Duquesne Law Review

Volume 33 | Number 3 Article 14

1995

Workers' Compensation - Physical Condition - Disability - Claimant's Burden of Proof

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WORKERS' COMPENSATION—PHYSICAL CONDITION—DISABILITY—CLAIMANT'S BURDEN OF PROOF—The Supreme Court of Pennsylvania held that a claimant must prove a change in his or her physical condition only in cases where the employer would have to prove the same.

Dillon v. Workmen's Compensation Appeal Board (Greenwich Colliers), 640 A.2d 386 (Pa. 1994).

Thomas Dillon (the "Claimant") was an employee[1] of Greenwich Colliers (the "Employer").[2] The Claimant was eligible to collect workers' compensation benefits, pursuant to the Pennsylvania Workers' Compensation Act (the "Act"),[3] because he sustained an injury to his lower back in the scope of his employment.[4] Pursuant to a notice of compensation payable,[5] the

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1. The Workers' Compensation Act defines an employee as a:

> [S]ervant, and includes all natural persons who perform services for another for valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of business of the employer, and exclusive of persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale in the worker's own home, or on other premises, not under control or management of the employer.

PA. STAT. ANN. tit. 77, § 22 (1992 & Supp. 1994).

2. Dillon v. Workmen's Compensation Appeal Board (Greenwich Collieries), 640 A.2d 386, 387 (Pa. 1994). The Workers' Compensation Act defines an employer as "synonymous with master, and includes natural persons, partnerships, joint-stock companies, corporations for profit . . . municipal corporations, the Commonwealth, and all governmental agencies created by it." PA. STAT. ANN. tit. 77, § 21.

3. PA. STAT. ANN. tit. 77, §§ 1-1603 (1992 & Supp. 1994). The name of the Act was changed from "Workmen's Compensation" to "Workers' Compensation" by amendment in 1993. *See* PA. STAT. ANN. tit. 77, § 1.

4. *Dillon*, 640 A.2d at 387. For purposes of workers' compensation, the employee is considered within the scope of employment when he or she is "actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere." PA. STAT. ANN. tit. 77, § 411(1).

5. Upon notice given by the employee, an employer may voluntarily agree to pay the employee benefits pursuant to the Act. PA. STAT. ANN. tit. 77, § 731. The Act provides:

> Where payment of compensation is commenced without an agreement, the employer or insurer shall simultaneously give notice of compensation payable to the employee . . . on a form prescribed by the department, identifying such payments as compensation under this act and shall forthwith furnish a copy or copies to the department as required by the rules and regulations.

Id.

Claimant was paid total disability.[6] By signing a final receipt,[7] the Claimant acknowledged termination of his compensation.[8] The parties assented to a supplemental agreement.[9] Under the agreement the Claimant was entitled to compensation amounting to thirteen days of work.[10] Two months later, the Claimant again injured his back, and received compensation which continued until he returned to work early the next year.[11]

Upon his return to work, the Claimant reinjured his back.[12] Due to his inability to work, the Claimant filed a claim petition,[13] which was later amended to a reinstatement petition.[14] After a hearing on the merits of the case, the referee[15] awarded the claimant compensation for partial disability.[16] At the hearing, the Claimant stipulated that work was available within his

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6. *Dillon*, 640 A.2d at 387. The statute does not define total disability. *See* PA. STAT. ANN. tit. 77, § 511. Courts have held that an award of total disability was appropriate in cases where the employer could not prove that there was work available within the claimant's physical capabilities. *See* Schmidt v. Workmen's Compensation Appeal Board (Fetch), 594 A.2d 812, 815-16 (Pa. Commw. Ct. 1991).

7. A "final receipt" is a mutual agreement between the parties reciting that the employer has paid and the claimant has received all benefits due under the award. McGahen v. General Electric, 177 A.2d 85, 90 (Pa. 1962) (quoting Glen Alden Corp. v. Tomchick 130 A.2d 719, 721 (Pa. Super. Ct. 1957)). This definition was not included in the Act.

8. *Dillon*, 640 A.2d at 387. This final receipt became effective on May 30, 1978. *Id.*

9. The Claimant received compensation from August 30, 1978 through September 11, 1978. *Id.* The Act allows parties to make a supplemental agreement when the claimant's status changes. *See* PA. STAT. ANN. tit. 77, § 732. The statute provides that:

> [A]ny party . . . at any time after such agreement has been approved by this department or after the expiration of the time allowed for an appeal . . . or order, may file . . . a certified copy of such supplemental agreement . . . and it shall thereupon be the duty of the prothonotary to modify . . . such . . . agreement. . . .

Id. § 934.

10. *Dillon*, 640 A.2d at 387.

11. *Id.* The Claimant received compensation from the date of his injury of November 15, 1978 through January 21, 1979, when he returned to work. *Id.*

12. *Id.*

13. *Id.* The Act requires that "[a]ll proceedings before any referee shall be instituted by a claim petition. . . . [A]ll claim petitions shall be in writing and in the form prescribed by the department." PA. STAT. ANN. tit. 77, § 711.

14. *Dillon*, 640 A.2d at 387. A referee may:

> [M]odify, reinstate, suspend, or terminate a notice of compensation payable, an original or supplemental agreement, or an award . . . upon petition filed by either party . . . upon proof that the disability of an injured employee has increased, decreased, recurred, or has temporarily or finally ceased. . . .

PA. STAT. ANN. tit. 77, § 772.

15. Prior to the 1993 amendment to the Workers' Compensation Act, Workers Compensation Judges were designated as referees. *See* PA. STAT. ANN. tit. 77, § 701.

