to as "Act 44" the Pennsylvania Legislature began what would become a three-year process of re-modeling the Act in an effort to reduce the cost of Pennsylvania work injuries. The remedial law sought to achieve "medical cost containment" through the introduction of medical fee caps, utilization review and self-referral prohibitions.

The passage of Act 44 foreshadowed additional remedial legislation, which came in the form of "Act 57 of 1996" a hotly debated bill that represented the next logical step in reducing the cost of Pennsylvania work injuries. Spearheaded by the insurance lobby, and signed into law on June 24, 1996 by Governor Tom Ridge, Act 57 sought to remedy what employers and

insurance advocates saw as a series of inequitable and costly features of the Pennsylvania Act[2] by focusing upon **indemnity** cost reduction[3]. The new law took provocative action – it created an "Impairment Rating" regime transforming the essential character of the Act from a pure "wage loss" statute to a "quasi-wage loss" statute; it sanctioned the use of "Compromise and Release Settlements;" it created a series of off-sets designed to prohibit "double recoveries" of benefits and it eliminated the most inequitable aspects of the old Section 309.

The least controversial methodologies of Section 309 survived Act 57 - Sections 309(a), (b) and (c) of the statute continue to include longstanding methodologies used for calculating the average weekly wage of those injured employee whose earnings are fixed by the week, by the month or by the year.

Too, the "seasonal" occupation methodology set forth in Section 309(e) remains viable.

For the hourly worker, however, the new law introduced three new calculation methodologies:

> "(d) If at the time of the injury the wages are fixed by any manner not enumerated in clause (a); (b) or (c), the average weekly wage shall be calculated by dividing by thirteen the total wages earned **in the employ of the employer** in each of the highest three of the last four consecutive periods of thirteen calendar weeks in the fifty-two weeks immediate preceding the injury and by averaging the total amounts earned during these three periods; (emphasis supplied)
>
> (d.1) If the employee **has not been employed by the employer** for at least three consecutive periods of thirteen calendar weeks in the fifty-two weeks immediately preceding the injury, the average weekly wage shall be calculated by dividing by thirteen the total wages **earned in the employ of the employer** for any completed period of thirteen calendar

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

[3] There is no question that Act 57 was motivated by a consensus that workers' compensation costs had become too expensive for many companies to conduct business in Pennsylvania. See Township of Lower Merion v. Workers' Compensation Appeal Board (Tansey), 783 A.2d 878 (Pa. Cmwlth. 2001).

weeks immediately preceding the injury and by averaging the total amounts earned during such periods; (emphasis supplied)

(d.2) If the employee **has worked less than a complete period of thirteen calendar weeks** and does not have fixed weekly wages, the average weekly wage shall be the hourly wage rate multiplied by the number of hours the employee was expected to work per week under the terms of employment." (emphasis supplied).

In Colpetzer, the Commonwealth Court observed that the foregoing provisions govern the following factual scenarios: (1) Section 309(d) applies where the employee has been **employed** by the employer for at least three consecutive periods of thirteen calendar weeks in the fifty-two week period immediately preceding the work injury; (2) Section 309(d.1) applies where the employee has **not been employed** by the employer for at least three consecutive periods of thirteen calendar weeks in the fifty-two week period immediately preceding the work injury and (3) Section 309(d.2) applies where the employee has not **worked** a complete period of thirteen calendar weeks for the responsible employer.

Perhaps the most conspicuous feature of the new law was its elimination of the two "exceptional cause" calculations and the two "mandatory alternative" calculations discussed above, which had provided the authority for case-by-case assessment of average weekly wage.

Indeed, the new methodologies reflected the Legislature's determination to foster fairer assessments by (1) eliminating the costly flexibility inherent in the old Section 309; (2) increasing the number of 13-week pay periods to be included in the calculation, thereby averaging out the effect of isolated earning "spikes" that significantly impacted calculations under the old law and (3) eliminating the mandatory alternative methodology that assumed a five-day work week, thereby accommodating non-traditional work schedules.

Following a four-year incubation period, the Commonwealth Court began to issue a series of decisions construing the three new calculations.

The issue that seemed to draw the most attention from workers' compensation litigants was the meaning of the phrases "in the employ of the employer" as used in Section 309(d) and "has not been employed" as used in Section 309(d.1). Although the distinction between maintaining an employment relationship and actually working for wages had been litigated before the advent of Act 57, the issue generated less controversy before 1996 because the old law did not require an assessment of earnings over multiple 13 week periods, but limited the analysis to individual 13 week periods. See Sheesley Company v. Workmen's Compensation Appeal Board (Brant), 106 Pa. Cmwlth. 227, 526 A.2d 450 (1987); Romig v. Champion Blower & Forge Company, 315 Pa. 97, 172 A. 293 (1934).

