The Common Law of Partial Disability and Vocational Rehabilitation under the Pennsylvania Workmen's Compensation Act: *Kachinski* and the Availability of Work Doctrine

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The Common Law of Partial Disability and Vocational Rehabilitation under the Pennsylvania Workmen’s Compensation Act: Kachinski and the Availability of Work Doctrine

David B. Torrey*

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I. Introduction

In contrast to the workers' compensation law of virtually all other states, the Pennsylvania law regarding an injured worker's "partial disability" status and right to vocational rehabilitation is governed exclusively by court cases. This development is remarkable given the evolution of workers' compensation laws in other jurisdictions, which have uniformly provided for vocational rehabilitation programs by way of statute1 as this effort has become recognized as an essential element of a worker's right of recovery for his or her work-related injury. The legal determination of an injured worker's entitlement to partial, as opposed to total, disability is also usually governed by statute.2

Both developments, which are inextricably related, are the result of legislative default. Without legislative guidance on the issue, Pennsylvania courts in the 1930s began to generate the rule that workers possessing significant residual physical impairment could only be reduced to a partial disability status upon a showing by the employer that "suitable work" was available and "within his reach."3 After a half-century of comment on and development of this job availability rule, the courts seized upon this doctrine, altered it, and—in lieu of any legislatively prescribed program—judicially instituted a program of rudimentary vocational rehabilitation.


rehabilitation in Pennsylvania.⁴

This long-term case development of a crucial, substantive aspect of the law is a phenomenon worthy of study, not only for its historical uniqueness but because of pragmatic necessity. It is submitted that, without some working familiarity with the leading cases and background of the judicially created rules, the participant in the workers' compensation system will not be able to assess reliably the rights and remedies of both employer and worker.

The reality that an entire aspect of the law is found in the court precedents raises a number of significant issues. First, this submerged character of the law makes the rules governing partial disability and vocational rehabilitation virtually inaccessible to the non-lawyer community of employers and employees for whom the workers' compensation laws were enacted and are administered. It is, of course, wholly appropriate that courts interpret the law in this and other areas and thus add to the substantive law.⁵ Still, the lack of any legislatively prescribed, easily referred-to positive code or set of regulations precludes even the hope that quick and reliable reference can be made by the lay public to this crucial aspect of the law. The absence of any such codification of at least the basics is especially inappropriate in the field of workers' compensation, in which a pervasive goal has been to minimize court battles and the excessive involvement of lawyers.⁶

Second, notwithstanding the general excellence of Pennsylvania appellate courts, the multiple declarations of the courts with regard to the law of partial disability and vocational rehabilitation have not always been consistent,⁷ are at times confusing,⁸ and occasionally are contradictory.⁹ This fact makes the law even less accessible to the non-lawyer community, breeds litigation and the over-involvement of lawyers, and disrupts the ability of even sophisticated individuals and entities to assess rights and remedies

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⁶ Donald T. DeCarlo & Martin Minkowitz, Workers' Compensation Insurance and Law Practice 4 (LRP Publications, 1989). Of course, it is nonetheless true that workmen's compensation is a legal system and the appropriate involvement of attorneys is both intended and inevitable. See Irvin Stander, Guide to Pennsylvania Workers' Compensation 41-42 (Pennsylvania Bar Institute, 1978).
⁷ See notes 81-82 and accompanying text.
⁸ See notes 319-20 and accompanying text.
⁹ See notes 134-38 and accompanying text; notes 171-75 and accompanying text.
and plan for the future with confidence.

Third, and on a different level of analysis, the somewhat free-wheeling case law development of these two related aspects of the law has resulted in what are, it is submitted, undesirable substantive results. Two such results immediately stand out.

The commonwealth court in the 1980s, for example, pushed the law of job availability dangerously close to a program requiring employers to be virtual insurers, for all times, of employment for partially disabled workers. The court, in this regard, began to demand that an employer reinstate a worker—whose benefits had been suspended upon the return to work—on total disability, once he suffered a renewed loss of earnings. This was so even when it was undisputed that the proximate cause of the loss of earnings was not the worker’s residual disability, but instead such things as economic downturn or layoff. While this rule perhaps made sense for workers who could only return to modified work, the court demanded that this rule apply even where the worker had returned to his time-of-injury job. Only by offering new work, or finding it for the worker, could the employer again reduce its liability. Workmen’s compensation thus approached unemployment compensation.

This development was solely the result of carefully considered yet nonetheless errant interpretation of decades and layers of court precedents. While this trend of court decisions has apparently been undercut recently by the supreme court—a sensible development—it is safe to say that the case law would never have been generated were there some legislative guidance on the simple issue of job availability and a laid-off worker’s entitlement to benefits.

The other substantive development subject to criticism is the judicially constructed and mandated program of vocational rehabilitation itself. Only praise can be afforded the commonwealth court and the chief architect of the program, Senior Judge Alexander F. Barbieri, for initially instituting such a program through judicial activism in light of the legislature’s total neglect of this aspect of workmen’s compensation. Nevertheless, the constraints of judicial lawmaking have generated a vocational rehabilitation system which is no substitute for a legislatively mandated, comprehensive program.

12. See notes 82-87 and accompanying text.
There is, for example, still no entity within the Bureau of Workers’ Compensation responsible for the implementation or even mere monitoring of vocational rehabilitation. Further, there is no ability on the part of an injured worker to initiate the rehabilitation process—all control over the process is in the hands of the employer and its insurance carrier. Finally, the rules and nuances of the court-created program, as set forth in the cases, are found in a myriad number of cases which must become mastered by lawyers, rehabilitation counselors and job finders. This process tends to misdirect valuable dollars away from constructive programs to rehabilitate injured workers and into the treasuries of these service providers.

These problems, plainly, can only be addressed by affirmative action by the legislature.

Despite these complaints, the case law doctrines of partial disability and vocational rehabilitation have reached a plateau, the Pennsylvania Supreme Court having spoken in coherent terms on both related issues. The landmark case of *Kachinski v WCAB (Vepco Const. Co.)*, which is now well-known to most individuals involved in the workers’ compensation system, was filed in 1987 and set forth what were purported to be “concrete guidelines” for employer and employee to follow in the process of vocational rehabilitation. While many twists have since been placed upon these guidelines by the commonwealth court, it is nevertheless true that the *Kachinski* decision still stands as the reference point for all subsequent decision-making.

In a more recent case, *Pieper v Ametek-Thermox Instruments Division*, the supreme court addressed the partial disability question and decided when the employer was obliged to demonstrate “job availability” or undertake vocational rehabilitation. The court largely affirmed the many commonwealth court precedents which enforced a “presumption of continuing disability” on the part of workers who have returned to work at light duty or at created jobs, and ratified the commonwealth court’s position that, when such a worker again loses earning power, job total disability must be reinstated—whatever the cause of the loss of work—unless actual availability of work is shown. Settling a disputed issue, however, the court insisted that if a worker has returned to work on a suspension to the *time-of-injury* job, at full duty, the *claimant* must

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demonstrate that the renewed loss of earnings is actually accompanied by continued physical problems from the work injury.\textsuperscript{15} By so doing, of course, the supreme court has seemingly undercut the commonwealth court's demand that employers become virtual insurers, for all time, of employment for partially disabled workers.

This article seeks to chronicle and analyze the development of the related case law doctrines of partial disability and vocational rehabilitation, which can be characterized generically as the "availability of work doctrine," and which are dominated most recently by the \textit{Kachinski} and \textit{Pieper} cases.

This article first treats the historical development of the "availability of work" doctrine from its roots in the 1930s up until the present time. As will be seen, within the last ten years or so the cases begin to fall into two categories—one set dealing with the specific burdens on the employer with regard to how to show job availability,\textsuperscript{16} and the other dealing with when job availability must be shown.\textsuperscript{17} The cases dealing with the former burden have become increasingly complex, as "job availability" changed from a theoretical concept to one with specific requirements of employers to provide work or realistic job referrals to workers. It is these cases which together comprise the law of "vocational rehabilitation" in Pennsylvania.