16. *Dillon*, 640 A.2d at 387. Partial disability is statutorily defined as that which is less than total disability. PA. STAT. ANN. tit. 77, § 512.

sedentary medical limitations.[17]

Toward the end of the partial disability period, the Claimant filed a review petition seeking to increase his compensation from partial disability benefits to total disability benefits.[18] At the hearing, the Claimant argued that, although his physical condition remained unchanged since the last hearing, the fact that he was unable to find employment commensurate with his medical limitations entitled him to total disability benefits.[19] The Claimant's physician, in his deposition, opined that the Claimant could not perform the job he had on the date of his original injury.[20] The Employer argued that the Claimant was trying to relitigate his original claim for total disability which could not be accomplished through a modification petition.[21]

In spite of the Employer's argument, the referee awarded the Claimant total disability as of January 15, 1992.[22] The Employer appealed, and the Workers' Compensation Appeal Board (the "Board")[23] reversed and remanded the case because the deposition of the Employer's medical expert was not received into evidence.[24] On remand, the referee received the Employer's medical testimony and awarded the Claimant total disability.[25] The referee determined that the Claimant could not find a job within his sedentary limitations and concluded that the Claimant was not required to show that his compensable injury had changed

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17. *Dillon*, 640 A.2d at 387. The court noted that the Claimant's stipulation of available work did not extend beyond the date of the referee's decision dated June 20, 1980. *Id.* Benefits were set at $135.58 per week. *Id.* This figure was calculated by subtracting the then current federal minimum wage of $2.20 per hour multiplied by 40 hours per week ($116) from the claimant's average weekly wage of $319.38. *Id.* This equation yielded $203.38. *Id.* The Workers' Compensation Act requires that for partial disability, this figure be reduced to two-thirds of its value ($135.58). PA. STAT. ANN. tit. 77, § 512.

18. *Dillon*, 640 A.2d at 387. The Claimant asserted at the August 3, 1983 hearing that he became totally disabled as of January 15, 1982. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* The Claimant never appealed the original award to the Board. *Id.*

22. *Id.*

23. The Workers' Compensation Appeal Board is a departmental administrative board that is independent of the Department of Labor and Industry. *See* PA. STAT. ANN. tit. 77, § 701. Grounds for appeal to the Board are error of law or that the referee's findings of fact were not supported by sufficient evidence. *Id.* § 853. The proper appeal from a decision of the Workers' Compensation Appeal Board is a petition for review to the Pennsylvania Commonwealth Court. 2 PA. CONS. STAT. § 702 (Supp. 1994).

24. *Dillon*, 640 A.2d at 387. The Board held that the referee had improperly closed the record and rendered his decision without receiving the deposition of the defense's medical expert. *Id.* at 388.

25. *Id.*

since the decision granting partial disability.[26] The Employer appealed again to the Board, which held that the referee erred as a matter of law in awarding the Claimant total disability.[27] On remand from the Board, the referee made no new findings of fact and, after applying the law as directed by the Board, dismissed the Claimant's modification petition.[28]

The Board's decision was affirmed by the commonwealth court.[29] The court held that in order for a petitioner to modify an award or agreement, he must come forward with competent evidence of a change in his physical condition since the date of the award or agreement.[30]

The Supreme Court of Pennsylvania granted allocatur.[31] The issue before the court was whether a claimant receiving partial disability workers' compensation benefits could meet the required burden of proof for a modification to total disability without producing evidence of a change in physical condition.[32] The Claimant argued that if the Employer had the right to modify the agreement without showing any change in the Claimant's physical condition, the Claimant should be afforded the same right.[33]

The Supreme Court of Pennsylvania[34] focused on the fairness of allowing a claimant to modify his disability without proving a change in his physical condition.[35] The court explained that a consistent, flawed extension of a court's usage of the word disability in a prior case caused the present improper evaluation of

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26. *Id.*

27. *Id.* at 388. The Board relied on a recent commonwealth court case. *See* Mancini v. Workmen's Compensation Appeal Board, 440 A.2d 1275, 1276 (Pa. Commw. Ct. 1982). In *Mancini*, the Pennsylvania Commonwealth Court held that the claimant, when petitioning for a modification of benefits, had the burden to prove a change in his physical condition. *Mancini*, 440 A.2d at 1277.

28. *Dillon*, 640 A.2d at 388. On August 15, 1989, the Board affirmed the referee's dismissal of the petition. *Id.*

29. *Id.*

30. *Id.*

31. Dillon v. Workmen's Compensation Appeal Board (Greenwich Colliers), 626 A.2d 1160 (Pa. 1993). "Allocatur" means "it is allowed." BLACK'S LAW DICTIONARY 75 (6th ed. 1990).

32. *Dillon*, 640 A.2d at 388.

33. *Id.* at 390. The Claimant relied on the commonwealth court's reasoning in *Lukens* which stated, "it has long been established in the workmen's compensation area that proof of a change in medical condition is not required when that is not the basis for seeking a decrease in the benefits." *Id.* (quoting Lukens, Inc. v. Workmen's Compensation Appeal Board (Williams), 568 A.2d 981 (Pa. Commw. Ct. 1989), *allocatur denied*, 593 A.2d 426 (Pa. 1990)).

34. Justice Zappala authored the opinion for the court; there was no dissent. *Dillon*, 640 A.2d at 386.

35. *Id.* at 391.

the claimant's physical condition.[36] The court concluded that the term disability meant nothing more than the effect a work-related injury had on the claimant's earning power.[37]

In support of this conclusion, the supreme court illustrated that an award of partial disability was similar to a suspension of benefits.[38] The court explained that full disability benefits awarded to a claimant could be suspended when it was established that the claimant's disability no longer hindered his earning power.[39] The court noted that an employer's burden of proof was satisfied by offering the claimant a job or securing him a position that corresponded to his medical restrictions or limitations in which he could earn at least the same wages as before the original injury.[40] The court held that the claimant's burden of proof to lift the suspension and resume full disability benefits could be met by proving that, through no fault of his own, the claimant's earning capacity was adversely affected by the disability and that the factors originally necessitating the suspension were no longer present.[41] The court reasoned that there was no need for the claimant to prove an exacerbation of his physical condition.[42] The court concluded that the Claimant, by showing that it was impossible to find work within the limitations, met the required burden of proof and should have been granted the modification petition.[43]

Because the Claimant proved that his earning power was negatively affected by the original injury in that he could not

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36. *Id.* at 388 (citing Henderson v. Air Master Corp., 276 A.2d 581 (Pa. Commw. Ct. 1971)). In *Henderson*, the claimant was receiving partial disability and, toward the close of this period, filed a reinstatement petition seeking total disability payments. *Henderson*, 276 A.2d at 582. The court held that the claimant was trying to relitigate his original claim and dismissed it for failure to show a difference in his disability from the original determination. *Id.* See notes 76-82 and accompanying text for a discussion of *Henderson*.

