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Pennsylvania's Workers' Compensation Law: An Examination of Key Changes Made to Supersedeas Proceedings by Act 57 of 1996

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I. INTRODUCTION

The Pennsylvania Legislature enacted the Pennsylvania Workers' Compensation Act[1] in 1915 to provide benefits to employees who suffer work-related injuries resulting in a loss of earnings.[2] The Act protects employees and their families from suffering economic loss due to an injured employee's inability to work by insuring quick and certain payments for these injuries.[3] Compensation under the Act is the exclusive means of recovery for an employee injured within the scope of employment[4] and is provided as a fair exchange for the employee's relinquishment of all other causes of action against the employer.[5]

On June 24, 1996, the Pennsylvania Legislature passed Act 57, which significantly amends the Workers' Compensation Act.[6] Act 57 changes the Workers' Compensation Act by placing the burden of proving entitlement to continued receipt of benefits on the employee in a supersedeas proceeding brought by the employer relative to its petition to terminate benefits.[7] Arguably, Act 57 also places this burden on the employee in a supersedeas proceeding relative to the employer's petition to modify or suspend the benefits. In this author's opinion, such alterations

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1. PA. STAT. ANN. tit. 77, § 1 (1992).

2. United States Steel Corp. v. Workmen's Comp. Appeal Bd., 437 A.2d 92, 94 (Pa. Commw. Ct. 1981).

3. Wagner v. National Indem. Co., 422 A.2d 1061, 1065 (Pa. 1980).

4. PA. STAT. ANN. tit. 77, § 481 (1992).

5. Rudy v. McCloskey & Co., 35 A.2d 250, 251 (Pa. 1944). The Workers' Compensation Act factors the cost of the compensation paid to an injured employee into the cost of business, which is ultimately paid by the consuming public. *Id.* Under Pennsylvania law, an employee is barred from suing his or her employer only with respect to injuries that bring the employee within the ambit of the Act. Hartwell v. Allied Chem. Corp., 320 F. Supp. 75, 77 (W.D. Pa. 1970).

6. Act of June 24, 1996, No. 1996-57, 1996 Pa. Legis. Serv. 248 (West).

7. *Id.* § 413 (a)(1). "A supersedeas is synonymous with a stay of the proceedings." BLACK'S LAW DICTIONARY 1438 (6th ed. 1990). In the context of the Workers' Compensation Act, a supersedeas terminates the payment of benefits to the employee while the litigation of the case to determine whether such termination is proper is pending.

to the Workers' Compensation Act are clearly contrary to the Act's remedial purpose.[8]

This comment first explains the procedure for securing a supersedeas in termination proceedings that existed prior to the enactment of Act 57. Next, it explains how Act 57 procedurally and substantively changes that procedure and raises the procedural, evidentiary and practical problems that will likely arise as a result of Act 57's passage. This comment then explains the procedure for securing a supersedeas in modification and suspension proceedings that existed prior to Act 57 and analyzes whether Act 57 also changes those proceedings. Throughout the comment, suggestions and insight are offered with respect to methods for dealing with the changes made to the Workers' Compensation Act by Act 57.

II. A Brief Synopsis Of Pennsylvania's Workers' Compensation Law In Termination Proceedings and the Supersedeas

In Pennsylvania, employees are deemed totally disabled for purposes of workers' compensation benefits when their work-related injuries have deprived them of all earning power.[9] When an employer seeks to terminate an employee's benefits, it must prove that the employee has fully recovered from his or her work-related injury or that the employee has returned to work at his or her pre-injury wages.[10] The employee enjoys the presumption of continuing total disability until there is competent examination and testimony to the contrary.[11]

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8. *See* Builders Exch., Inc. v. Workmen's Comp. Appeal Bd., 439 A.2d 215 (Pa. Commw. Ct. 1982)(holding that provisions of the Workmen's Compensation Act are remedial in nature, to be liberally construed, and any borderline interpretations of the Act should be resolved in favor of the injured employee.)

9. 4156 Bar Corp. v. Workmen's Comp. Appeal Bd., 438 A.2d 657, 658-59 (Pa. Commw. Ct. 1981)(noting that total disability is a question of fact requiring medical evidence and consideration of factors such as the employee's mental outlook, background, education and type and availability of work that the employee is capable of performing).

10. Hertz Penske Truck Leasing Co. v. Workmen's Comp. Appeal Bd., 651 A.2d 1145, 1147 (Pa. Commw. Ct. 1994)(holding employer estopped from seeking termination of employee's benefits based on theory that work related injury did not result in a loss of earnings when the employer voluntarily paid compensation to the employee following injury). *See also* Forbes Health Sys. v. Workmen's Comp. Appeal Bd., 463 A.2d 83, 84 (Pa. Commw. Ct. 1983)(holding that the burden of proof in a termination proceeding cannot be shifted to the employee merely upon assertion that the employee's injury was not work related).