The latter category of cases can also be referred to as "burden of proof" cases,\textsuperscript{18} as they address the issue of when the employer has the burden of providing to a worker a conforming job, or otherwise putting the case in a vocational rehabilitation mode. This article thereafter seeks to set forth the positive law in both of these areas, with special emphasis on the many cases which have meticulously characterized what the employer must do to effectively demonstrate a worker's change to partial disability, and how the compensation claimant is expected to respond.\textsuperscript{19}

Finally, this article addresses the lack in Pennsylvania of any formal vocational rehabilitation provision within its workmen's compensation law. Such provisions were announced as mandatory in any effective compensation program by the National Commis-
sion on Workmen's Compensation Laws in 1972, and virtually all states now have such a provision. This article provides suggestions for a statute in this regard and discusses the operation of such laws in other jurisdictions.

As suggested above, the intent of this article is chiefly to set forth the current law of the availability of work doctrine and to explain historically how it came to be generated by the courts. While the author also sets forth thoughts with respect to the potential for a statutory vocational rehabilitation provision, this article does not include a hard recommendation for the full parameters of such a law. Such a recommendation should only follow an empirical study of the need for such a law, how it is likely to be administered and utilized in the Commonwealth, and what costs are involved. Plainly, however, the fact that the immense body of judge-made law treated here even exists points up the noticeable omission from the Pennsylvania Act of a key inclusion of any modern workmen's compensation statute.

II. THE AVAILABILITY OF WORK DOCTRINE: BRIEFLY DEFINED

As discussed above, the availability of work doctrine has impact on both the issues of when a worker may be reduced from total to partial disability, and the employee’s ability to secure vocational rehabilitation services.

In briefest summary, the current law is as follows. An employer paying total disability workmen’s compensation is only entitled to an order of partial disability—reduction (“modification”) or suspension of payments—after demonstrating: (1) that the claimant has physically become able to do some occupational category of work, and (2) that work within such category, and within the worker's vocational restrictions, is actually available to the worker. “Actually available," since the early 1980s, has meant

21. See notes 335-73 and accompanying text.

Once actual job availability is shown, partial disability is payable, either by order or agreement, pursuant to Section 306(b) of the Act, which provides, in pertinent part:

For disability partial in character [the claimant shall receive] sixty-six and two-thirds percentum of the difference between the [average weekly wage] of the employee . . . and the earning power of the employe thereafter; but such compensation shall not be more than the maximum compensation payable. This compensation shall be paid during the period of such partial disability . . . but not for more than five hundred weeks.
that the worker has actually been referred a then-open job, and has either returned to such work or has refused or otherwise failed, without good cause, to return to or attempt the referred work.23

Importantly, there is no purely medical or theoretical analysis with regard to an individual's partial disability under the Pennsylvania Workmen's Compensation Act. Accordingly, a physician's opinion that the claimant is, for example, only "25% disabled" is meaningless under the Pennsylvania Act. The percentage must be converted to *pragmatic* restrictions, and a job *within* those limitations and within the worker's vocational capabilities must be referred to the worker. Likewise, localized market analyses of the area job market for sedentary jobs are ineffective in Pennsylvania without effectively referring such jobs to the injured worker in question.

The burden of showing "job availability," and thus of showing partial disability, is on the employer in virtually all contexts. The scenario indicated above is the most familiar, with the employer actively seeking to reduce the benefits of the worker drawing total disability.24 The burden is present, however, in other cases as well. For example, if a worker has returned to work at modified duty, a presumption of continuing disability exists which entitles the worker to a virtual automatic reinstatement of benefits when he or

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77 Pa Stat Ann § 512 (Purdon 1992). Thus, a worker with an average weekly wage of $300 who returns to work earning $200—or sacrifices the opportunity to work at this rate—is entitled to two-thirds the difference, or $66.66 per week. When the demonstrated earning power is in excess of the average weekly wage, the claimant's benefits are deemed "suspended." *Jasper v WCAB (Teledyne)*, 498 Pa 263, 445 A2d 1212 (1982); *Ede v Ruhe Motor Corp.*, 184 Pa Super 603, 136 A2d 151 (1957).

A worker with a *substantial* average weekly wage, for example $1000, who returns to a job or otherwise has earning power of $200, will not be entitled to two-thirds the difference, since, using 1992 figures, two-thirds of the difference is in excess of the maximum compensation payable, or $455. The worker will thus labor at his pay of $200 per week and continue to receive benefits at his total disability rate. The effect of the finding that the claimant has "earning power," however, is that the claimant is deemed partially disabled and is entitled to such benefits for five hundred weeks. This puts a "cap" on liability when compared to the total disability benefit, which lasts for the "duration of the disability." Section 306(a) of the Act, 77 Pa Stat Ann § 511 (Purdon 1992).

A claimant with a substantial average weekly wage can also ignore job referrals with modest wages with impunity and suffer no immediate sacrifice of benefits. This phenomenon can stand in the way of good faith vocational rehabilitation and placement efforts under the *Kachinski* regime.

23. Id. See also *King Fifth Wheel*, 468 A2d 1211 (1983); notes 82-114 and accompanying text.

she again experiences a loss of wages.\textsuperscript{25} Only upon a showing, once again, of an available job, will the employer be entitled to reduce the claimant’s benefits to partial disability.

Similarly, if the claimant’s initial application for benefits is denied, and the employee remains off from work in the course of litigation, the claimant will be entitled to an ongoing award of total disability benefits if there has been no intervening offer of conforming work.\textsuperscript{26}

It is not surprising that a court-mandated “vocational rehabilitation” was generated out of this legal framework. The most basic form of vocational rehabilitation is, after all, simply locating a job within the worker’s current capabilities and directing the individual to such work.\textsuperscript{27} The motivation for this process is obvious under the above analysis: if an employer must pay the worker total disability until he or she secures work or is shown to have real earning power, the employer will eventually try to direct the worker back to work.

In many cases such simple “job finding” will be the beginning and end of all rehabilitation attempts under the Pennsylvania law, since there is no statute to demand any more of an employer. In other cases, however, an employer will expend greater energies and explore more exotic forms of rehabilitation—coaching for interviewing, outplacement, retraining, other education—if it is deemed necessary to demonstrate that the worker has restored earning capacity.

### III. HISTORICAL DEVELOPMENT OF THE “AVAILABILITY OF WORK” DOCTRINE

Without exception, all of the basic rules cited in the prior section were generated from court decisions. The heritage of these rules is quite ancient, with the genesis of the doctrine traceable to court cases of the 1930s. An understanding of this heritage is important for a complete appreciation of the modern rules.

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\textsuperscript{25} See Busche \textit{v} WCAB (Townsend \textit{&} Bottum, Inc.), 77 Pa Commw 469, 466 A2d 278 (1983).

\textsuperscript{26} See Petrone \textit{v} Moffat Coal Co., 427 Pa 5, 233 A2d 891 (1967).

\textsuperscript{27} See, for example, Comment, \textit{Vocational Rehabilitation in the Workers’ Compensation System}, 33 Ark L Rev 723, 728 (1980).
A. The Law of "Nondescript" Disability and the Presumption of Job Availability

The relevant roots of the modern availability of work doctrine are found in the earlier law of "nondescript" disability. This term, virtually forgotten in contemporary practice, was described only twenty years ago as one reflecting an "integral part of the disability law of Pennsylvania in workmen's compensation cases." The "nondescript" type of total disability as a judicial doctrine is important because it was the original judge-made doctrine which demanded a showing of job availability:

[The term "nondescript"] started simply as a designation of one who, while not totally incapacitated under ordinary standards of disability, still had such elements of disability as residuals following his injury that he was unable to compete for employment on the open labor market. In other words, if a job had to be fashioned for him, then he was a "nondescript" on the open labor market, and in such case was entitled to continuation of total disability benefits.

In such cases, the employer had the burden of proof and could only gain an order of partial disability upon a showing that suitable work within the nondescript limitations was available. "Available suitable work" in the case of a worker with nondescript disability was not considered in the abstract. The employer would literally have to provide a specially created job to the individual in such cases to establish entitlement to partial disability.