37. *Dillon*, 640 A.2d at 391. The court drew the distinction between the original physical injury and its effect on the injured employee's future ability to earn money. *Id.*

38. *Id.* at 392. A suspension of benefits stops or reduces the employer's duty to pay benefits to the claimant when the disability of the claimant has decreased. PA. STAT. ANN. tit. 77, § 772. The court relied on an earlier case to make this analogy. *Id.* (citing Pieper v. Ametek-Thermox Instruments, 584 A.2d 301 (Pa. 1990)). See notes 114-25 and accompanying text for a discussion of *Pieper*.

39. *Dillon*, 640 A.2d at 392 (quoting *Pieper*, 584 A.2d at 304).

40. *Dillon*, 640 A.2d at 392.

41. *Id.* The court in *Pieper* explained that the claimant's disability was caused by his original injury because the connection was established during the original claim, coupled with the fact that the suspension of benefits never suggested a termination of the employer's liability. *See Pieper*, 584 A.2d at 305.

42. *Dillon*, 640 A.2d at 393 (quoting *Pieper*, 584 A.2d at 304).

43. *Dillon*, 640 A.2d at 393.

find work within his physical limitations, the supreme court reversed the commonwealth court's order affirming the Board.[44] The supreme court reinstated the referee's decision and awarded the Claimant total disability.[45]

The Pennsylvania Workers' Compensation Act[46] is a forced bargain between the employer and the employee, whereby the employer gives up the affirmative defenses of assumption of the risk, contributory or comparative negligence, and injury by a fellow servant, while the employee surrenders his right to sue the employer in tort.[47] The Act requires an injured party to prove: (1) an employment relationship; (2) an injury; (3) that the injury occurred during the course of employment; and (4) that the injury related to the employment.[48] The Act allows a Workers' Compensation judge to alter the claimant's benefits when either party proves a change in the claimant's disability.[49] The purpose of this section was to make the award of benefits flexible enough to be modified if the employee's disability status changed after an award has been ordered.[50]

The first Pennsylvania case addressing the issue of a claimant's ability to modify his compensation under the Act was *Zuro v. McClintic Marshall Co.*[51] In *Zuro*, the claimant, a struc-

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44. *Id.*

45. *Id.*

46. PA. STAT. ANN. tit. 77, §§ 1-1603. The Workers' Compensation Act applies "to all injuries occurring within this Commonwealth, irrespective of the place where the contract for hiring was made, renewed, extended, and extraterritorially as provided." PA. STAT. ANN. tit. 77, § 1.

47. *See* Hinton v. Waste Techniques Corp., 364 A.2d 724, 727 (Pa. Super. Ct. 1976). *See generally* David B. Torrey, *Time Limitations in the Pennsylvania Workmen's Compensation Act and Occupational Disease Acts: Theoretical Doctrine and Current Applications*, 24 DUQ. L. REV. 975, 978 (1986). While the employee relinquished the right of a common law action against the employer, the employee was not barred from prosecuting actions against third persons for wrongs committed against him at work. *See* Grant v. GAF Corp., 608 A.2d 1047, 1054 (Pa. Super. Ct. 1992) (citing Mays v. Liberty Mutual Ins. Co., 323 F.2d 174 (3d Cir. 1963)).

48. PA. STAT. ANN. tit. 77, § 411(1). The Act excludes certain occurrences from eligibility for compensation, namely, self-inflicted injury or death and violation of the law. *Id.* § 431.

49. *Id.* § 772. The Act provides that a Workers' Compensation judge:

> [M]ay modify . . . an award . . . upon petition filed by either party . . . upon proof that the disability of an injured employe has increased . . . provided . . . where compensation has been suspended because the employe's earnings are equal to or in excess of his wages prior to the injury that payments under the . . . award may be resumed at any time during the period for which the compensation for partial disability is payable, unless it be shown that the loss of earnings does not result from the disability due to the injury.

Id.

50. *See* Leeper v. Logan Iron & Steel Co., 198 A. 489, 492 (Pa. Super. Ct. 1938).

51. 195 A. 160 (Pa. Super. Ct. 1937).

tural steelworker, broke his left leg while on the job and subsequently entered into a voluntary compensation agreement with his employer.[52] The employee petitioned to modify the agreement, and the employer petitioned to terminate it in the summer of 1930.[53] Before the referee ruled on the petitions, the parties executed a supplemental agreement, which provided that the employer would pay the claimant partial disability benefits.[54] The claimant then tried to modify the supplemental agreement.[55] The court, in denying the claimant's appeal, held that even if the claimant's leg injury prevented him from working, he was required to prove that his injury affected more than just his leg.[56]

The court based its decision on the schedule of benefits for a specific loss.[57] The court interpreted the statute to be the exclusive remedy for all the costs incurred through a specific loss, including pain and loss of employment, "whether it be total, partial, or no incapacity at all."[58] Therefore, in order for the claimant to prevail on a petition for modification, the claimant had the burden of proving an extension of the injury.[59]

The Superior Court of Pennsylvania, in *Hendricks v. Patterson*[60] employed a similar analysis in deciding a claimant's petition for modification of court-awarded partial disability benefits.[61] In *Hendricks*, the parties entered into an agreement requiring the employer to pay the claimant total disability.[62] The employer successfully petitioned for modification from total disability to partial disability.[63] Four years later, the claimant al-

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52. *Zuro*, 195 A. at 160.

53. *Id.*

54. *Id.* The employer agreed to pay the claimant $15 per week for 215 weeks. *Id.*

55. *Id.* The claimant alleged he was totally disabled because he tried working for three summers, but still experienced a great deal of pain and swelling in both legs. *Id.* at 160-61.

56. *Id.* at 161.