11. *4156 Bar Corp.*, 438 A.2d at 659 (citing Marshall v. City of Altoona, 222 A.2d 408 (Pa. Super. Ct. 1966)). *See also* Fox v. American News Co., 151 A.2d 670 (Pa. Super. Ct. 1959)(holding that presumption of total disability applies where the employer seeks termination of benefits voluntarily paid to the employee).

Prior to the enactment of Act 57, employers commonly sought to have workers' compensation benefits paid to injured employees terminated pending a final determination of whether the employee was entitled to continued receipt of the benefits. The vehicle for doing so was the supersedeas. In order to accomplish the termination of benefits, an employer merely filed a petition either alleging that: (1) the injured employee was fully recovered from the work-related injury, attaching an affidavit to this effect signed by a physician; or (2) the employee was back to work earning at least his or her pre-injury wages.[12] Upon these allegations, and with no further proof required, compensation benefits were automatically terminated.[13] The employee was afforded no opportunity to present evidence contradicting the allegations of the employer.

In the 1984 case of *Baksalary v. Smith,*[14] a class action lawsuit was brought on behalf of injured employees whose benefits were terminated after their employers merely filed termination petitions accompanied by physician's affidavits of full recovery.[15] The members of the class challenged the constitutionality of the automatic supersedeas, claiming that it violated their right to due process under the Fourteenth Amendment to the United States Constitution.[16] A three-judge federal court panel subsequently agreed with the plaintiffs and declared that the automatic supersedeas was indeed unconstitutional.[17] The

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12. Section 774 of the Workers' Compensation Act provides, in pertinent part:
> The filing of a petition to terminate or modify a notice of compensation payable or a compensation agreement or award as provided in this section shall operate as a supersedeas, and shall suspend the payment of compensation fixed in the agreement or by the award, in whole or to such extent as the facts alleged in the petition would, if proved, require only when such petition alleges that the employee has returned to work at his prior or increased earnings or where the petition alleges that the employee has fully recovered and is accompanied by an affidavit of a physician on a form prescribed by the department to that effect which is based upon an examination made within fifteen days of the filing of the petition.

PA. STAT. ANN. tit. 77, § 774 (1992).

13. *Id. See also* Williams v. Workmen's Comp. Appeal Bd., 562 A.2d 437 (Pa. Commw. Ct. 1989)(holding that supersedeas provision in effect at that time was granted automatically upon proper allegations and an affidavit of full recovery); Strait v. Gulf Oil Co., 14 A.2d 168 (Pa. Super. Ct. 1940)(holding that petition to terminate compensation operates as supersedeas and suspends payment of compensation to the extent that facts alleged in petition are assumed to be true, provided that supporting affidavit of physician is attached and payment of benefits has been made up to the date that the petition was filed).

14. 579 F. Supp. 218 (E.D. Pa. 1984).

15. *Baksalary*, 579 F. Supp. at 223. Three individual plaintiffs represented the class, each suffering a termination of benefits after the employers filed a termination petition and affidavit of full recovery. *Id.*

16. *Baksalary*, 579 F. Supp. at 219.

17. *Id.* at 233. Prior to the *Baksalary* decision, a three-judge federal court panel of the United States District Court for the Eastern District of Pennsylvania found the auto-

Baksalary court reasoned that since the automatic supersedeas provision of the Workers' Compensation Act provides an injured employee with no recourse to assert his or her claim and contradict the allegations of the employer, it deprives employees of a property right without due process of law in violation of the Fourteenth Amendment to the United States Constitution.[18]

Following the *Baksalary* decision, employers sought to terminate an employee's workers' compensation benefits under a provision of the Workers' Compensation Act allowing for a discretionary supersedeas.[19] Under this provision, a petition for

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matic supersedeas provision to be constitutional. Silas v. Smith, 361 F. Supp. 1187, 1193 (E.D. Pa. 1973). The *Baksalary* court refused to follow the *Silas* holding, however, reasoning that the ruling had been reached at a time when employers and employees could, if they chose, opt out of the Workmen's Compensation Act. *Baksalary*, 579 F. Supp. at 219.

