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WORKERS' COMP ALERT

Commonwealth Court Rules on Labor Market Survey Burden in South Hills Health System v Workers' Compensation Appeal Board (Kiefer)

The Pennsylvania Commonwealth Court has decided a case of first impression under Act 57; in South Hills Health System v Workers' Compensation Appeal Board (Kiefer), 1357 CD 2000 (dec. 9-12-02), a three judge panel clarified an employer's burden of proof on a labor market survey case. The Court affirmed the underlying denial of the employer's Modification Petition, finding that the employer failed to present evidence of an actual open and available job. In holding that an employer must prove the existence of a specific job, rather than rely solely on expert opinion evidence that the claimant has an earning power in his usual area of employment, the Court sent a strong signal that the morass of work availability problems attendant to pre Act 57 cases under Kachinski and its progeny will remain with us.

In South Hills, the employer petitioned for modification of benefits. It presented evidence from the pre injury employer that it had sent notices of vacant jobs on which she would have preferential bidding rights. The pre injury employer did not specifically offer a job to the claimant taking into consideration her restrictions. The Court rejected the employer's argument that their burden of proof was satisfied without the clear demonstration that the pre injury employer offered an appropriate job. The employer also engaged a vocational expert to determine the claimant's earning power. The vocational expert testified that the claimant had an earning power based on her survey of jobs which existed in her labor market. These jobs were not found to be open and available to the claimant at the time of the expert's assessment.

It was generally agreed that the legislative intent in amending Section 306 (b) of the Workers' Compensation Act was to address the cumbersome judicial doctrine which had evolved in the realm of work availability. The labor market survey standard was thought to remedy the hypertechincal, unpredictable results so common under the Kachinski test by eliminating the need to refer specific jobs and track the claimant through the lengthy process. An expert opinion on an earning power would streamline and add efficiency to the process. The South Hills Court rejected this reasoning and interpreted the legislative intent quite differently.

The Court put a great deal of emphasis on selected language taken from Section 306(b) and

seemed to wholly ignore other pertinent language. They focused on “employment **which exists**” and “proof of **available** employment.” The decision reflects the pre Act 57 mind set that unless a job is presented to the claimant on a “silver platter” there can be no presumption of an ability to earn an income. The Court discounts the directive that earning power be determined by residual abilities and the local labor market.

Several questions are left open with this decision. The Court did not make clear whether the claimant must receive a job offer for availability to be successfully demonstrated. They did not address notification standards of the open jobs and the Court was silent on the claimant’s duty to pursue these open jobs in good faith. We will watch for further developments in this area, but it does not seem too great a leap to find ourselves squarely back in the Kachinski arena in the near future.

For now, practitioners would be wise to review their files where modification is being sought on the basis of a labor market survey to ensure that your evidence can meet the newly defined standard. Unreasonable contest attorney fees are a possibility if prompt action is not taken. Finally, the South Hills case serves to remind us of the adage, “the more things change, the more they stay the same.” As always, we are available to discuss your questions, concerns and specific cases with you.