57. *Zuro*, 195 A. at 161. Here the specific loss was the use of the claimant's leg. *Id. See* PA. STAT. ANN. tit. 77, § 513 (1992).

58. *Zuro*, 195 A. at 162 (quoting Gardner v. Pressed Steel Car Co., 186 A. 410 (Pa. Super. Ct. 1936)).

59. *Zuro*, 195 A. at 161-62.

60. 67 A.2d 652 (Pa. Super. Ct. 1949). Appeals from state administrative agencies, including the Workers' Compensation Appeal Board, are now heard by the commonwealth court. 42 PA. CONS. STAT. §§ 763(a)(1); 5105(a)(2) (1981).

61. *Hendricks*, 67 A.2d at 653. On August 23, 1938, while working for the employer, the claimant fell off a ladder and broke his left hip. *Id.*

62. *Id.*

63. *Id.* The modification order was effective on May 13, 1942 and provided that the employer would pay the claimant total disability through February 27, 1942, and partial disability of 75% thereafter. *Id.*

leged that his disability increased from partial to total disability.[64] The claimant's modification petition was granted, and the employer was directed to resume paying total disability.[65] In affirming the referee's allowance of the petition for modification, the superior court held that the question of whether a disability was partial or total was one of fact.[66] While maintaining that a claimant had to meet the required burden when seeking to modify the compensation benefits, the court reasoned that the claimant carried that burden by showing that other parts of his body, other than his hip, were permanently disabled as a result of the original injury.[67] The court concluded that it was a change in the claimant's physical condition, not his inability to find employment, that allowed him to seek a modification of his benefits.[68]

The Supreme Court of Pennsylvania, in *Petrone v. Moffat Coal Co.*,[69] announced the criterion for determining total disability.[70] In *Petrone*, the claimant filed a claim petition for compensation pursuant to the Pennsylvania Occupational Disease Act,[71] alleging that he was totally disabled.[72] The court reasoned that if the claimant could not perform the sort of manual labor he did prior to contracting anthracosilicosis, he was with-

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64. *Id.* On September 3, 1946, the claimant petitioned for modification. *Id.*
65. *Id.* at 653.
66. *Hendricks*, 67 A.2d at 653.
67. *Id.* at 654.
68. *Id.*
69. 233 A.2d 891 (Pa. 1967).
70. *Petrone*, 233 A.2d at 892.
71. PA. STAT. ANN. tit. 77, §§ 1201-1603 (1992 & Supp. 1994)).
72. *Petrone*, 233 A.2d at 892. The claimant worked in a coal mine for thirty-three years. *Id.* The claimant alleged he was totally disabled from anthracosilicosis. *Id.* Anthracosilicosis is defined as a mixture of anthracosis and silicosis. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 96 (27th ed. 1988). Anthracosis is a lung disease caused by inhaling coal dust into the lungs. *Id.* Silicosis is an inflammation in the lungs caused by inhaling dust containing silicon dioxide. *Id.* at 1527.

The referee found that the claimant was totally disabled and ordered the employer to pay the claimant total disability benefits. *Petrone*, 233 A.2d at 893. The Board reversed, because there was expert testimony indicating that the claimant could do light work of a general nature. *Id.*

On appeal, the superior court set forth a presumption that when a claimant was able to do light work of a general nature, such work existed; therefore, the claimant who could do light work could never be totally disabled. *Id.*

The supreme court disagreed with the presumption and held that the fact that the claimant was able to do a certain level of work did not suggest that such work was available. *Id.* at 894. The court criticized the superior court's presumption with the following analogy, "the fact that one is a swimmer does not legally or factually presume that there is available a river or even a swimming pool in the community in which he may swim." *Id.*

out earning power and therefore was totally disabled.[73] The court further asserted that the claimant should never be required to solicit every employer in the community for a position within his physical limitations.[74] The supreme court concluded that if such work were available, it would be more practical for the employer to prove its availability, rather than compelling the claimant to prove that no such work existed.[75]

Despite the supreme court's decision in *Petrone*, Pennsylvania courts continued to place the burden of proof on claimants who were petitioning for modification, as evidenced by the commonwealth court's decision in *Henderson v. Air Master Corp.*[76] In *Henderson*, the referee determined that the claimant was fifty percent disabled and ordered the employer to pay partial disability.[77] After the period of partial disability expired, the injured claimant filed a reinstatement petition alleging that he was totally disabled.[78] The referee granted the claimant's petition, but was subsequently reversed by the Board.[79]

On appeal, the commonwealth court focused on whether the claimant was attempting to relitigate the percentage of the disability that was caused by the original injury.[80] As in *Hendricks*, the court concluded that, in order to prevent a myriad of litigation by claimants seeking to increase their percentage of disability, a claimant seeking to relitigate his partial disability award had to prove a change in his physical condition.[81] The court noted that the Board had determined that there was no

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73. *Petrone*, 233 A.2d at 895.

74. *Id.*

75. *Id.* The court remanded the case for a determination as to whether such light duty work was available for the claimant. *Id.*

76. 276 A.2d 581 (Pa. Commw. Ct. 1971).

77. *Henderson*, 276 A.2d at 582. The referee ordered partial disability on November 28, 1959 to continue for 350 weeks, ending on August 12, 1966. *Id.* At the time, this was the maximum number of weeks authorized under the Act. *Id.* The period of partial disability is currently 500 weeks. *See* PA. STAT. ANN. tit. 77, § 512.

78. *Henderson*, 276 A.2d at 582. Neither the Board nor the commonwealth court addressed the issue of whether the claimant was able to find suitable employment. *Id.*

79. *Id.* The Court of Common Pleas of Philadelphia affirmed the Board's decision and the claimant appealed to the Commonwealth Court of Pennsylvania. *Id.*

80. *Id.* In *Henderson*, the court further determined that a "disability" required a change in physical condition. *Id.* at 582.