18. *Baksalary*, 579 F. Supp. at __. The Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any state deprive any person of life, liberty or property, without due process of law: nor deny any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

In 1985, the United States Supreme Court dismissed the plaintiffs' appeal in the *Baksalary* case for lack of jurisdiction. Allstate Insurance Co. v. Baksalary, 469 U.S. 1146 (1985). Notably, however, Justice Brennan and Justice Stevens would have affirmed the decision of the district court. *Id.*

19. The provision allowing for a discretionary supersedeas is as follows:

> [A] petition to terminate or modify a compensation agreement or other payment arrangement or award as provided in this section shall not automatically operate as a supersedeas but may be designated as a request for a supersedeas, which may then be granted at the discretion of the referee hearing the case. The referee hearing the case shall rule on the request for a supersedeas as soon as possible and may approve the request if proof of a change in medical status, or proof of any other fact which would serve to modify or terminate payment of compensation is submitted with the petition. The referee hearing the case may consider any other fact which he deems to be relevant when making the decision on the supersedeas request and the decision shall not be appealable.

PA. STAT. ANN. tit. 77, § 774 (1992).

The Pennsylvania Legislature added the discretionary supersedeas provision in 1972 because it wanted procedural safeguards to apply in all but the clearest workers' compensation cases. Dep't of Labor and Indus. v. Workmen's Comp. Appeal Bd., 427 A.2d 1277, 1278 (Pa. Commw. Ct. 1981).

After the 1972 amendments, and prior to the *Baksalary* decision, an employer was free to choose between the automatic and discretionary provisions of the Workers' Compensation Act. *Department of Labor and Industry,* 427 A.2d at 1278. If, however, the employer asserted that the employee's earnings were equal to or exceeded what they were prior to his or her injury without supporting evidence, it was forced to choose whether to stop payments immediately and risk the penalty imposed when the allegations were later determined to be unfounded, or continue to pay and risk losing the money spent prior to a finding that the allegations were true. *Id.* In either case, the decision entailed a risk to the employer that could be avoided by filing a discretionary supersedeas petition, pursuant to which a hearing would be held and the facts established. *Id.*

termination acts merely as a "request" for a supersedeas.[20] Pursuant to the request, a hearing is held and a workers' compensation judge considers all facts relevant to the termination issue introduced by both the employee and employer.[21] The judge then renders a decision "as soon as possible."[22]

III. Act 57 Changes Made To The Supersedeas Hearing In A Termination Proceeding

Section 413 (a.1) of Act 57 essentially codifies the *Baksalary* decision as it mandates that all termination, modification and suspension petitions act only as a "request" for a supersedeas.[23] This section now requires a supersedeas hearing to be held within twenty-one days of the assignment of a termination peti-

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20. Pa. Stat. Ann. tit. 77, § 774 (1992). *See supra* note 19 for the pertinent text of this section of the Workers' Compensation Act.

21. Pa. Stat. Ann. tit. 77, § 774 (1992). This statutory section provides, in pertinent part:

> The referee hearing the case shall rule on the request for a supersedeas as soon as possible and may approve the request if proof of a change in medical status, or proof of any other fact which would serve to modify or terminate payment of compensation is submitted with the petition. The referee hearing the case may consider any other fact which he deems relevant when making the decision on the supersedeas request and the decision shall not be appealable.

Id.

22. *Id.*

23. Act of June 24, 1996, No. 1996-57, § 413 (a.1), 1996 Legis. Serv. 248, 264 (West). Section 413 (a.1) provides as follows:

> The filing of a petition to terminate, suspend or modify a notice of compensation payable or a compensation agreement or award as provided in this section shall automatically operate as a request for a supersedeas to suspend the payment of compensation fixed in the agreement or the award where the petition alleges that the employee has fully recovered and is accompanied by an affidavit of a physician on a form prescribed by the Department to that effect, which is based upon an examination made within twenty-one days of the assignment of such petition. All parties to the special supersedeas hearing shall have the right to submit, and the workers' compensation judge may consider testimony of any party or witness; the record of any physician; the records of any physician, hospital, clinic, or similar entity; any party at the hearing of the case; and any other relevant materials. The workers' compensation judge shall rule on the request for supersedeas within seven days of the hearing and shall approve the request if prima facie evidence of a change in the medical status or any other fact which would serve to modify or terminate payment of compensation is submitted at the hearing, unless the employee establishes, by the preponderance of the evidence; a likelihood of prevailing on the merits of his defense. The workers' compensation judge's decision shall be interlocutory and shall not be appealable. The determination of full recovery with respect to either the petition to terminate or modify or the request for supersedeas shall be made without consideration of whether a specific job vacancy exists for the employee or whether the employee would be hired if the employee applied for work which the employee is capable of performing.