The "nondescript" form of disability was distinguished from the disability of a worker who had recovered enough to do modified work of a general nature. In these cases, there was no burden on the employer of showing an available modified job, and "the employer could meet his burden to reduce his liability from total to partial simply by offering evidence of any percentage of improvement, however minor, even while admitting that he would not or could not reemploy the disabled employe." Importantly, the ini-

30. Id.
31. See, for example, Jones v Hayle Brook Coal Co., 119 Pa Super 409, 411, 179 A 783, 784 (1935).
32. Interview with Raymond F. Keisling, Esquire (Feb 21, 1992).
tial interpretation of the law did not recognize this dichotomy.\textsuperscript{34}

It is generally accepted that the first appellate case to herald the nondescript doctrine, and demand a showing of job availability, was the superior court’s decision in \textit{Consona v R.E. Coulborn & Co.}\textsuperscript{35} In that case, the claimant had suffered a number of serious facial wounds and sought reinstatement of compensation after difficulty in attempting return to work. There was evidence of record on some level of earning capacity, as the claimant had actually labored since the injury in a mushroom house.\textsuperscript{36}

The employer argued that this objective evidence of restoration of earning capacity should preclude an award of reinstated total disability, notwithstanding the claimant’s inability to perform steady light work. This argument was rejected by the superior court in the following often-repeated language, which established the “nondescript” rule and the dichotomy summarized above:

The evidence indicates that the claimant can, at irregular intervals, do some light work, but of a very limited character. His incapacity is such that it would not be practicable to expect that he could hold a job. If he were \textit{able uninterruptedly to do light work, it might be presumed that work of that

\begin{footnotesize}
\begin{enumerate}
\item A2d 891 (1967).
\item Prior to the development of this dichotomy, a certain level of confusion existed with regard to the determination of a worker’s partial disability. Provision for the monetary entitlement was clear enough, but there was no clear provision for what \textit{evidence} was necessary to demonstrate that the totally disabled worker had restored “earning capacity” was now only partially disabled. As in the \textit{current} law, there was no statutory provision for the critical test.

One approach, however, was simply to have the physician testify with regard to his opinion concerning the worker’s earning capacity given his physical capabilities or estimated percentage of loss. This method was gravely questioned in its time and was subject to sharp criticism by the contemporary leading authority. See Skinner, \textit{1 Pennsylvania Workmen’s Compensation} at 424-30 (cited in note 28). The approach endorsed by Skinner, in all cases where the allegation had been made that an employee’s disability had changed from total to partial, was to treat the issue of whether an employee had “earning capacity” as a factual one, based upon the referee’s consideration of certain facts:

To arrive at a “conclusion” or to express an opinion on the question of what the earning power of any partially disabled person is and to what extent that represents a loss when compared to wages earned before the accident would involve necessarily the consideration of two or three elements which must be considered in forming an opinion: (1) The physical ability to work and the character of the work the person could perform in his impaired condition. (2) The wages customarily paid in the vicinity for the character of work he is to perform. (3) The wages earned before the accident and while the person was supposedly 100\% efficient.

Id at 427. The practice of using physicians alone, however, to render opinions as to partial disability continued until the commonwealth court began to define the elements of job availability in the 1970s and 1980s.

\item 104 Pa Super 170, 158 A 300 (1931).
\item \textit{Consona}, 158 A at 300.
\end{enumerate}
\end{footnotesize}
nature would be available. . . . It is a matter of common knowledge that there is a general disinclination on the part of employers to give work to cripples. If suitable work was available to this man with his limitations, it was incumbent upon the [employer] to show that fact. There was no attempt to assume this burden.37

The Court then cited a collateral authority—later to be assailed—to create the nondescript rule and its corollary:

If the workman is proved able to do light work in general, it may be presumed that such work is available; but if the injury has left the workman a "nondescript" in the labor market, unfitted to do even light work of a general character, but fitted to do "odd" jobs not generally obtainable, it may be presumed that there is no work available for him, even though he attempted to find such. . . . If the workman is left a nondescript, prima facie he is unable to obtain suitable employment, and so long as this presumption remains not overturned the workman is entitled to compensation for total incapacity.38

This basic dichotomy essentially remained in place until 1967.39

In the meantime, multiple decisions were generated by the superior court which ratified the Consona case and clarified that this was, indeed, the law.40 Attempts to extend the employer's responsibility of showing job availability beyond the nondescript context, however, were resisted. The superior court, in this regard, consistently sustained the reasoning of the "nondescript" cases, but refused to require employers to show job availability in every case where it was alleged that the worker "cannot compete in the open labor market."41

37. Id (emphasis added).
38. Id at 300-01, quoting Annotation, Workmens' Compensation: Statutory phrase "incapacity for work" or the like, as including inability to obtain work following an injury, 33 ALR 122 (1924).
39. See notes 51-66 and accompanying text.
40. See, for example, Nagel v McDonald Mining Co., 150 Pa Super 527, 28 A2d 805 (1942); Earley v Philadelphia & Reading Coal & Iron Co., 144 Pa Super 301, 19 A2d 615 (1941); Jones v Hayle Brook Coal Co., 119 Pa Super 409, 179 A 783 (1935). See also Cox v Woodlands Cemetery Co., 133 Pa Super 313, 2 A2d 565 (1938). The Earley case is usually pointed to as the most influential of the cases in establishing the "presumption of job availability," as it expanded on Consona and held that where a worker is able to steadily perform light work, "it is presumed that such work is available, and that one can procure it." Earley, 19 A2d at 617 (emphasis added).
41. See, for example, Forsythe v Harrison Twp., 157 Pa Super 433, 43 A2d 366 (1946); Allen v Dravo Corp., 149 Pa Super 188, 27 A2d 491 (1942); Conley v Allegheny Co., 131 Pa Super 236, 200 A2d 287 (1938).

Only where the claimant was shown to be a nondescript would the presumption of non-availability of work apply. A claimant could not demonstrate his status as a nondescript merely by showing he allegedly could not compete on the open job market. To the contrary:

To bring the claimant within the classification of a "nondescript," it must be shown
Importantly, throughout this period a distinction was drawn between the ability to work and the ability to procure a job. In this regard, it was the capacity to work, not the ability to apply and be considered by an actual employer, that controlled. In the superior court’s words, “The Compensation Act is not designed to afford insurance against unemployment, and the fact that work is not procurable does not prove that a man is not capable of performing it. It is the ability by which the question is determined.”

Some twenty-three years after the genesis of the “nondescript” doctrine and of the corresponding rule that a presumption of availability of work exists with regard to other partially disabled workers, the Pennsylvania Supreme Court finally ratified the dichotomy. This ratification came about in the celebrated case of Unora v Glen Alden Coal Co., a case which is typically cited as the source of the judge-made law of job availability. The case is justly remembered both for the colorful language employed by its author, Justice Musmanno, and for its invocation of Professor Larson’s view of disability as being a concept necessarily implicating both physical and vocational factors.

The facts of the case were unremarkable. Three coal miner-claimants in the consolidated appeal had been refused disability benefits, as the testifying physicians would only say that the miners were partially disabled, based upon an assessment of their medical condition only. At that time, compensation for disease was only payable for total disability and hence the workers were left without any recovery.

This result was considered intolerable by the supreme court, which remanded for a consideration of whether, with their level of impairment, they were able to be employed. In the supreme court’s view, the physicians had rendered their opinion that the workers were only partially disabled “on the false premise that total disability under the act is strictly and exclusively a medical . . . [or] physiological fact.” In the court’s view, “total disability . . . in

that his injuries prevent him from getting employment by reason of the fact that his condition disqualifies him. To sustain such a claim, the claimant must show that there is no source of permanent employment available to a man who is under the disadvantage he suffers.


43. 377 Pa 7, 104 A2d 104 (1954).