81. *Id.* The court refused to consider the issue of whether a claimant could relitigate his percentage of disability by showing that there was no suitable employment available to him. *Id.* While the commonwealth court acknowledged the supreme court's decision in *Petrone*, the court reasoned that it was not applicable because the issue in this case involved a change in the percentage of disability, and not the availability of employment that the claimant could perform. *Id.*

evidence that the claimant's disability had changed.[82] The commonwealth court therefore affirmed.[83]

In *Airco-Speer Electronics v. Workmen's Compensation Appeal Board*,[84] the Commonwealth Court of Pennsylvania held that a claimant's inability to find work within his medical limitations, without a change in his physical condition, was not enough to modify his benefits.[85] In *Airco-Speer*, the parties entered into an agreement whereby the employer would pay the claimant total disability benefits.[86] Later that year, the claimant filed a successful modification petition, resulting in an order for total disability.[87] The referee ordered total disability effective October 6, 1972, and the Board affirmed.[88]

On appeal, the commonwealth court reversed, and held that the claimant's unsuccessful attempt to work was not enough to warrant an increase in benefits to total disability.[89] The court asserted that unless the claimant could prove a change in physical condition, there could not be a change of the original award.[90] The court noted that otherwise, claimants might repeatedly file frivolous modification petitions after receiving unfavorable awards to circumvent the appellate process.[91]

In *Cerny v. Schrader & Seyfried, Inc.*,[92] the Supreme Court of Pennsylvania clarified the claimant's burden of proof to successfully modify an award.[93] In *Cerny*, the claimant petitioned for

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82. *Id.* at 583.

83. *Henderson*, 276 A.2d at 583.

84. 333 A.2d 508 (Pa. Commw. Ct. 1975).

85. *Airco-Speer*, 333 A.2d at 509. The claimant was an employee for over nineteen years. *Id.* The claimant injured her back while at work. *Id.*

86. *Id.* The agreement was made shortly after the claimant's August 20, 1970 injury and the payments were at a weekly rate of $60. *Id.* The employer later unsuccessfully petitioned for termination; however, the referee granted a modification of the agreement to reflect partial disability. *Id.* The employer petitioned to terminate benefits on February 2, 1972. *Id.* The referee ordered partial disability on August 2, 1972. *Id.*

87. *Id.* The claimant filed the petition for modification on October 18, 1972. *Id.* The claimant attempted to perform a position that the referee, who originally awarded her partial disability, concluded was within her limitations. *Id.* The commonwealth court concluded that the second referee, who awarded her total disability, merely had a difference in opinion with the former, and that was not cause for relitigation of her disability. *Id.*

88. *Id.*

89. *Id.*

90. *Airco-Speer*, 333 A.2d at 510. The court noted that the claimant petitioned for modification just two months after the award. *Id.*

91. *Id.*

92. 342 A.2d 384 (Pa. 1975).

93. *Cerny*, 342 A.2d at 385. The claimant was seriously injured when a sewer trench, in which he was working, collapsed upon him. *Id.* The parties agreed that the claimant would receive total disability until he returned to work. *Id.* The claim-

modification to total disability after the close of the partial disability period awarded by the referee.[94] The supreme court held that the claimant seeking to modify an already expired partial disability award into a total disability award had to prove an increase in disability.[95] The court explained that it had to balance two sides in modification proceedings.[96] First, the claimant had to prove that there was both an increase in the disability since the partial disability award and that the claimant could not perform the pre-injury job.[97] Second, the court found that the employer could thwart the claimant's petition merely by proving that there was work available within the claimant's medical limitations.[98] The court concluded that where the employer could find work within a claimant's physical limitations, the claimant could not receive total disability.[99]

In *Mancini v. Workmen's Compensation Appeal Board*,[100] the commonwealth court addressed the issue of deterioration of disability.[101] In *Mancini*, after the parties agreed that the employer would pay the claimant total disability benefits, the employer filed a termination petition, alleging that the claimant refused reasonable medical services.[102] The referee reduced the claimant's benefits from total to partial disability.[103] Just be-

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ant was paid $47.50 weekly and returned to work on June 26, 1962. *Id.* After returning to work, the claimant was assigned to a light duty job due to his injury. *Id.*

The claimant was laid off on September 21, 1962. *Id.* The employer petitioned for termination on November 1, 1962 and alleged the claimant's disability stopped on June 15, 1962, shortly more than a week before the claimant returned to work. *Id.* The referee denied the employer's petition to terminate the claimant's benefits, but modified them to 75% partial disability, effective September 21, 1962, for 350 weeks, ending on June 5, 1969. *Id.*

94. *Id.* at 385. The claimant petitioned for modification on August 15, 1969. *Id.* The referee denied the petition because the claimant was able to do light work. *Id.* at 386. The Board reversed, holding that it was the defendant's duty to prove that there was light duty work available to the claimant. *Id.*

The Board relied on a supreme court case which held that, because it was more difficult to prove the non-existence of a job than it was to prove the existence of one, it was the employer's burden to prove there was a job for the claimant. *Id.* (citing Barrett v. Otis Elevator Co., 246 A.2d 668 (Pa. 1968)). Concluding that the claimant failed to prove a change in his disability, the commonwealth court reversed. *Cerny*, 342 A.2d at 386.

95. *Cerny*, 342 A.2d at 386.

96. *Id.* at 387.

97. *Id.*

98. *Id.*

99. *Id.*

100. 440 A.2d 1275 (Pa. Commw. Ct. 1982).

101. *Mancini*, 440 A.2d at 1278. The claimant fell off a ladder while working for the employer. *Id.* at 1276.

102. *Id.*

103. *Id.* The medical services would have reduced the claimant's disability by 90%. *Id.* The agreement was made shortly after the injury in 1966. *Id.* The referee

fore the claimant's partial disability ended, the claimant petitioned for modification to total disability, alleging that he was unable to work.[104] The commonwealth court upheld the claimant's modification because the claimant's evidence exhibited a deterioration of his physical condition.[105] According to the court, this determination of his physical condition meant that the modification by the referee was proper.[106]

The Supreme Court of Pennsylvania in *Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.)*,[107] outlined the procedure for an employer to modify the claimant's disability benefits.[108] In *Kachinski*, the claimant was injured while working as a mechanic for the employer.[109] The supreme court, while noting that it was incumbent upon employers to make injured claimants whole, asserted that an employer could not be held financially liable beyond the extent of the claimant's injury.[110] The court articulated the procedure for an employer to compel employees to return to work.[111] First, the employer had to prove that the claimant's physical condition had improved.[112] Second, the employer had to prove there were

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denied the termination petition, but reduced the claimant's status to partial disability at the rate of 10% on February 17, 1970 because the claimant refused medical care. *Id.*

104. *Id.* at 1277. The period of partial disability at the time was 350 weeks. *Id.* The referee granted the claimant's petition and the Board reversed. *Id.*

105. *Id.* at 1278.