Id.

tion to a workers' compensation judge, and the judge's decision to be rendered within seven days of the hearing.[24]

Section 413 (a.1) of Act 57 clearly calls into question the viability of the deeply-rooted case law consistently holding that in a termination proceeding, the employer carries the heavy burden of proving that the employee no longer suffers a loss of earning power.[25] Act 57 accomplishes such change by shifting the burden of persuasion[26] in a supersedeas hearing held pursuant to a termination petition to the employee.[27] Specifically, while section 413 (a.1) of Act 57 provides that both the employer and employee may submit evidence for consideration at the supersedeas hearing, it also sets forth that the workers' compensation judge must approve the supersedeas request if the employer establishes prima facie evidence[28] of any facts requiring termination of the benefits.[29] The only exception to this mandate occurs if the employee establishes, by a preponderance of the evidence,[30] that he or she will prevail on the merits of the underlying case.[31] Thus, under section 413 (a.1) of Act 57, an employer who wishes to secure a supersedeas has to show evidence that, if believed, establishes the employee's full recovery. The employee, however, must rebut the employer's evidence with convincing evidence that he or she is still disabled, or face a cessation of benefits while litigating the case on the merits.

Exactly how section 413 (a.1) of Act 57 will fare in the context of Pennsylvania's well-settled case law establishing the

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24. *Id.* Prior to the enactment of Act 57, there was no specific time requirement within which the supersedeas hearing must be held. PA. STAT. ANN. tit. 77, § 774 (1992). *See supra* note 19 for the pertinent text of this section of the Workers' Compensation Act.

25. *See* 4156 Bar Corp. v. Workmen's Comp. Appeal Bd., 438 A.2d 657, 658-59 (Pa. Commw. Ct. 1981)(holding that total disability is presumed to continue unless and until competent examination and testimony discloses otherwise); *see also* Fox v. American News Co., 151 A.2d 670 (Pa. Super. Ct. 1959)(holding that presumption of total disability applies where employer seeks termination of benefits voluntarily to employee).

26. "The party with the burden of persuasion has the onus of ultimately convincing the trier of fact of all of the elements of that party's case." BLACK'S LAW DICTIONARY 196 (6th ed. 1990).

27. Act of June 24, 1996, No. 1996-57, § 413 (a.1), 1996 Pa. Legis. Serv. 248, 264 (West). *See supra* note 23 for the pertinent text of section 413 (a.1) of Act 57.

28. "Prima facie evidence is evidence that, in the judgment of the law, is sufficient to establish a given fact and which, if not rebutted, will remain sufficient." BLACK'S LAW DICTIONARY 1190 (6th ed. 1990).

29. Act of June 24, 1996, No. 1996-57, § 413 (a.1). 1996 Pa. Legis. Serv. 248, 264 (West). *See supra* note 23 for the pertinent text of section 413 (a.1) of Act 57.

30. "The preponderance of the evidence is that evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it. It is evidence which, as a whole, shows that the fact sought to be proved is more probable than not." BLACK'S LAW DICTIONARY 1182 (6th ed. 1990).

31. Act of June 24, 1996, No. 1996-57, § 413 (a.1), 1996 Pa. Legis. Serv. 248, 264 (West). *See supra* note 23 for the relevant text of this section of Act 57.

employee's presumption of continued disability in a proceeding to terminate an employee's workers compensation benefits is unclear. Shifting the burden of proof to the employee in a supersedeas hearing held pursuant to a termination petition clearly poses significant evidentiary issues as well as practical problems in application.[32] An analysis of such problems is presented below.

IV. Evidentiary and Practical Problems Caused By Act 57 Changes To Supersedeas Proceedings

The passage of Act 57 will undoubtedly lead to a total restructuring of the supersedeas hearing held pursuant to a termination proceeding. As a result, it will also necessitate a restructuring of a practitioner's task in representing an employee in such hearings.

Under the Workers' Compensation Act as amended by Act 57, a practitioner representing an injured employee has little time to prepare for the supersedeas hearing since the hearing must be held within twenty-one days of the assignment of the petition to the workers' compensation judge.[33] In addition, the practitioner's presentation of evidence at the hearing will be much more involved because the employee must ultimately convince the judge as to the issue of continued disability. With such a

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32. The burden-shifting provision of section 413 (a.1) of Act 57 may be challenged under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Arguably, employees are unable to meaningfully present their case given the twenty-one day provision of section 413 (a.1) and the burden of proving continued disability by a preponderance of the evidence. This constitutional challenge, however, will probably fail in light of *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Supreme Court in *Mathews* formulated a balancing test for determining what process is required in any case. *Mathews*, 424 U.S. at 335. The *Mathews* court held that three factors should be weighed in making such a determination: (1) the private interests that will be affected by the official action; (2) the risk of erroneously depriving such interests through the procedures used; and (3) the government's interest, including the fiscal and administrative burdens that any additional or substitute procedure would entail. *Id.* In balancing these interests, the *Mathews* court held that no evidentiary hearing is required prior to an initial termination of social security disability benefits because the affected individual will have a subsequent evidentiary hearing and judicial review before the decision to terminate becomes final. *Id.*

Although the *Baksalary* court determined that a time lag in excess of one year between the grant of a supersedeas and a final decision by the workers' compensation judge is not rare and rises to the level of constitutional significance, Pennsylvania's procedure under the amended Act will probably withstand a constitutional challenge based on the *Mathews* decision. Pennsylvania's procedure provides even more protection than is required under *Mathews* by providing for a hearing *prior* to a cessation of benefits, whereas, under *Mathews*, no initial hearing prior to the cessation of Social Security benefits is required. *Mathews*, 424 U.S. at 335.