In a series of rulings, the Commonwealth Court was asked to address the meaning of "in the employ of the employer" in a variety of factual settings. Norton v. Workers' Compensation Appeal Board (Norton), 764 A.2d 704 (Pa. Cmwlth. 2000), Port Authority of Alleghany County v. Workers' Compensation Appeal Board (Cooley), 773 A.2d 224 (Pa. Cmwlth. 2001), Bethlehem Structural Products v. Workers' Compensation Appeal Board (Vernon), 789 A.2d 767 (Pa. Cmwlth. 2001), and Merkle v. Workers' Compensation Appeal Board (Hofman Industries), 796 A.2d 1034 (Pa. Cmwlth. 2002).

Concluding that the phrase is not limited to actual days that the employee performs work for wages, but refers to the existence of a continuing employment relationship - even where temporary work interruptions occur during the relevant period preceding the work injury - the court construed the new law in the manner envisioned by the drafters of Act 57 – it applied the language of the statute **literally** while resisting the temptation to craft an artificial snapshot of the employee's pre-injury earning history on a case-by-case basis. See Port Authority of Alleghany County v. Workers' Compensation Appeal Board (Cooley), supra;

Gartner v. Workers' Compensation Appeal Board (Kmart Corporation), 796 A.2d 1056 (Pa. Cmwlth. 2002).

The court's literal approach to Section 309 continued in Collier v. Workers' Compensation Appeal Board (PRS/Engles Trucking), 805 A.2d 1267 (Pa. Cmwlth. 2002) (because the employee's absence from work following a non-work-related automobile accident did not require him to re-apply or re-interview for his old position, and therefore did not permanently sever his employment relationship, he had "completed" a single 13 week calendar period of employment before his work injury, thereby triggering the Section 309(d.1) methodology) and in Bethlehem Structural Products v. Workers' Compensation Appeal Board (Vernon), 789 A.2d 767 (Pa. Cmwlth. 2001) (the word "worked" does not refer to the employee's employment relationship with the employer, but refers to the amount of time the employee actually performed services on behalf of the employer.)

On April 22, 2002, the Commonwealth Court applied Section 309(d) literally, while adjudicating Merkle v. Workers' Compensation Appeal Board (Hofman Industries), supra. In that case, the worker suffered two work injuries in a span of thirteen months. On **February 26, 1997** he sustained a left arm injury that prompted the filing of a Notice of Compensation Payable, providing him total disability benefits at a rate of $399.93 per week, based upon an average weekly wage of $599.90. Over the ensuing thirteen months he periodically missed time from work because of the effects of his work injury. He suffered Injury #2 on **March 13, 1998** that prompted the issuance of a Notice of Compensation Payable providing him total disability benefits at a rate of 280.50 per week, based upon a pre-injury wage of $326.81. While acknowledging that his work attendance had been impacted during the 52 weeks preceding Injury #2 as a consequence of his Injury#1 disability, the court ruled that the methodology set forth in Section 309(d) was properly applied below: "Because Claimant had an employment

relationship with Employer for at least three consecutive periods of thirteen calendar weeks in the fifty-two weeks immediately preceding his March 13, 1998 injury, Section 309(d.1) by its clear language, does not apply here, see 77 P.S. §582(d); Port Authority, and Employer's calculation under Section 309(d) was proper." 796 A.2d. at ___.

The court's unanticipated departure from the literal application to Section 309 came in its July 17, 2002 ruling in Colpetzer, which involved a worker who suffered two work injuries in a span of nine months. The claimant first suffered a shoulder injury while in defendant's employ on **March 15, 1996,** prompting the filing of a Notice of Compensation Payable awarding total disability benefits at a rate of $527.00 per week, based upon a pre-injury average weekly wage of $ 791.32. He remained disabled as a result of Injury #1 until he returned to work on August 15, 1996. Nearly four months later he suffered a **second work injury** - involving the cervical spine - on **December 5, 1996**. Although acknowledging on appeal that the WCJ had correctly determined that the claimant had been employed for at least 52 weeks before Injury #2, thereby satisfying the language of Section 309(d), the Commonwealth Court abandoned the methodology required by the statute because in its view, it failed to yield a realistic assessment of claimant's earning experience.