106. *Mancini*, 440 A.2d at 1278. The court did not discuss the issue of the claimant's prior refusal to seek medical attention because that issue had already been litigated at the modification hearing. *Id.*

107. 532 A.2d 374 (Pa. 1987).

108. *Kachinski*, 532 A.2d at 375.

109. *Id.* The claimant was working with a paint can that exploded, causing burns on his face and causing him to fall, injuring his back. *Id.* The claimant was awarded compensation for his facial burns, but not for his back injury. *Id.* The claimant filed a review petition on April 9, 1981, seeking coverage for his back injury. *Id.* The employer filed a modification petition on September 24, 1981, alleging that the claimant had sufficiently recovered to return to work on June 30, 1981. *Id.*

Hearing the two petitions together, the referee concluded that the claimant had recovered from the facial injuries and that his back had improved to an extent that he could do some of the jobs that the employer alleged he was capable of performing. *Id.* at 376. The referee reduced the claimant's benefits from total disability to partial disability. *Id.* This decision was affirmed by the Board. *Id.* The commonwealth court reversed, and the claimant's benefits were reinstated. *Id.*

110. *Id.* at 379.

111. *Id.* at 380.

112. *Id.* Two years after this decision, the commonwealth court narrowed the requirements of *Kachinski* by deciding that the employer did not have to prove a change in the claimant's physical condition unless that was the basis for seeking a decrease in benefits. *See* Lukens, Inc. v. Workmen's Compensation Appeal Board (Williams), 568 A.2d 981, 983 (Pa. Commw. Ct. 1989), *allocatur denied*, 593 A.2d 426 (Pa. 1990).

available jobs in accordance with the claimant's physical limitations.[113] The claimant then had to demonstrate good faith by applying for and attempting the job.[114] If the job referral did not materialize, the court determined that the employer could petition to modify the claimant's benefits.[115]

In *Pieper v. Ametek-Thermox Instruments Division*,[116] the Pennsylvania Supreme Court did not address the issue of modifying partial disability benefits to total disability benefits, but rather discussed how a claimant could lift a suspension of benefits.[117] In *Pieper*, the issue before the court was whether a claimant had to prove a causal connection between his present disability and prior work-related injury in order to reinstate suspended benefits.[118] The supreme court outlined the distinction

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113. *Kachinski*, 532 A.2d at 380.

114. *Id.* If the claimant failed to make a good faith effort to secure the job, the employer could use the failure as evidence to reduce the claimant's benefits. *Id.*

115. *Id.* The claimant's counsel did not inform his client of the availability of the positions found by the employer. *Id.*

The court concluded that although such action could lead to both a modification action of the claimant's benefits and a subsequent malpractice action against the attorney, it would excuse this claimant from the force of the law. *Id.* at 381.

At the modification hearing, the claimant verbally expressed an interest in pursuing some of the jobs that the employer had suggested, but the claimant's attorney and the referee told him not to follow-up on any of them. *Id.* However, the opinion established that an employer could modify a claimant's benefits if he proved a change in the employee's physical condition and showed that there was an appropriate job available for the employee to pursue. *Id.* at 380-81.

116. 584 A.2d 301 (Pa. 1990).

117. The *Dillon* court later read the Act's definitions of "disability" and "injury" as well as the requisite burdens of proof required of the employers and claimants in light of *Pieper*, and held that the burden of proof for a modification, like a termination, should be equal as between employers and claimants. *See Dillon*, 640 A.2d at 392-93.

118. *Pieper*, 584 A.2d at 302. The claimant was a mechanical assembler for the employer. *Id.* at 303. The claimant alleged that, during the course of his employment, he fell and received a herniated a disk in his back. *Id.* at 302. The claimant was injured on October 8, 1982. *Id.* The employer paid the claimant total disability benefits pursuant to a notice of compensation payable that was dated December 6, 1982, and these payments stopped when the claimant executed a final receipt upon his return to work on April 11, 1983. *Id.*

Just over a week after his return to work, the claimant had a recurrence of his original back injury. *Id.* Thereafter, he entered into a supplemental agreement with the employer, which provided for a reinstatement of his total disability benefits. *Id.* When the claimant returned to part-time employment with the employer on May 31, 1983, his benefits were reduced to partial disability by another supplemental agreement. *Id.* When the claimant returned to work full-time on June 21, 1983, his disability benefits were terminated pursuant to yet another supplemental agreement. *Id.* The claimant did not receive any workers' compensation benefits during this six-month period beginning June 23, 1983, when he was laid off. *Id.* at 302 n.5. The claimant filed a reinstatement petition on September 18, 1984. *Id.* at 303. The claimant alleged a change in his physical condition as of January 25, 1984. *Id.* The referee granted the claimant's reinstatement petition and lifted the suspension of the

between a termination of benefits and a suspension of benefits.[119] The court explained that a termination of benefits discharged the employer's liability to provide the claimant with any further disability benefits.[120] A termination meant that all of the claimant's disability had ceased.[121] The court distinguished a suspension from a termination and held that a claimant did not need to prove the causal connection between the present disability and the original work-related injury when petitioning to lift a suspension of benefits because a suspension never suggested that the claimant's disability had ceased.[122] The court determined that a suspension, unlike a termination, was supported only by a finding or agreement that the claimant's earning power was not restricted by the original injury.[123]

The supreme court asserted that the commonwealth court used the wrong test when it determined that the claimant was not qualified to have his benefits reinstated.[124] Because there was no proof that a termination was effective in this case, the claimant's benefits had been suspended and the claimant had met his burden of proof for reinstating his benefits.[125] The Supreme Court of Pennsylvania held that a claimant who was not

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claimant's benefits. *Id.* The referee concluded that the claimant was totally disabled from doing his pre-injury job, or any similar job, and that his present disability was the result of his original work-related injury. *Id.*

The Board affirmed and the employer appealed to the commonwealth court, arguing that the claimant neither showed a deterioration of his condition, nor proved a causal connection between the present disability and the previous work-related injury. *Id.* The commonwealth court reversed, holding that the claimant was required to prove that a causal connection did, in fact, exist. *Id.*

119. *Id.* at 303-04.