44. Unora, 104 A2d at 105-06.

45. Id at 106-07.
the nomenclature of workmen's compensation proceedings imports economic as well as physical findings." Quoting Larson, the court stated:

The disability concept is a blend of two ingredients. . . . [T]he first ingredient is disability on the medical or physical sense, as evidenced by obvious loss of members or by medical testimony that the claimant simply cannot make the necessary muscular movements and exertions; the second ingredient is de facto inability to earn wages . . . . The proper balancing of the medical and wage-loss factors, is, then, the essence of the "disability" problem in workmen's compensation.\(^{46}\)

The court then imposed its own "nondescript" rule—though avoiding the use of that word—in the following language, at the same time pointing out and citing the longstanding "nondescript" line of cases:\(^{47}\)

The determination of total disability is one which requires a consideration and weighing (in addition to the anatomical facts) of such factors as the claimant's mental outlook, his industrial background, his education, the occupation, if any, he could perform where his particular physical impairment would not be a total bar, and whether such work exists. Where the injured person can handle only a specially-created job, one light of effort and responsibility but laden with rest and comfort (employment plums that do not often dangle from the trees of everyday economics) the burden is on the defendant-employer to show that such a job is in fact within reach. If proof of that fact is not presented, the claimant is then entitled to a finding of total disability.\(^{48}\)

Under this newly regenerated rule, the presumption of availability of work continued with regard to workers who had been cleared for general work of a modified or light-duty nature. Promptly after Unora, for example, the superior court held that, in a case where the accepted medical evidence was that an injured worker was "capable of steadily performing certain types of light work," it is "presumed that such work is available, and that one can procure it."\(^{49}\)

During this period, as before, employers would typically rely on the opinion of physicians with regard to the ability of workers to do steady light work. Because of the presumption of availability of such work, of course, vocational experts were not usually involved

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46. Id at 107, quoting Arthur Larson, 2 Workmen's Compensation Law § 57.11 at 10-12 (Matthew Bender, 1989).
47. Unora, 104 A2d at 107 n 3.
48. Id at 107.
in the process. This procedure was considered in its time appropriate under the rule set forth in *Unora*.

B. *Overthrow of the Presumption of Job Availability and Doctrine of Nondescript Disability*

The long-standing dichotomy discussed above—the presumption that work is not available for a nondescript, but available for a worker cleared for general light work—came to an end in 1967 in the landmark case of *Petrone v Moffat Coal Co.* The claimant was a coal miner who had labored in the anthracite mines for thirty-three years and had contracted anthracosilicosis. The medical opinions in the case as to the level of his disability were conflicting, but the medical testimony accepted by the fact-finder was to the effect that the claimant “could perform light work of a general nature such as operating an elevator or a power lawn mower,” and that the “claimant could perform light work of a general nature including ‘many jobs inside of the mines’ although he would not advise that.”

The Workmen’s Compensation Appeal Board (hereinafter “the Board”) and the superior court, finding this evidence credible, dutifully followed the half-century of precedent:

> An employee who can perform light work of a general nature but cannot do so steadily and uninterruptedly, who has been disabled by occupational disease is also entitled to compensation for total disability. . . . However, where, as in the instant case, a claimant suffering from occupational disease is able to perform light work of a general nature, as distinguished from work of a specialized nature, continuously and steadily, it is presumed that such work is available and the claimant is not totally disabled within the meaning of the Act. . . .

Accordingly, the denial of benefits was upheld.

In the supreme court, this ruling was reversed and the entire presumption of available work overthrown. Prefacing the decision with memorable prose, as he had done in the *Unora* decision,

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50. See, for example, *Purnell v Wolfe*, 204 Pa Super 211, 203 A2d 511 (1964) (employer argued that partial disability should be ordered based solely on doctor's medical opinion); *Mueny v Kelso Beach Improvement Assoc.*, 181 Pa Super 105, 124 A2d 153 (1956) (employer sought to demonstrate partial disability based solely on doctor’s medical opinion).

51. 427 Pa 5, 233 A2d 891 (1967).


54. *Petrone*, 233 A2d at 892:
Justice Musmanno declared the following:

This is a strange presumption. How does the fact that a person is capable of performing light work guarantee that light work is available? . . . "A presumption should always be based upon a fact, and should be a reasonable and natural deduction from that fact." . . .

. . . .

The presumption spoken of by the Superior Court . . . is so unnatural and illogical that one wonders how it ever found a footing in the law. . . . The original false step . . . was apparently taken in the case of Consona . . .

It would appear that the opinion writer in that case was led into this fallacious [presumption] by [reliance upon the authority of a collateral text], where the . . . writer was discussing something else, namely, the question as to who has the burden of proof to show that suitable employment is in fact available.55

The court then openly overturned the pre-existing law, and ruled that the presumption was null and void: "If the finding 'capacity to perform light work' is to mean anything, there must be some evidence that light work exists."56 Further, it was the employer that had the burden of demonstrating that work was available to the partially recovered employee:

The law does not require that the claimant must visit every building and house in the community to inquire if he is needed as an elevator operator or engineer on a power lawn mower. If light work is available, it is easier for the defendant to prove its existence than for the claimant to prove its non-existence.57

Significantly, the court was influenced in so changing the rule, and in ruling on the burden of proof issue, by reference to the practice in the social security context. The federal cases dealing with that law "adopt the rule that when a claimant is found physically capable of performing light work of a general character, the burden should be on the party from whom compensation is sought to show

When Joseph P. Petrone was thirteen years of age, the economic straits of his family drove him into the anthracite mines of Lackawanna County. After toiling for thirty-three years in the depths of the earth, extracting one of nature's most useful minerals, Petrone found his strength ebbing, his step faltering, and his lungs clogging. He soon learned that he was doomed by the fate which has caught up with countless coal miners. Anthracosilicosis had taken up dread habitation in his chest. He could not work—his days as a coal miner were over.

Id. 55. Id at 893-94.
56. Id at 893.
57. Id at 895.
that such work is available to the claimant." 58

The *Petrone* decision was truly a landmark in the case law doctrine of job availability. With this development it became plain that evidence of the availability of work was required in all cases where the claimant possessed a residual disability. The fundamental distinction between "nondescript" disability and general disability became irrelevant.

It should be recalled, however, that at this juncture "availability of work" was still considered in the abstract. Notwithstanding the requirement of showing the availability of work, there was no requirement that the existence of such work had to be communicated to the worker. Cases decided after *Petrone* in the 1970s and early 1980s consistently insisted that the task of showing job availability did not require that the worker be aware of the work or receive an actual offer of employment. 59

The *Petrone* case was followed quickly by yet another landmark case on the law of job availability, *Barrett v Otis Elevator Co.* 60 Its ultimate holding has had longstanding effect on the burden of proof issue in showing job availability.

The claimant in *Barrett* had filed a claim petition, and the medical evidence ultimately found credible indicated that the claimant was indeed disabled from his regular rigorous work. His disability, however, had been characterized as "40%," with no attention being paid to job availability—no determination had been made as to whether the claimant was able to do light work of a general nature, as had been the usual practice. 61

The claimant had been found partially disabled, and he challenged this finding in the supreme court in light of the *Petrone* case. The employer had argued that *Petrone* was not applicable in light of the percentage finding of disability which, in its view, could be interpreted as conclusive with regard to a finding of partial, as opposed to total, disability. 62

This argument was rejected, with the court pointing to the decisions in *Unora* and *Petrone*, 63 which had both stressed the impor-

58. Id (Roberts concurring). The presumption of job availability had also been sharply attacked by the superior court itself shortly before the *Petrone* decision. See *Kirk v L. Bauer, Jr., Inc.*, 209 Pa Super 357, 228 A2d 228 (1967). This case was probably influential in the supreme court's subsequent overthrow of the doctrine.

59. See notes 68-70 and accompanying text.

60. 431 Pa 446, 246 A2d 668 (1968).


62. Id at 671.

63. Id at 672, 674.
tance of the role of *vocational* factors in the determination of disability. In this case, the court pointed out, the claimant had shown that he could not do his regular work and this assertion had been found believable by the fact-finder. As no showing of job availability had been undertaken by the employer, the claimant was to be considered totally disabled:

We hold that, once the claimant has discharged his burden of proving that, because of his injury, he is unable to do the type of work he was engaged in when injured, the employer has the burden of proving that other work is available to the claimant which he is capable of obtaining.\(^6\)

As will be seen, this holding as to allocation of the burden of proof has had tremendous effect on subsequent decisions, and the basic rule certainly survives at the present time.