33. Act of June 24, 1996, No. 1996-57, § 413 (a.1). 1996 Legis Serv. 248, 264 (West). *See supra* note 23 for the pertinent text of section 413 (a.1) of Act 57.

heavy burden and so little time to gather the necessary medical evidence, the employee will assuredly be disadvantaged in relation to the employer. Indeed, the employer probably will not file a petition for supersedeas until it secures medical evidence supporting its case. The practitioner must be alert to this problem and require the employee to periodically obtain updated medical reports on his or her medical condition from the treating physician in order to avoid the rush and confusion associated with obtaining such reports on short notice.

The employee's presentation of medical testimony at the supersedeas hearing and the nature of such testimony will also need tailoring as a result of the changes to the Workers' Compensation Act. Prior to the enactment of Act 57, a workers' compensation judge decided whether to grant a supersedeas petition in a termination proceeding based only on whether prima facie evidence existed that, *if believed*, warranted the order of continued benefits.[34] If such evidence did exist, the petition was denied and the employee continued to receive benefits during the pendency of the underlying litigation. The judge was not required to weigh the credibility of medical witnesses or the opinions contained in hearsay[35] medical reports.

Under section 413 (a.1) of Act 57, however, the workers' compensation judge must weigh the evidence in determining whether the employee has carried the burden of proof by a preponderance of the evidence.[36] This necessarily means that the judge will have to determine the credibility of witnesses based merely on hearsay evidence, as well as use that evidence to ultimately determine the propriety of the employee's continued receipt of benefits in cases where the judge is faced with conflicting evidence as to whether the employee continues to suffer from a work-related injury.

The Workers' Compensation Act, as amended by Act 57, clearly flies in the face of previous case law holding that although hearsay evidence of facts and medical diagnoses may be considered by a judge in a workers' compensation matter when it corroborates other competent evidence, hearsay evidence is insufficient to constitute the exclusive basis for a grant or denial

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34. Prima facie evidence standing alone is presumed true. BLACK'S LAW DICTIONARY 1190 (6th ed. 1990).

35. "Hearsay is testimony given in court about an out of court statement which is offered as an assertion of the truth of the matters asserted therein, and thus rests for its value upon the credibility of the out of court asserter." BLACK'S LAW DICTIONARY 722 (6th ed. 1990).

36. Act of June 24, 1996, No. 1996-57, § 413 (a.1), 1996 Pa. Legis. Serv. 248, 264 (West). *See supra* note 23 for the text of 413 (a.1) of Act 57 of 1996.

of benefits.[37] As a result, the practitioner representing an injured employee should object to any decision made by a judge based solely on hearsay evidence introduced by the employer. In addition, the practitioner should present oral testimony of the employee's medical witnesses at the supersedeas hearing in order to secure an evidentiary advantage over the employer, as the judge may find such live testimony more credible than the hearsay report of the employer's independent medical examiner. The practitioner should also seize the opportunity to use the transcribed medical testimony presented at the supersedeas hearing in his or her case-in-chief on a later occasion, to avoid the cost of eliciting testimony from a physician multiple times.

If, in spite of the employee's physician's live testimony, a decision is made by the workers' compensation judge that the physician or the employee is not credible at the supersedeas hearing, the practitioner is wise to seek the judge's recusal from presiding over the hearing on the merits.[38] It would be improper for the same judge, who is required to be impartial,[39] to continue to sit as the fact-finder of credibility after making a credibility determination at a preliminary stage of the proceedings adverse to the employee. A judge's own need for consistency in his or her assessment of credibility may clearly taint the proceedings and thus cause an unfair adjudication of the matter.

V. Act 57's Possible Changes to Modification And Suspension Proceedings

Pennsylvania distinguishes the practice of securing a supersedeas in a modification or suspension proceeding from the same practice in a termination proceeding. It is not clear from the Act, however, whether those proceedings are governed by the same provision of Act 57 and therefore subject to the same difficulties in practice.