120. *Id.* at 304.

121. *Id.* A termination of benefits was supported by a finding or agreement that all of the claimant's disability stemming from a work-related injury had ceased, or that the parties had come to a settlement, which released the employer from any further liability to the employee. *Id.* The court stated that a claimant seeking a reinstatement of terminated benefits needed to establish the causal connection between his present disability and the prior compensable injury. *Id.*

122. *Id.*

123. *Pieper*, 584 A.2d at 305. The suspension of benefits did not involve any stipulation as to the claimant's recovery or change in physical condition. *Id.* Unlike a termination, a suspension created the presumption that the claimant's physical condition remained the same and that the employer did not contest the causal connection; therefore, the employer's liability did not change. *Id.*

Because the suspension of benefits merely established that the claimant's earning power was no longer impeded, evidence that the claimant's earning power was again restricted due to his disability, was sufficient to lift the suspension. *Id.*

124. *Id.* at 306.

125. *Id.* There was no conclusive proof that there had been a termination of benefits because no final receipt was executed; there was only a supplemental agreement between the parties. *Id.* The court noted that the claimant met his burden of proof mainly through expert testimony. *Id.*

receiving benefits could petition to receive benefits without showing a change in his physical condition.[126]

The Commonwealth Court of Pennsylvania, in *Spinabelli v. Workmen's Compensation Appeal Board (Massey Buick, Inc.)*,[127] maintained that the claimant had to prove a change in his physical condition, if he manifested bad faith in his attempts to find suitable employment, in order to reinstate total disability benefits.[128] In *Spinabelli*, the claimant was receiving compensation when the employer successfully petitioned for modification, alleging that it had offered the claimant a position within his physical restrictions, which the claimant did not try to perform.[129] The commonwealth court concluded that in cases where a claimant initially manifested bad faith, and later renounced the decision not to accept the position, the claimant would be required to prove that the disability had increased and that the claimant was unable to perform the employer's previously proffered position.[130]

The Pennsylvania Workers' Compensation Act was enacted to help the worker obtain the remuneration he needed to pay medical bills and other expenses causally related to an injury received at work.[131] Workers' compensation statutes were urgently needed because the common law shielded the business defen-

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126. *Id.* at 306-08.

127. 614 A.2d 779 (Pa. Commw. Ct. 1992).

128. *Spinabelli*, 614 A.2d at 780. While the *Dillon* court equalized the burdens of proof between employers and claimants in modification proceedings, it appears that a claimant's bad faith in attempting to find employment would not entitle him to this equal footing.

129. *Id.* at 779. The date of the claimant's original injury was December 22, 1981. *Id.* Finding that the claimant refused in bad faith to pursue this proffered job, the referee modified the claimant's benefits on April 28, 1986. *Id.* The claimant did not appeal this modification, but instead filed for a reinstatement of benefits on May 29, 1986. *Id.*

The claimant alleged that he had a change of heart and wanted to try the job that the employer offered earlier. *Id.* The job was that of a car jockey (one who moves cars around the lot) and was originally offered to the claimant by the employer in May of 1984. *Id.* When the claimant asked the employer for the job, the employer told the claimant that the job was no longer available. *Id.*

The referee granted the claimant's petition for modification, reasoning that the claimant made a good faith effort to obtain employment commensurate with his medical profile. *Id.* The referee concluded that it was the employer's fault that a position was no longer available. *Id.*

The Board reversed, holding that once a claimant refused to try a position offered by the employer, the employer was not required to maintain that position indefinitely. *Id.* The commonwealth court affirmed the decision of the Board. *Id.* The Board and the commonwealth court agreed that it was the claimant's bad faith, not the disability, which adversely affected his earning power. *Id.*

130. *Id.* at 780.

131. *See generally* Torrey, cited at note 47, at 979-81.

dants.[132] The legislature was trying to give the employees a fair fight against the powerful and ever-growing industrial employers. The goal of defending the worker would include ensuring that every right afforded to an employer would be given to the employees who were covered under the Act. However, this design was not always followed, resulting in cases in which the employee was required to satisfy a higher burden of proof than the employer.

For example, the *Zuro*[133] decision was the first case to limit the employee's footing against the industrial employer by holding that a claimant who petitioned for an increased disability award had to show that his physical condition had deteriorated since the date of the award for partial disability.[134] The court later attempted to explain this rationale in *Hendricks*,[135] which held that it was the claimant's change of physical condition, not the inability to find employment, that was the basis for a modification of benefits.[136]

In *Henderson*,[137] as well as in numerous other cases, the commonwealth court misinterpreted the meaning of the word disability. The courts did not consider that while the claimant's physical injury did not become worse, its lasting effects on the claimant's ability to earn money could certainly intensify over time. Until the *Dillon* decision, the Pennsylvania courts would not allow claimants to modify their benefits unless they proved either that the original injury deteriorated or had affected other parts of the body.[138]

However, the courts were not so strict with the employers, even though the original intent of the Act was to lessen the employee's burden of proof.[139] In *Petrone*[140] and *Kachinski*[141]

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132. *See* Keller v. Old Lycoming Twp., 428 A.2d 1358, 1363 (Pa. Super. Ct. 1981).

133. Zuro v. McClintic Marshall Co., 195 A. 160 (Pa. Super. Ct. 1937). See notes 51-59 and accompanying text for a discussion of the *Zuro* decision.