The new rulings of *Petrone* and *Barrett* were revolutionary in their era, as reflected by Judge Barbieri in his treatise. Writing in 1972, he pointed out that:

While these small burden of proof changes may not seem to be of major significance because of their purely procedural character, the increase in the benefit responsibilities of employers and their insurance carriers is quite remarkable. . . . Previously, the employer could meet his burden to reduce his liability from total to partial simply by offering evidence of any percentage of improvement, however minor, even while admitting that he would not or could not reemploy the disabled employe. [This simple showing would have] the effect of changing the lifetime period of benefit entitlement at the maximum rate to the partial disability schedule of payments which are not only in lesser weekly amounts, but for a limited period of time.\(^5\)

The *Petrone* and *Barrett* cases were to remain the leading precedents regarding the basic tenets of job availability until the 1987 decision in *Kachinski v WCAB (Vepco Constr. Co.)*.\(^6\)

C. *Between Barrett and Kachinski*

The two landmarks discussed in the prior section established job availability as a pervasive requirement in the demonstration of partial disability. As identified by Judge Barbieri, however, these were essentially burden of proof cases. Precisely how job availability was shown had always been a rather inexact art; certainly the reported appellate court cases fail to reveal any structured pattern. This inexactitude continued after *Petrone* and *Barrett* and existed

\(^{64}\) Id at 674.


until the accession of the *Kachinski* regime.

Still, in the years following *Petrone* and *Barrett*, the case law did begin to develop a rather demanding set of criteria with regard to what the employer was to prove to demonstrate job availability. This development, prompted by the emphasis of *Unora* and the cited cases on the importance of vocational factors in the determination of partial disability, also generated the widespread use of vocational experts to testify in modification petitions with regard to the availability of appropriate work in the claimant's particular geographic area.\(^7\) In lieu of firm guidelines, a variety of approaches were undertaken by such vocational experts and counselors. "Market surveys" of sedentary or other modified duty work were typically requested by employers and insurance carriers with regard to partially recovered workers.

The large number of cases generated during this period ultimately gave rise to the current supreme court landmark, *Kachinski*, with its pragmatic recitation of "concrete guidelines" for the proper demonstration of job availability.

The summarization which follows can be said to constitute the essential law of job availability of this period. Many of these rules will be familiar as aspects of the present law, and even remain now as part of the substantive law. Other aspects, however, are defunct under the *Kachinski* regime, and at the time of this writing most of the cases cited immediately below are no longer recognized as particularly current authority.

The cases decided immediately after *Petrone*—now of the newly created commonwealth court—confirmed that to demonstrate job availability the employer need not show an actual job offer, nor was linking the claimant with a job opportunity or sending a job referral required. For example, job availability was satisfied in one early case based upon the testimony of the manager of the local Office of the State Bureau of Employment Security that there were "fourteen positions [in the area] which perhaps claimant could fill."\(^6\) In this and similar cases, testimony from a vocational specialist as to the simple availability of open jobs was considered adequate testimony; an offer of employment or communication of the existence of the work was simply not required.\(^5\)

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69. Compare also *Chamberlain Corp. v Pastellak*, 7 Pa Commw 425, 298 A2d 273.
Reflecting the uncertainty during this period of the complete meaning of job availability, the commonwealth court also held that the employer need not show that the "available jobs" were even open for application. In one case, indeed, the employer sought to establish job availability with a market survey which did not include in its essential analysis whether the identified jobs were vacant and in need of filling. This was found acceptable by both the Board and the commonwealth court, which affirmed the modification of claimant's benefits:

[Here] a witness, qualified... as a rehabilitation psychologist and vocational rehabilitation specialist, testified that suitable jobs for the claimant existed in the local job market and specified a number of these positions as well as some of these companies willing to hire disabled persons. We believe that this testimony was sufficient. We do not believe that the employer was required under Barrett v Otis Elevator... to show the existence of specific job openings.\textsuperscript{70}

The foregoing approaches to showing job availability during this period—market surveys of available jobs—were typical and considered legitimate under Petrone. The totally abstract approach to showing job availability, however, achieved by having an expert testify as to the claimant's presumed ability to do a number of theoretically available jobs, was disapproved by the commonwealth court. In 4156 Bar Corp. v WCAB,\textsuperscript{71} the employer's expert had administered a number of tests to the claimant to determine the claimant's level of intelligence, his interests and personality, and then "concluded that the claimant was capable of performing a variety of jobs."\textsuperscript{72} The expert apparently determined that the "available jobs" were suitable for the worker without a market survey, and instead simply provided a number of job titles. This process was considered unacceptable by the referee and the court as reflecting proof of job availability. In the court's words, "Merely providing a list of job titles which appear to be compatible with claimant's condition is not equivalent to establishing the availability of work the claimant can competently perform."\textsuperscript{73}

The court also insisted that a job alleged to be available to the

\textsuperscript{70}Dreher v WCAB, 38 Pa Commw 473, 393 A2d 1081, 1081 (1978). See also RCA Corp. v WCAB, 46 Pa Commw 411, 406 A2d 588 (1979) (referee committed error in requiring employer to communicate availability of work to claimant).

\textsuperscript{71}63 Pa Commw 176, 438 A2d 657 (1981).

\textsuperscript{72}4156 Bar Corp., 438 A2d at 659.

\textsuperscript{73}Id at 659-60.
claimant be tailored to the "individually disabled worker" in question, as opposed to a partially disabled worker in general.\textsuperscript{74} This approach was driven, appropriately, by the commonwealth court's reading of Petrone as demanding that the "employer must show that the claimant is, in fact, employable within the relevant job market."\textsuperscript{75} Further, the job had to be available at a time relevant to the allegations of the claimant's alleged resolution to partial disability.\textsuperscript{76} The job or jobs were to be located within the worker's present general geographic area in order to be considered available.\textsuperscript{77}

A claimant was held to be able to \textit{rebut} a showing of job availability by actually applying for the job (if this was the manner of showing job availability being undertaken in his case) and being \textit{rejected},\textsuperscript{78} or by presenting persuasive testimony that he simply could not do the tasks of the job purportedly within reach.\textsuperscript{79} A claimant's subjective displeasure with a proposed job, however, was deemed irrelevant to the analysis of job availability.\textsuperscript{80}

A separate, but related, line of cases also grew out of Petrone and Barrett. These cases continued to deal with the issue of \textit{when} job availability had to be demonstrated, as opposed to what job availability \textit{consists of} and \textit{how} it is demonstrated. The development of these cases is treated in part five of this article.\textsuperscript{81}

\textbf{D. Immediate Roots of Kachinski: A "Job Available"—Not Merely a "Job Open"}

Although the commonwealth court in the years after Petrone and Barrett continued to develop a law of job availability, the law, by any analysis, was not particularly coherent. While there were favored methods in the trade with regard to what vocational evi-

\begin{footnotesize}


\footnote{77. \textit{Yellow Freight Sys., Inc. v WCAB}, 32 Pa Commw 147, 377 A2d 1304, 1306 (1977).}

\footnote{78. See \textit{WCAB v St. Joseph's Hosp.}, 52 Pa Commw 265, 415 A2d 957, 958 (1980).}

\footnote{79. See, for example, \textit{WCAB v Universal Cyclops}, 20 Pa Commw 261, 341 A2d 223, 225 (1975); \textit{Weathergard, Inc. v WCAB}, 41 Pa Commw 275, 398 A2d 1103, 1104 (1979).}


\footnote{81. See notes 259-322 and accompanying text.}
\end{footnotesize}
idence should be produced, there was no clear guideline provided by the court.

One well established rule, however, was that the employer need not actually show an offer of work. Further, because the court had held that the employer need not show that the “available” job was even open for applications, vocational personnel typically did not undertake to direct actual job referrals, i.e., communication of the fact of an open, available job to partially recovered workers. The majority view was, certainly, that such efforts were not required under the law.