In order to achieve such an assessment, the court instructed that the average weekly wage calculation for Injury #1 be used in order to determine the average weekly wage for Injury #2:

> "In the case of an employee who is absent from work because of a work-related disability [during the fifty-two calendar week period immediately preceding the subject work injury] we note that the method to determine the reality of the employee's earning potential during the time of disability is obvious. By virtue of the fact that the employee is receiving disability benefits, his or her **average weekly wage** (emphasis in original) **during this period has already been established.**(emphasis supplied) Thus, it is a

> simple matter of using an established average weekly wage for the period when the employee is on disability as a gauge to reflect the reality of the employee's earning potential during that time. The WCJ erred by ignoring this evidence of Claimant's earning potential [and by failing] under Section 309(d) [to incorporate] the established average weekly wage for that period of time when Claimant was not receiving wages because of a work-related disability."

802 A.2d at ___. (emphasis supplied).

On April 23, 2003, following its granting of claimant's request for re-argument[4], the Commonwealth Court issued its final ruling in Zerby, in which it embraced the result in Colpetzer, while concluding "that in cases where Section 309(d) applies, use of the previously established AWW is required by Section 423 and is more reflective of the reality of employee's earnings" thereby requiring that its previous decision in Merkle v. Workers' Compensation Appeal Board (Hofmann Industries) be overruled. (See Appendix "A" at pp. at 12-13); (R. 173a-174a).

The PDI respectfully submits that the ruling in Zerby / Colpetzer should be reversed as a matter of law for a number of reasons.

In both cases, the court applied an ad hoc "methodology" that is not set forth in Section 309. In doing so, the has court ignored its traditional refusal to act beyond the statute's strict guidelines, Adams v. Workmen's Compensation Appeal Board (Frank D. Suppa Logging), 107 Pa. Cmwlth. 30, 527 A.2d 625 (1987); Kashuba v. Workmen's Compensation Appeal Board (Hickox Construction), supra.

[4] The Commonwealth Court's first ruling in Zerby, which followed its ruling in Port Authority, was issued one month after Colpetzer, on August 20, 2002. In Zerby #1, the court, citing its holding in Merkle v. Workers' Compensation Appeal Board (Hofman Industries) ruled that a literal application of Section 309(d) was in order, thereby requiring an averaging of three 13 calendar week periods preceding Injury #2, during much of which he was out of work receiving total disability.

In both cases, the court has sanctioned the inclusion of earnings generated nearly **two years before** the subject work injury, despite the statute's unequivocal instruction that only wages generated during the 52-week period immediately prior to the injury be assessed.[5]

Moreover, the court's observation in both cases that by the time of Injury #2 the injured employee's average weekly wage had already been determined would appear to require a fundamental misapplication of the statute, which insists that in all cases, the employee's average weekly wage be determined as of the date of injury - not as of a date preceding the date of injury.

By violating the parameters set forth by the Legislature in Section 309, the court has created a methodology that includes an assessment of wages generated under very different economic or professional circumstances. Indeed, as this Honorable Court has recognized, the Legislature chose to limit the assessment to wages generated over the course of one year preceding the work injury in order to reflect the employee's **recent** pre-injury earning experience[6]. The earnings generated by a worker in "Year -4" are oftentimes far different than they were in "Year -2" for any number of reasons, including changes in pay structure, changes in performance, changes in general economic conditions or in economic conditions specific to the liable employer or changes in the employee's job duties or responsibilities.

The Pennsylvania Legislature has already determined what earning horizon should be applied in calculating average weekly wage for a given work injury. The judiciary has no

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[5] The court observed that "[t]his is not to say that in all cases when an hourly employee is absent from work during the applicable period preceding the work injury, a false or artificial earnings history is established [thereby requiring the use of the non-statutory calculation]. Obviously, each case must be reviewed on its particular facts"

[6] Triangle Building Center v. Workers' Compensation Appeal Board(Linch), 560 Pa. 540, 548, 746 A.2d 1108, 1112 (2000).

authority to expand that horizon in order to achieve what might be viewed as a fair result on a case-by-case basis.