An employer who sought to modify an employee's workers' compensation benefits prior to the enactment of Act 57 was required to prove that the employee's medical condition had changed and that the employee was medically capable of

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37. Czankner v. Sky Top Lodge, Inc., 318 A.2d 379, 381 (Pa. Commw. Ct. 1974); Cody v. S.K.F. Indus., Inc., 291 A.2d 772 (Pa. 1972)(finding ample corroborative evidence in support of hearsay statement admitted into evidence in workers' compensation matter).

38. Recusal is the process by which a judicial official is disqualified from hearing a case on the objection of a party or on the official's own motion due to self interest, bias or prejudice. Black's Law Dictionary 1277 (6th ed. 1990).

39. Kinter v. Workmen's Comp. Appeal Bd., 579 A.2d 1012 (Pa. Commw. Ct. 1991), *app. denied*, 588 A.2d 915 (1991).

returning to some type of gainful employment.[40] The employer then had to produce evidence that a job opportunity existed fitting the occupational category for which the employee had been given medical clearance to perform.[41] Until an employer met this threshold, the injured employee was not required to carry any burden of proof.[42] Once an employer introduced evidence of a change in the employee's medical condition and available employment, however, the employee was required to prove that he or she followed through in good faith on the job referral or that the referred position was not suited to his or her medical condition.[43]

An employer who sought to suspend workers' compensation benefits prior to the enactment of Act 57 had a slightly different burden of proof than the employer seeking to modify such benefits. The employer seeking a suspension of benefits had to prove that although the employee continued to suffer from a work-related injury, such injury no longer resulted in a loss of earning power.[44]

Employers often sought a discretionary supersedeas in a modification or suspension proceeding prior to the enactment of Act 57 merely by alleging that: (1) the employee's disability had decreased; (2) the employee was capable of some type of gainful employment; and (3) there were employment positions available to that employee.[45] To meet the burden for actually modifying or suspending the benefits, however, the employer also needed to prove that the employee did not use good faith to obtain the

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40. Kachinski v. Workmen's Comp. Appeal Bd., 532 A.2d 374, 380 (Pa. 1987)(holding that the employer has the burden in a modification proceeding of producing medical evidence describing the employee's physical and mental capabilities and vocational evidence classifying available jobs along with a description of a job that matches the employee's capabilities).

41. *Kachinski,* 532 A.2d at 379. An employer did not have the burden of proving available work, however, if it proved that the employee's disability had completely ceased. Sheehan v. Workmen's Comp. Appeal Bd., 600 A.2d 633, 637 (Pa. Commw. Ct. 1991). Additionally, "job availability" apparently no longer means "actual" job availability as in the *Kachinski* era. Rather, the earning power of the claimant is determined by the type of work the claimant is capable of performing, and is based on expert opinion evidence regarding "job listings with agencies and advertisements in the usual employment area." Act of June 24, 1996, No. 1996-57, § 306 (b) (2), 1996 Pa. Legis. Serv. 248, 253 (West).

42. Pettigrew v. Workmen's Comp. Appeal Bd., 590 A.2d 1364, 1365 (Pa. Commw. Ct. 1991).

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

44. Ede v. Ruhe Motor Corp., 136 A.2d 151, 153 (Pa. Super. Ct. 1957). There is a distinction between earning power and wages. *Ede,* 136 A.2d at 153. Where there is disability and a loss of earning power, but the employee continues to receive as much in wages for his or her services as he or she received prior to the work related injury, an award of compensation may be made, but the payments must be suspended. *Id.*

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

available employment.[46] If the employer presented such evidence, the employee was required to show that although he or she used good faith to secure the employment, the referred positions were not offered to the employee or he or she was medically incapable of performing such work.[47]

The procedure for obtaining and defending a request for a supersedeas in a modification or suspension proceeding has likely changed in light of Act 57. The uncertainty as to this matter, however, is easily attributable to the poor draftsmanship of that Act.

The discretionary supersedeas provision of the Workers' Compensation Act is recodified in Act 57 at section 413 (a.2).[48] Although the text of the original provision remains substantially intact, the circumstances in which section 413 (a.2) applies are unclear.[49] An analysis of Act 57 reveals that both section 413 (a.1) and section 413 (a.2) contain provisions that appear to relate to the procedure for obtaining a supersedeas in a modification or suspension proceeding.[50] Exactly which subsection applies to such proceedings is an important issue to an injured employee, however, for at least two reasons.