This process, now a hallmark of the Kachinski requirements, was first injected into the law by Senior Judge Barbieri of the commonwealth court in King Fifth Wheel Co. v WCAB (Rhodes). In that case, the employer produced vocational testimony that modified work was available to the partially recovered claimant, who apparently was a laborer for a manufacturing concern. The vocational counselor testified that light work within the claimant’s restrictions was available in the form of a dental lab technician. This testimony was found credible, and the referee modified the worker’s benefits. The Board, however, reversed, pointing out that the employer had failed to show that such work was vocationally appropriate for the claimant.

This reversal was sustained by the commonwealth court, with the following critical modification:

[The vocational counselor] testified to a job open and not necessarily available. . . . There is no evidence that the job described is available to this claimant in his state of disability as described by both medical witnesses; Claimant was never told of the existence of this opening or of any other of the jobs described by [the vocational counselor] . . . .

The court thus concluded that the employer had failed to meet its burden of proof on this additional ground.

The apparent addition of this new requirement in showing job availability was correctly noted as remarkable—and unsupportable—by a contemporary commentator:

A marked departure is signified by the court’s language suggesting a requirement that the existence of jobs be communicated to the claimant to satisfy [the employer’s] burden. . . . The author respectfully points out that the court’s language, in King Fifth Wheel . . . is not consistent with the many previous pronouncements by this court that the standard is not

82. 79 Pa Commw 300, 468 A2d 1211 (1983).
83. King Fifth Wheel Co., 468 A2d at 1212 (emphasis added).
an actual offer of employment, but rather proof of available work. 84

The commonwealth court purported to support this requirement by invoking the example of a prior case. In that decision, Livingston v WCAB (Upper Yoder Twp.), 85 the employer chose to prove the existence of available work by way of an actual job offer sent to the worker in a mailgram. As the quoted author insists in his criticism, however, the case certainly cannot be read to this day as precedential authority for imposition of the communication requirement. The commentator is entirely correct in complaining that, "although such communications can obviously serve as evidence of the existence of available work, there is nothing in the Livingston opinion which suggests that such communications are necessary." 86 Nevertheless, this requirement became injected in the pre-Kachinski law of job availability with this remarkable act of judicial activism.

In the next two years the commonwealth court was to make clear that the "notice" requirement was a keystone of showing job availability. The most hotly contested and pivotal case was Backowski v WCAB (E.W. Tire Co.). 87 In this case the employer challenged the correctness of King Fifth Wheel, pointing to the fact, as had the commentator quoted above, that the longstanding rule was that job availability did not require an actual communication of the existence of open jobs. Under the strong influence of Judge Barbieri, the commonwealth court sustained its new rule:

[In this case] there is not one item of testimony indicating that any of the jobs described were made known to Claimant at any time during the [critical] period . . . .

We believe that the form of post hoc revelation of allegedly available employment in this case has no evidentiary competence to establish the availability of job opportunities on which the right to compensation can be vitiating. 88

Reflecting the still maverick aspect of this extension of the law, the court did not attempt to justify the new requirement by invocation of its own King Fifth Wheel and Livingston cases. Instead, the court declared that the only basis for reducing a worker's benefits

86. Weber, 55 Pa Bar Ass'n Q at 157 (cited in note 84).
anyway in the context of showing job availability was the worker's refusal of available light work. The court, in this regard, reasoned further that a claimant can hardly refuse work and have his benefits reduced when he has never had the job brought to his attention in the first place. Thus, necessarily, notification of the worker of the available work is a requirement of showing job availability.89

While the notice requirement is now taken for granted under Kachinski and is part of a laudable system, it is nevertheless true that the foregoing reasoning was an unsatisfactory legal-reasoning modality for extension of this requirement into the law of showing job availability. The cases cited in the course of the court's reasoning were cases where the employer had chosen on its own to show job availability by making actual offers or referrals of work and had been met with refusals by workers. In those cases it was true indeed that the court would order modification or suspension.90

However, as the commentator complained in the context of the earlier King Fifth Wheel case, there was no requirement in the first place that job availability be shown through actual job offers. The longstanding rule and precedents of the commonwealth court was that "the standard is not an actual offer of employment, but rather proof of available work."91 Plainly, what the commonwealth court did in its King Fifth Wheel and Backowski cases was to effectively overthrow its prior rulings without wishing to acknowledge the same.92

The court was, in any event, to apply this rule with vigor in several other cases93 in the period immediately preceding the accession of the supreme court's Kachinski regime, which adopted with vigor the rule of communicating notice of the availability of an

89. Id at 62:
The basis for suspension in a case like this one where partial disability is established, and admittedly claimant can perform sedentary work, would be the claimant's refusal to accept available employment. He cannot refuse, of course, what has not been revealed or made available to him.

Id (emphasis added).

90. See, for example, Yellow Freight Sys., Inc. v WCAB, 32 Pa Commw 147, 377 A2d 1304 (1977).

91. Weber, 55 Pa Bar Ass'n Q at 157 (cited in note 84).

92. The court continued to claim, however, that the employer need not show an "actual job offer," but this is essentially the case unless the claimant ignores job referrals or commits outright sabotage in the course of job placement efforts.

93. Dave v WCAB (Raybestos Manhattan, Inc.), 97 Pa Commw 265, 508 A2d 1335, 1337 (1986); W & L Sales Co. v WCAB (Drake), 92 Pa Commw 396, 499 A2d 710, 711 (1985), aff'd per curiam, 524 Pa 591, 574 A2d 603 (1986); Woytach v WCAB (City of Scranton), 92 Pa Commw 300, 498 A2d 1390, 1391 (1985).
open job to the injured worker.

IV. **KACHINSKI AND THE CONTEMPORARY LAW OF JOB AVAILABILITY**

A. The Supreme Court’s New Declaration and the “Concrete Guidelines”

As discussed above, in the years after **Petrone** and **Barrett** the commonwealth court constructed a law of job availability that added great substance to the essentially procedural teaching of those cases. While the decisions during this period were subject to some contradiction and confusion, the court—under the distinct influence of Judge Barbieri—began to lay down a coherent body of law to control the showing of job availability. The cases of **King Fifth Wheel** and **Backowski** are the best public illustrations of this influence.

Among the cases generated by the court reflecting this influence was **Kachinski v WCAB (Vepco Constr. Co.)**. In that case, an employer had filed a modification petition after securing medical evidence that the claimant’s disability had been resolved and that he could work on a sedentary level. A vocational expert then located jobs within that category, and the existence of some was communicated to the claimant. The claimant did not pursue any of these proposed jobs and the referee thus modified the claimant’s benefits.

The commonwealth court reversed, recounting first the new rule that “the work proposed for a partially disabled claimant must be actually available, that is, in fact within his reach, and it must be brought to his notice by the employer.” In addition, however, the court faulted the employer’s proofs on the grounds that the vocational testimony did not sufficiently demonstrate that the particular rigors of each proposed job were matched with the claimant’s individualized needs:

The employer does not have to produce a job offer, ..., but positions which are pie-in-the-sky, often described by vocational experts as sedentary or light or requiring little lifting, do not without additional description of their physical demands, establish actual availability of work which a claimant with particular physical limitations can do.

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94. See notes 82-93 and accompanying text.
96. **Kachinski**, 498 A2d at 38.
97. Id.
The employer's evidence [in this case] would support a finding that there were positions of employment in the workplace for partially disabled persons. It does not support the referee's findings that some of these jobs were actually available or within reach of this claimant.\textsuperscript{88}

This same reasoning was employed in a companion case, \textit{Farkaly v WCAB (Baltimore Life Ins. Co.)},\textsuperscript{99} only a day later. In that case, the court held again that an employer's showing of job availability was defective because the vocational counselor had failed to sufficiently demonstrate that the proposed work met with the specific medical restrictions on the claimant. While the proposed work was identified as sedentary and the claimant was capable of doing sedentary work, there was no \textit{particularized} evidence that the job would not involve lifting above the level of the shoulders or pulling of heavy weights, which were also aspects of the claimant's sedentary restrictions.\textsuperscript{100}

Both of these cases were accepted by the supreme court for review, with \textit{Kachinski} being utilized as the vehicle for announcement of the new "concrete guidelines" to define the elements of showing job availability. The contention surrounding this area of the compensation law had been illustrated for the supreme court by the dissenting opinions of Judge Doyle in both \textit{Kachinski} and \textit{Farkaly}.