134. *Zuro*, 195 A. at 161-62.

135. Hendricks v. Patterson, 67 A.2d 652 (Pa. Super. Ct. 1949). See notes 60-68 and accompanying text for a discussion of the decision in *Hendricks*.

136. *Hendricks*, 67 A.2d at 655.

137. Henderson v. Air Master Corp., 276 A.2d 581 (Pa. Commw. Ct. 1971). See notes 76-83 and accompanying text for a discussion of *Henderson*.

138. *See, e.g.*, *Mancini*, 440 A.2d at 1278.

139. The creation of the Workers' Compensation Act took away three of the employer's affirmative defenses: assumption of the risk; contributory negligence; and injury by fellow servant. *Id.*

140. Petrone v. Moffat Coal Co., 233 A.2d 891 (Pa. 1967). See notes 69-75 and accompanying text for a discussion of *Petrone*.

141. Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.) 532 A.2d 374 (Pa. 1987). See notes 107-115 and accompanying text for a dis-

the Pennsylvania Supreme Court held that employers were not required to meet the same burden as employees in order to modify the claimant's disability benefits.[142] The *Petrone* decision permitted employers to seek modification of the claimant's benefits when there was evidence that proved the claimant was able to do light work of a general nature.[143]

The *Petrone* decision favored the claimant only to the extent that it removed the presumption that a claimant who was able to work could have found a suitable job in the community. The court in *Kachinski* held that the employer was required to prove both that the claimant's physical condition improved and that there was work available.[144]

This line of cases did not balance the employer's burden with that of the employee's in light of the *Cerny*[145] decision. The court held in *Cerny* that the claimant's burden of proof when seeking to modify a partial disability award was to show both that there was an increase in the disability since the partial disability award *and* that the claimant was incapable of performing the pre-injury position.[146]

The Pennsylvania courts provided no explanation as to why there should be a different burden of proof in a modification petition for the employer than for the claimant. The Supreme Court of Pennsylvania used the *Pieper*[147] decision to begin to rebalance the burdens of proof between the employee and the employer. In *Pieper*, the court held that a claimant who sought a reinstatement of suspended benefits had no burden of proving a causal connection between the original injury and his current disability.[148] The court properly recognized that the original suspension was not based upon an improvement of the disability and therefore the reinstatement of suspended benefits did not

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cussion of *Kachinski*.

142. *See Petrone*, 233 A.2d at 894; *Kachinski*, 532 A.2d at 379.

143. *See Petrone*, 233 A.2d at 892.

144. *Kachinski*, 532 A.2d at 377. The *Kachinski* holding was modified by the commonwealth court in *Lukens* to the extent that the employer was no longer required to prove a change in the claimant's physical condition in order to successfully petition for modification. *See* Lukens, Inc. v. Workmen's Compensation Appeal Board (Williams), 568 A.2d 981, 983 (Pa. Commw. Ct. 1989). The commonwealth court in *Lukens* allowed the employer to alter the benefits received by a claimant whose disability was formerly adjudicated and was not in dispute in the petition for modification. *See Lukens*, 568 A.2d at 983-84.

145. Cerny v. Schrader & Seyfried, Inc., 342 A.2d 384 (Pa. 1975). See notes 92-99 and accompanying text for a discussion of the decision in *Cerny*.

146. *Cerny*, 342 A.2d at 387.

147. Pieper v. Ametek-Thermox Instruments, 584 A.2d 301 (Pa. 1990). See notes 116-26 and accompanying text for a discussion of *Pieper*.

148. *See Pieper*, 584 A.2d at 304.

require evidence regarding that disability; rather, the claimant had to show that the claimant's earning power was again affected adversely by the disability.

The *Dillon* decision employed the logic of *Pieper* and applied its reasoning to that of a modification petition. By doing so, the Supreme Court of Pennsylvania restored the balance between the claimant and the employer. The court recognized that, unless a claimant acted in bad faith, as in *Spinabelli*,[149] the claimant should have been afforded the same opportunity to modify the disability benefits from partial to total disability as the employer.

Under the guise of policy, the Supreme Court of Pennsylvania actually employed a two-pronged legal analysis that had the effect of rebalancing the interests of employers and claimants. The first was the clear distinction between the terms injury and disability — a distinction that was blurred by the superior court in *Henderson*.[150] Viewing these terms in their appropriate characterizations, it is clear beyond peradventure that in order for a claimant to prove a change in his disability, there could never be an absolute requirement that he demonstrate a change in his physical condition, as disability refers only to a change in the claimant's earning power. Second, the issue of the burden of proof between claimants and employers was clarified. The *Dillon* court held that what was fair for employers was fair for claimants. While critics of the *Dillon* holding would maintain that this was a policy decision and should not have been made by the court, the Supreme Court of Pennsylvania merely interpreted the Act as intended by the legislature from its inception to the present. The policy of the legislature was to put the employers and the claimants on an equal footing.[151] It was also the duty of the courts to correct a misapplication of law when the need arose. Because this decision was rendered both under policy considerations and precise legal analysis, it is unlikely to be overruled.

This rather straightforward decision had the force of restructuring the burdens of proof between the parties and returned the claimant and the employer to the quasi-bargaining equilibrium that was intended by the original Workmen's Compensation Act.[152] The inability to find employment appropriate in view of

149. *See* Spinabelli v. Workmen's Compensation Appeal Board (Massey Buick, Inc.), 614 A.2d 779, 780 (Pa. Commw. Ct. 1992). See notes 127-30 and accompanying text for a discussion of *Spinabelli*.

150. *See Henderson*, 276 A.2d at 582.

151. *See* Torrey, cited at note 47, at 978.

152. The Supreme Court of Pennsylvania noted that it was incumbent upon

one's medical limitations is as worthy of compensation as is a recurrence of a physical injury. *Dillon* is a clear victory for the disabled employee, who, in these times of scarce employment, will likely not find a similar full-time job that would be as financially rewarding as that original position which rendered him permanently disabled.

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employers to make injured claimants whole. *Kachinski*, 532 A.2d at 380.