First, section 413 (a.2) contains no burden-shifting provision like the one contained in section 413 (a.1).[51] Specifically, section

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46. *Id.*

47. *Id.*

48. Act of June 24, 1996, No. 1996-57, § 413 (a.2), 1996 Pa. Legis. Serv. 248, 264-65 (West).

49. Section 413 (a.2) of Act 57 provides as follows:

> In any other case, a petition to terminate, suspend or modify a compensation agreement or other payment arrangement or award as provided in this section shall not automatically operate as a supersedeas, but may be designated as a request for a supersedeas, which may then be granted at the discretion of the workers' compensation judge hearing the case. A supersedeas shall suspend the payment of compensation in whole or to such extent as the facts alleged in the petition would, if proved, require. The workers' compensation judge hearing the case shall rule on the request for a supersedeas as soon as possible and may approve the request if proof of a change in medical status, or proof of any other fact which would serve to modify or terminate payment of compensation is submitted with the petition. The workers' compensation judge hearing the case may consider any relevant fact which he deems to be relevant when making his decision on the supersedeas request and the decision shall not be appealable.

Act of June 24, 1996, No. 1996-57 § 413 (a.2), 1996 Pa. Legis. Serv. 248, 264-65 (West).

50. Section 413 (a.1) of Act 57 provides: "The filing of a petition to terminate, *suspend,* or *modify* a notice of compensation payable or a compensation agreement or award as provided in this section shall automatically operate as a request for a supersedeas. . . ." Act of June 24, 1996, No. 1996-57 § 413 (a.1), 1996 Pa. Legis. Serv. 248, 264 (West). Section 413 (a.2) of Act 57 sets forth: "In any other case, a petition to terminate, *suspend,* or *modify* a compensation agreement or other payment arrangement or award as provided in this section shall not automatically operate as a supersedeas, but may be designated as a request for a supersedeas." *Id.* § 413 (a.2), at 264-65.

51. *See supra* note 49 for the text of section 413 (a.2) of Act 57 of 1996. *See supra* footnote 23 for the text of section 413 (a.1) of Act 57 of 1996.

413 (a.2) provides that at a supersedeas hearing, the employer must submit a petition setting forth facts that, if proved, warrant the modification or suspension of benefits.[52] Upon the petition, the judge may, *in his or her discretion,* grant or deny the request.[53] Under section 413 (a.2), therefore, the employee does not need to prove continued disability at the supersedeas hearing, while under section 413 (a.1) an employee is faced with such a burden.

Second, section 413 (a.2) provides that a workers' compensation judge may consider *any relevant evidence* at the supersedeas hearing.[54] Under section 413 (a.1), however, a judge is specifically prohibited from considering any evidence regarding job availability.[55] Therefore, if section 413 (a.2) applies to a supersedeas hearing in a modification or suspension proceeding, employers likely still retain the burden of proving job availability.

There are three provisions in the text of section 413 (a.1) indicating that section's applicability to a supersedeas hearing held pursuant to a petition to modify or suspend an injured employee's benefits. First, section 413 (a.1) sets forth that "[t]he filing of a petition to terminate, *suspend or modify* a notice of compensation payable or a compensation agreement or award . . . shall automatically operate as a request for a supersedeas. . . ."[56] Second, pursuant to section 413 (a.1), a workers' compensation judge must grant a supersedeas petition if prima facie evidence of a "change in condition or any other fact that would serve to *modify*" benefits exists.[57] Third, section 413 (a.1) provides that a workers' compensation judge is to issue a decision in a supersedeas proceeding "without consideration of whether a specific job vacancy exists for the employee . . . or whether the employee would be hired if the employee applied for work which the employee is capable of performing."[58] Since job availability is

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52. Act of June 24, 1996, No. 1996-57, § 413 (a.2), 1996 Pa. Legis. Serv. 248, 264-65 (West). *See supra* note 49 for the pertinent text of this section.

53. Act of June 24, 1996, No. 1996-57, § 413 (a.2), 1996 Pa. Legis. Serv. 248, 264-65 (West).

54. *Id.* The pertinent text of section 413 (a.2) is as follows: "[T]he workers' compensation judge hearing the case may consider any other fact which he deems to be relevant when making his decision on the supersedeas request and the decision shall not be appealable." *See id.*

55. Act of June 24 of 1996, No. 1996-57, § 413 (a.1), 1996 Pa. Legis. Serv. 248, 264 (West). *See supra* note 23 for the relevant text of this section.

56. Act of June 24, 1996, No. 1996-57, § 413 (a.1), 1996 Pa. Legis. Serv. 248, 264 (West).

57. *Id.*

58. *Id.*

only material to modification and suspension proceedings,[59] this language tends to establish the applicability of section 413 (a.1) to such matters.

Further evidence supporting the application of section 413 (a.1) to modification and suspension proceedings is found in section 306 (b) (3) of Act 57.[60] Like section 413 (a.1), this section provides, in part, that an employer is required to notify the injured employee of the duty to seek employment when the employer's insurance company receives evidence of the employee's ability to return to gainful employment.[61] In reading sections 413 (a.1) and 306 (b) (3) together, as is required when statutes stand *in pari materia*,[62] a duty is apparently conferred upon the injured employee to obtain employment, while no duty is conferred upon the employer to address job availability at the supersedeas hearing. Therefore, it appears that section 413 (a.1) does apply to supersedeas requests pursuant to modification and suspension petitions.