The court ultimately ratified, with some modification, the rules generated by Judge Barbieri and the commonwealth court, but recognized and implemented the substance of those dissents. The court first recognized that job availability for nearly half a century had been shown in the same manner as it is in the social security context, i.e., by merely showing the theoretical availability of work.\textsuperscript{101} In its view, accordingly, an issue before the high court was "whether an employer can sustain his burden of showing available work by demonstrating the existence of jobs in the marketplace, as opposed to demonstrating jobs which have actually been made available to the claimant."\textsuperscript{102} This issue, the court correctly noted, had not been considered in \textit{Petrone} and \textit{Barrett}.\textsuperscript{103}

After an analysis of the distinctions between social security and

\begin{itemize}
  \item \textsuperscript{88} Id at 39-40, citing \textit{4156 Bar Corp.}, 438 A2d 657 (1981).
  \item \textsuperscript{100} \textit{Farkaly}, 498 A2d at 36.
  \item \textsuperscript{101} \textit{Kachinski}, 532 A2d at 376 (recognizing that in \textit{Petrone} the supreme court "unfortunately . . . did not explain what evidence was required to show availability, but alluded to the proof method utilized under the Social Security disability program").
  \item \textsuperscript{102} Id.
  \item \textsuperscript{103} Id at 376, 377-78.
\end{itemize}
workmen's compensation, the court adopted the concept of "actual" job availability which had been generated by the commonwealth court. In the Kachinski court's view, making this a requirement of the employer was not only consistent with its own prior declarations as to "disability" in Unora, Petrone, and Barrett, but was in consonance with the policies supporting the workmen's compensation system:

The employer, as the owner of the production process . . . bears a responsibility to those who are injured while operating it. That responsibility, though not without its limits, requires at a minimum some effort on the part of the employer to make the injured employee whole. To impose on the injured party the duty to find alternative work under pain of foregoing the compensation to which he has become entitled is to condition one's receipt of compensation on something other than the injury itself: a concept far removed from the salutary purpose of workmen's compensation to provide relief due to injuries caused by the workplace.

Therefore, we adopt the Commonwealth Court's interpretation of "available" as requiring a showing of actual availability.\(^{104}\)

One injured at work, stranded into partial disability, deserves more than a generic list describing where he might find some suitable work.\(^{105}\)

The supreme court also adopted the requirement that the available job be within the claimant's vocational and physical restrictions, but found inappropriately "hypertechnical"\(^{106}\) the commonwealth court's demand that available jobs be meticulously matched with the idiosyncracies of the claimant's physical restrictions. Adopting the spirit of Judge Doyle's dissent, the court complained that the commonwealth court's approach

basically imposed on the employer the duty to specify every aspect of every job in question: a cumbersome burden in light of the fact that only so much can be known about a job in advance. It is enough that the employer produce medical evidence describing the claimant's capabilities, and vocational evidence classifying the job, e.g., whether it is light work, sedentary work, etc., along with a basic description of the job in question. From such evidence it will be up to the referee to determine whether the claimant can perform the job in question.\(^{107}\)

The court then set forth the following as "concrete guidelines"\(^{108}\)

\(^{104}\) Id at 379.
\(^{105}\) Id at 380.
\(^{106}\) Id at 379.
\(^{107}\) Id.
\(^{108}\) Id.
which "consider both the employees' interest in receiving the compensation due him, and the employer's interest in not being held responsible in excess of the injury caused":109

1. The employer who seeks to modify a claimant's benefits on the basis that he has recovered some or all of his ability must first produce medical evidence of a change in condition.
2. The employer must then produce evidence of a referral (or referrals) to a then open job (or jobs), which fits in the occupational category for which the claimant has been given medical, clearance, e.g., light work, sedentary work, etc.
3. The claimant must then demonstrate that he has in good faith followed through on the job referral(s).
4. If the referral fails to result in a job then claimant's benefits should continue.110

The court further elaborated substantially on these requirements, noting as a preface that the "viability of this system depends on the good faith of the participants."111

The court then declared, in this regard, that (1) "the referrals by the employer must be tailored to the claimant's [vocational] abilities," (2) the referrals must be "made in a good faith attempt to return the injured employee to productive employment, rather than a mere attempt to avoid paying compensation," (3) employees are to "make a good faith effort to return to the work force when they are able, and their benefits can be modified for failure to follow up on referrals or for willfully sabotaging referrals," (4) in the event that an employee "refuses a valid job offer his benefits can be modified if it is found he had no basis upon which to do so," (5) evidence from a physician "which rebuts the employer's evidence of a change in condition, or indicates the unacceptability of the offered employment, can be a basis for determination that claimant has a valid reason for refusing a job offer."112

Applying these criteria to the facts of the appeal, the court concluded that the employer had not met its burden of proof in light of the fact that effective notice of the available jobs had not been accomplished by the employer. The case was thus affirmed.113 In the companion case of Farkaly, however, effective notice had been provided. The court then held that the employer had adduced effective proof that the claimant could do sedentary work and that

109. Id.
110. Id.
111. Id at 380.
112. Id.
113. Id at 380-81.
such work had been referred. The commonwealth court's denial of modification was thus reversed on the reasoning that the court had applied its "hypertechnical" analysis.\(^\text{114}\)

B. The Cultural Revolution: Major Elaborations by the Commonwealth Court

A cursory review of the categorical requirements set forth by the supreme court in *Kachinski* will reveal the great influence of the commonwealth court cases generated in the years that followed *Petrone* and *Barrett*. Indeed, while the supreme court settled some disputes as to the details and issued a coherent, well thought-out opinion, the law of the supreme court in *Kachinski* is still essentially that of Judge Barbieri.

What the supreme court did that was of great value was to provide a policy basis for demanding that employers actually communicate the existence of suitable work to residually impaired workers. (That policy, of course, is the goal of returning a worker to productive employment in acknowledgment that this is an element of the employer's responsibility of making an injured employee whole.) The commonwealth court, an intermediate appellate court, apparently felt limited in terms of making a broad policy statement to generate new legal doctrine and had been mute on the issue of why actual job availability should be the rule. Instead, this requirement was grafted onto the law by rather tenuous use of precedent.\(^\text{115}\)

With the policy in place, however, the commonwealth court in the next few months launched a vigorous effort, again led by Judge Barbieri, to enforce and promote the policy. This effort was reflected by the filing of many opinions which declared pre-*Kachinski* job availability efforts ineffective, resulting in the reversal of many grants of modification.\(^\text{116}\) This period was to a great extent a "veil of tears" for employers and insurance carriers to live through, as the retroactive imposition of the "concrete guidelines" of *Kachinski* undermined many pre-*Kachinski* modification efforts recently completed, awaiting decision, or in the process of appeal. The imposition of unforeseen and unpredictable liability during this

\(^{114}\) *Farkaly*, 532 A2d at 383-84.

\(^{115}\) See notes 84-92 and accompanying text.

\(^{116}\) The *Kachinski* requirements were retroactively applied to all cases in the system because they were considered interpretations of then-existing law. See *M&L Auto Body v WCAB (Pallot)*, Pa Commw, 599 A2d 1016, 1020 n 5 (1991).
period most likely ran into the millions of dollars.

The more remarkable aspect of the effort, however, was the virtual "cultural revolution" which the court undertook to make major elaborations on the "concrete guidelines" of Kachinski. These new elaborations once and for all put to rest all notions that job availability was to be decided on a theoretical basis or in a vacuum, and instituted a job availability doctrine that approaches the level of constituting a basic vocational rehabilitation program of job placement.

These changes were undertaken in three cases decided by Judge Barbieri within the immediate six months after Kachinski. These cases effected the conversion by way of an ingenious series of interpretations of the employer's good faith burden in making job referrals. The court seized upon this concept, articulated in Kachinski, to create various new or more detailed employer requirements in the job availability/job placement effort.