By the time it issued its second ruling in Zerby, the Commonwealth Court seemingly recognized the need to support its abandonment of Section 309, with statutory authority. First, the court reasoned that its use of a methodology not included in the statute was proper by virtue of the fact that the statute does not prohibit such an approach: "[n]othing in Section 309 establishes that an employee's period of disability, with its established average weekly wage [for Injury #1], is to be excluded from a calculation of the employee's average weekly wage [for Injury #2]" is unsatisfactory since it seems to suggest that the Legislature bears the burden of including in the statute a prohibition against any ruling or practice that the courts might wish to apply to a particular case even in the absence of legislation sanctioning the ruling or practice.

In a further effort to distance itself to the equitable rationale underlying Colpetzer, the court also relied upon the language of Section 423 of the Act, reasoning that under that provision the Notice of Compensation Payable issued for Injury #1 must remain effective for Injury #2 simply because it was never revealed to be materially incorrect.

The court's reliance upon Section 423 is unsatisfactory for two reasons: (1) the Notice of Compensation Payable to which the court was referring assessed, as a matter of statutory law, the earnings claimant generated from the date of Injury #1 to a date **one year earlier** – neither party could have or would have challenged the Notice as materially incorrect with respect to a date of injury suffered months later and (2) regardless of the foregoing, the only method available for determining whether a Notice of Compensation Payable is accurate is application of the average weekly calculation methodologies set forth in Section 309!

The PDI respectfully submits that there is no statutory basis for the ruling in Zerby / Colpetzer.

In an effort to demonstrate the turmoil that Zerby / Colpetzer has already caused in the administration of workers' compensation claims, the PDI wishes to bring to this Honorable Court's attention, an actual workers' compensation matter that highlights quite well how case-by-case judicial legislation is anathema to the goals of the new Section 309 and Act 57.

Hypothetical - Claimant, a 34–year old female suffered a low back injury while in the course of her part-time duties as an RN for a large hospital on **April 29, 1996**, as she assisted a woman in the delivery of her baby. On that basis, defendant issued a Notice of Compensation Payable on June 3, 1996 accepting her injury as a "low back strain" and providing her total disability benefits at a rate of $521.87 per week on the basis of an average weekly wage calculation of $782.80.

Claimant, whose condition was ultimately diagnosed as a disc herniation at L4-5, eventually improved, prompting her return to work for defendant on December 30, 1996 at the a pay structure and schedule that was identical to that which she had enjoyed prior to her work injury. She performed her job without difficulty until **May 16, 1997**, when, while moving a piece of equipment, she developed an immediate onset of low back / leg pain that caused her to collapse. Her condition soon deteriorated, eventually resulting in a diagnosis of "complex regional pain syndrome." She has not worked since that date.

The parties in the case agree that claimant's May 16, 1997 work incident constitutes a new work injury, but have been forced to litigate claimant's May 16, 1997 average weekly wage calculation given the Zerby / Colpetzer ruling.

It will be recalled that **Injury #1** occurred **before June 24, 1996**, meaning that in calculating claimant's average weekly wage for that injury, defendant had an obligation to apply the old Section 309. On April 29, 1996 claimant worked on a part-time basis, thereby triggering the first "alternative" calculation under the old Sections 309(d) which, as noted

above, required that each worker be assigned a "daily" wage, multiplied by 5 – on the basis of the traditional five-day work week - even where the worker had never worked a full five-day work week.

Despite the fact that claimant worked only two days per week, her daily wage multiplied by 5 yielded an average weekly wage calculation well in excess of her actual weekly earnings.

With respect to her May 16, 1997 work incident, the new Section 309 calculations would yield a significantly lower average weekly wage calculation since most would agree that the old "alternative" calculation would not apply to an injury that occurred after June 24, 1996.

But, under Zerby/Colpetzer claimant's average weekly wage calculation for Injury #1 must be used in order to assess her Injury #2 average weekly wage given the fact that her wages during the 52-week period immediately preceding Injury #2 were in fact depressed due to the absences she experienced as a result of Injury #1.

In other words, the ruling in Zerby/Colpetzer requires that that an average weekly wage calculation methodology that was eliminated by the Legislature be revived in order to administer a post-Act 57 work injury!

Such an absurd result lays demonstrates quite well why the average weekly wage rules crafted by the Legislature should be honored and should not be subject to ad hoc judicial modifications depending upon the facts of the particular case. If the rules are deemed unfair or impractical, they should be remedied in the same fashion that resulted in the enactment of Act 57.

Ultimately, the rulings in Zerby and Colpetzer rely upon an overly narrow view of "reality" in the work force. Such a restrictive approach has left open how the goal of achieving a fair calculation of average weekly wage should be accomplished in various sympathetic factual

settings. The application of judicial concepts of reality on a case-by-case basis, ignores the role of the Legislature and eliminates any semblance of order or predictability for the claims handler, the attorney or the WCJ.