In spite of the similar language in sections 413 (a.1) and 306 (b) (3) of Act 57, however, there remains a strong argument that section 413 (a.2) should be construed as merely continuing the law that existed prior to the enactment of Act 57 since no substantive changes to that law were made.[63] As a result, practitioners representing an injured employee should argue that section 413 (a.2) governs the applicable procedure in modification

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59. Sheehan v. Workmen's Comp. Appeal Bd., 600 A.2d 633, 637 (Pa. Commw. Ct. 1991).

60. Section 306 (b) (3) of Act 57 provides as follows:

> If the insurer receives medical evidence that the claimant is able to return to work in any capacity, then the insurer must provide prompt written notice, on a form prescribed by the Department, to the claimant which states all of the following:
> (I.) The nature of the employee's physical condition or change of condition
> (II.) That the employee has an obligation to look for available employment
> (III.) That proof of available job opportunities may jeopardize the employee's right to receipt of ongoing benefits.
> (IV.) That the employee has a right to consult with an attorney in order to obtain evidence to challenge the insurer's contentions.

Act of June 24 of 1996, No. 1996-57, § 306 (b) (3) (i)-(iv), 1996 Pa. Legis. Serv. 248, 253 (West).

61. *Id.*

62. Statutes stand *in pari materia* when they relate to the same matter and must be construed together for their meaning. 1 PA. CONS. STAT. § 1932 (1995).

63. *See supra* notes 23 and 49 for a comparison of the two relevant sections. Note that the only changes made to section 774 in the Workers' Compensation Act by section 413 (a.2) of Act 57 are the replacement of the word "referee" with the words "workers' compensation judge," and the addition of the word "suspend." Act of June 24, 1996, No. 1996-57, § 413 (a.2), 1996 Pa. Legis. Serv. 248, 264-65 (West). Also note that a re-enacting statute that makes no changes to substantive law should be construed as continuing the prior law unless legislative intent to the contrary is manifested in the new statute. Department of Highways of Pa. v. Pennsylvania Pub. Util. Comm'n, 14 A.2d 611, 613 (Pa. Super. Ct. 1940).

or suspension proceedings. If such an argument succeeds, at least two benefits to the employee will be attained as well as other benefits to his or her attorney. Initially, the employee will be relieved of carrying the burden of proof at the supersedeas hearing. Moreover, the employer may still have to address the issue of job availability at the hearing, relieving the employee from the burden of finding available employment. As for the practitioner, the application of section 413 (a.2) to a supersedeas sought in a modification or suspension proceeding relieves him or her from the procedural and practical difficulties associated with the burden shift and time constraints associated with section 413 (a.1), previously mentioned in this comment.

VI. Conclusion

An analysis of how Act 57 changes the procedure for obtaining a supersedeas in termination, modification and suspension proceedings under the Pennsylvania Workers' Compensation Act illustrates that the legislature reacted far too swiftly and carelessly in passing the amendments. Since 1972, the legislature has emphasized the importance of continuing an injured employee's workers' compensation benefits pending litigation in all but the clearest cases. Act 57, however, clearly attempts to provide economic relief for employers and their insurers in workers' compensation matters. Thus, Pennsylvania lawmakers appear to have forgotten that the *worker's economic status* is the subject of protection under the original Workers' Compensation Act.

This result occurs through Act 57's provisions that relieve the employer of the burden of proof in the supersedeas hearing and by heightening and placing the burden of proof on the employee in those proceedings. The employer now has nothing to lose in filing the supersedeas request, as the requests will be granted in all but the clearest cases in which the employee successfully carries its burden by the preponderance of the evidence that he or she is entitled to the continued receipt of benefits.

Practical and evidentiary problems for injured employees and their attorneys also surface as a result of Act 57. Not only do unreasonable time constraints now hinder an employee's ability to prove his or her entitlement to benefits, but the total restructuring of the hearing process leaves even the most astute attorneys guessing as to Act 57's content, applicability and meaning. Creative argument is now necessary to ensure that an injured employee receives the benefits to which he or she is entitled.

The enactment of Act 57 was a knee-jerk reaction to insurance company lobbyists who complained about their relative inability

to secure a supersedeas under prior practice. The result of trying to remedy that problem, however, has caused new problems for injured workers. Act 57 has caused the pendulum to swing back too far on the side of insurance companies, and will subject many injured workers in this state to an erroneous cessation of workers' compensation benefits.

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