

Pennsylvania Weekly Case Law Summary

In Phoenixville Hospital v WCAB (Shoap), decided 11/21/13, the employer obtained a labor market survey that identified five jobs that presumably fit within claimant's medical, educational and vocational restrictions. Upon receipt of the labor market survey, claimant applied for the first three positions and had telephone interviews with the remaining two. During the pendency of the employer's modification petition, claimant testified that despite her timely applications and interviews, she was not offered a job and one prospective employer told her that she was not qualified for a position. Although the WCJ found the testimony of employer's medical and vocational experts more credible than claimant's experts, he nevertheless denied the employer's modification petition on the grounds that claimant applied in good faith to the jobs. The WCAB agreed, but the Commonwealth Court reversed, found for the employer, and focused on whether the employer presented evidence of open and available positions, not the claimant's response. The PA Supreme Court has now reversed, and by so doing, has brought elements of pre-Act 57 vocational placement back into the labor market survey analysis. While the Supreme Court was careful to state that actual job offers are still not required, the Court has found the following factors to be relevant in the vocational process:

- Employer must provide claimant with meaningful employment opportunities;
- Employer's vocational evidence should establish that prospective employers are in search of a candidate with the claimant's medical, educational, and vocational qualifications;
- Employer must show that the jobs remain open until such time as claimant is afforded a reasonable time to apply;
- Claimant has latitude to present evidence regarding his or her own experience with applying for these jobs and such evidence is relevant in the analysis; and
- Both parties have an implicit burden of establishing good faith with the vocational process

Comments:

While the Court discusses the above factors, it does not state that a claimant can defeat a petition merely by showing good faith as she could in pre-Act 57 cases. Rather, the Court has confirmed that a claimant's vocational experience is relevant in the vocational process. In order to maximize your chances of success on such a petition and to gain as much leverage as possible for settlement, defense attorneys should object on hearsay grounds to any testimony claimant offers regarding a prospective employer's response. In addition, your vocational counselors should be well versed in this case, should send job availability information to claimants at the time the jobs are located and should follow up with prospective employers thereafter. We suspect claimants' attorneys will try to use this case to their advantage. If you have questions regarding how we can best use it to our advantage, please let us know. Please also note that this case applies to all labor market surveys, even if they precede the date of the decision.