The PDI respectfully submits that when it expanded the number of 13-week periods over which earnings would now be assessed in calculating average weekly wage as of June 24, 1996, the Pennsylvania Legislature sought to expose the calculation to the vagaries of employment to a far greater degree than had the old law.

It did so because it recognized that in the workplace it is a reality that employees miss time from work during given time periods for any number of reasons, regardless of fault e.g. family illness and/or death, non-work-related physical disability, pregnancy/child birth, natural disasters, inclement weather conditions, man-made crises such as power black-outs, economically induced plant shut-downs and terrorist threats. When it modified Section 309 of the Act in 1996, the Pennsylvania Legislature made a conscious decision to better assess the injured workers' average weekly wage, by expanding the time period over which wages would now be scrutinized. In doing so, Legislature must have considered that the expanded view of earnings would be far more susceptible to the vagaries of employment.

The purpose of the expanded analysis called for by Act 57 was to eliminate those calculations that failed to truly consider the realities of employment and wage generation.

It is axiomatic that the Workers' Compensation Act should only be construed in the employee's favor where the language of the provision is ambiguous - that the letter of the law should not be ignored in the pursuit of policy where the statute is clear and free from all ambiguity. Kline v. Arden H. Vernere Co., 503 Pa. 251, 469 A.2d 158 (1983), Markle v. Workmen's Compensation Appeal Board (Caterpillar Tractor Co.), 541 Pa. 148, 661 A.2d 1355 (1995).

In Zerby / Colpetzer the Commonwealth Court acknowledged that the plain language of Section 309(d) applied to the facts of both cases. There is certainly no suggestion in either case that any word or phrase referring to "work" or employment" in Section 309 or the references in Section 309 to various time periods – the 52-week period immediately preceding the work injury and 13-week calendar week periods - are in any way ambiguous.

There is no justification for the failure of the court below to abandon the methodologies set forth in Section 309 of the Act[7].

The PDI respectfully notes that the perceived inequities that prompted the courts' disregard for Section 309 could perhaps have been avoided in each case had the court awarded disability benefits for both Injury #1 and Injury #2, simultaneously. It will be recalled that the claimant in Zerby returned to work following Injury #1, on a suspension basis (R. 58a) – without a full recovery. He thereafter experienced total wage loss through no fault of his own - Injury #2 (R. 58a-59a) - meaning that under Pieper v. Ametek-Thermox Instruments Division, 526 Pa. 25, 584 A.2d 301 (1990) and the cases that have followed it, claimant arguably should have been afforded a reinstatement of disability benefits attributable to Injury #1, while seeking additional disability benefits on the basis of Injury #2. The reinstatement of benefits for Injury #1 would offset the effect of the artificially depressed average weekly wage calculation for Injury#2 while upholding the integrity of Section 309.

[7] The PDI has reviewed this Honorable Court's Opinion and Order in Hannaberry HVAC v. Workers' Compensation Appeal Board (Snyder, Jr.) (No. 99 MAP 2001) circulated on October 22, 2003. The PDI respectfully urges that the ruling be limited to its facts, while recognizing the wisdom of Justice Eakin's warning that legislation should not be deemed ambiguous or should not be ignored where it fails to provide specific guidance for every eventuality in the workplace – that perceived failings in legislation should be corrected by the General Assembly. Indeed, when a statute is repeatedly discounted by the courts, it loses its fundamental character as a collective instruction for social interaction.

IX. CONCLUSION

The Pennsylvania Defense Institute wishes to thank this Honorable Court for considering the observations and thoughts that it has brought to this appellate proceeding. Our organization respectfully urges this Honorable Court reverse the Commonwealth Court rulings in Zerby and Colpetzer.

Respectfully submitted,

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Dated: November 10, 2003

CERTIFICATE OF SERVICE

I, Andrew E. Greenberg, Esquire, do hereby certify that an original and twenty-five (25) copies of the Brief of Amicus Curiae, Pennsylvania Defense Institute in Support of Appeal of , Reading Anthracite Company were served upon the Supreme Court of Pennsylvania at the address noted below, and that two true and correct copies were served on the Commonwealth Court, the Workers' Compensation Appeal Board, counsel for Appellant and counsel for Appellee respectively on **November 10, 2003**, via first-class U.S. Mail, postage pre-paid, at the following addresses:

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