While these "major elaborations" on Kachinski announced in these early months are undoubtedly part of the present law, they were nevertheless greeted with some distress by employers at the time. After all, the supreme court had announced "concrete guidelines" in a detailed, technical opinion, and the immediate emergence of further requirements was a surprise to most contemporary commentators, certainly including this writer.117 And, of course, the immediate evolution of new detailed requirements confounded the legal community—indeed, the commonwealth court had been scolded in Kachinski for being too "hypertechnical" in its requirements concerning the demonstration of job availability.

1. Doing "Everything Possible" to Convey Job Referrals to the Claimant—Communication of Basic Data

One of the least expected decisions to follow Kachinski was Todloski v WCAB (Supermarket Serv. Corp.).118 In this case the practice of some vocational counselors to dominate the job placement or search process was roundly condemned, with the court insisting that the employer or vocational counselor provide full information to the worker as to the identity, name, and address of the potential employer.

The vocational counselor in Todloski was apparently required to

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117. See, for example, David B. Torrey, Kachinski and Showing Job Availability: A Fourteen Month Retrospective, Pa Workmen's Compensation Newsletter at 3 (Jan 1989).
work through the injured worker's attorney. She would locate an appropriate job and then send a descriptive letter to the attorney. She would not include the name and address of the potential employer, instead requesting that the claimant call her if he was interested in the opportunity.\(^{119}\)

As suggested above, this method of communicating the availability of work was outlawed by Judge Barbieri. The court flatly stated that "a job opening is simply not available to the claimant unless he is informed of the name and address of the job. Here the Employer did not do everything possible to convey this information . . . . It is the Employer's burden to effectively convey this information."\(^{120}\) The court in this regard apparently sensed that the vocational counselor was "playing games" with the job referral process, and implied in rather harsh language that the whole process lacked good faith on the employer's part:

Here the employer did not do everything possible to convey this information to Claimant . . . . but instead chose to deliberately withhold vital information in order to control the application process . . . .

It is employer's burden to give the claimant all the necessary information to apply for a job opening, not to take the claimant by the hand or control the claimant's job search.\(^{121}\)

The existence of this rule has led, in any event, to the mandatory employer practice of providing essential information as to the nature of the job referral, and the avoidance of dominating the job placement effort. The case has not been read to forbid close monitoring of the process by rehabilitation counselors, nor is it illegitimate for counselors to accompany claimants to interviews, though this practice is probably of questionable utility in the vast majority of cases.

2. Insuring That the Potential Employer is Cognizant That the Potential Employee Has Restrictions

A second case filed within this immediate period admonished that job availability will only be shown when there is some likelihood that the potential employer will realistically consider employing the worker with his or her physical limitations. This case, \textit{Young v WCAB (Weis Markets)},\(^{122}\) possesses memorable facts

\(^{119}\) Todloski, 539 A2d at 518.
\(^{120}\) Id.
\(^{121}\) Id.
\(^{122}\) 113 Pa Commw 533, 537 A2d 393 (1988).
which led to the rule.

The claimant had been off work for several years, had undergone multiple surgeries, and had become a methadone addict. The employer's physician, nonetheless, cleared him for sedentary work. The vocational counselor, in the course of the ensuing job search, did not inform the prospective employer that claimant was a methadone addict; that he had "undergone at least seven back operations in three years"; that he had not worked in six years; the nature of the claimant's previous injuries; and that the claimant was forty-six years of age. The counselor apparently did not make a firm determination of whether the potential employer involved in the referral would accept an application from the worker.\(^\text{124}\)

The failure to convey this information and determine whether an application would be accepted was, in the court's view, fatal to the employer's attempt to demonstrate job availability. The court's concern in this case, among others, was that withholding of the information reflected lack of good faith. As if finding a fact, the court declared that the omissions committed by the vocational counselor reflected "simply an attempt to avoid paying compensation rather than a good faith attempt to return the employee to productive employment."\(^\text{125}\)

In addition, Judge Barbieri drew upon his pre-Kachinski case of King Fifth Wheel v WCAB (Rhodes),\(^\text{126}\) for support in the declaration that failure to reveal the omitted information rendered the potential job actually unavailable:

This court has held that a job is not actually available unless there is evidence that the employer named was willing to accept the claimant as an employee with his current physical limitations. . . . As Employer's vocational counselor chose not to discuss Claimant's physical limitations with the prospective employers, the jobs were not available. . . . If the employer is unwilling to even take an application from a claimant in response to the vocational expert's inquiries, the claimant has received nothing more than an opportunity to walk off the street an apply for a want ad job in the same manner as any member of the general public. This is not a job referral. "One injured at work, stranded into partial disability, deserves more than a generic list describing where he might find some suitable work."\(^\text{127}\)

The lesson of this case is difficult to cast firmly; an analysis of what to inform the potential employer of in each case will have to

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123. Young, 537 A2d at 396.
124. Id.
125. Id.
126. 79 Pa Commw 300, 468 A2d 1211 (1983).
127. Young, 537 A2d at 396.
be a matter of judgment. The entire rule, of course, is problematic, as conveying the information invites the potential employer to possibly discriminate on the basis of disability or age. Normally, of course, for an employer to affirmatively inquire into these things would be illegal.\(^{128}\)

It is submitted, however, that under the present regime a rule of thumb is that the vocational counselor should inform the prospective employer of any aspect of the claimant’s disability which a reasonable employer would want to know in making a decision with regard to whether an application from the employee could seriously be considered, based upon the essential job tasks of the potential work.

3. \textit{Informing the Claimant of the Physical Aspects of the Job, Occupational Category, and the Fact That the Claimant Has Been Cleared for Some Level of Work}

In the third of the three “cultural revolution” cases, \textit{Four-Way Constr. Co. v WCAB (Snyder)},\(^{129}\) the commonwealth court in one fell swoop added three more elements to the job availability requirements. In this case, Judge Barbieri demanded that the job referral letter or other communication to the claimant (or his or her counsel) include notice of (1) the particular physical demands of the potential job, (2) the fact that such demands are within the physical restrictions established for the claimant, and (3) the occupational category within which the job falls. Only in this way, according to the court, will the employer show that it made “an effort to convey necessary information which it ha[s] in its possession to claimant . . . .”\(^{130}\)

The court was cautious of the supreme court’s admonition that \textit{every aspect} of the proposed work need not be compiled and then revealed:

\begin{quote}
We do not mean to say that Employer must specifically detail every aspect of the job before Claimant has the responsibility to follow it up. . . . But Employer must at least provide the Claimant or his counsel with a general job classification along with a basic description to give Claimant something to go on.\(^{131}\)
\end{quote}

\(^{128}\) See, for example, The Americans with Disabilities Act, 42 USC § 12101 et seq (1991).
\(^{130}\) \textit{Four-Way Constr. Co.}, 536 A2d at 874.
\(^{131}\) Id.
The court’s requirement that the claimant be advised of the fact of the clearance for some level of work is rather subtle; nevertheless, this has come to be recognized as an essential requirement. One pre-Kachinski practice was not to share this information, but to simply approach the claimant “out of nowhere” with job referrals. This often resulted in the claimant failing to follow through on job referrals, later to complain that he or she knew nothing of being released. Such omissions led to the failure of demonstrating job availability in innumerable post-Kachinski cases.132

It is submitted that an essential requirement for vocational counselors and employers in the job availability/job placement effort is informing the worker at the outset of vocational rehabilitation of the fact of the release to sedentary, light work or other occupational category. In fact, a good practice is to forward immediately the restrictions form or report from a physician to the claimant; there is usually no good reason to keep such information a secret. Further, if a treating physician is being uncommunicative with his patient—an all too common allegation from injured workers—the counselor should intervene and tell the claimant that his own physician has released him for work.

C. Post-Revolution Refinements: Continuing Elaborations by the Commonwealth Court

For the first six months after Kachinski, the commonwealth court enacted major elaborations on the concrete guidelines provided by the supreme court. Since that time, those major elaborations have been ratified by further court panels, and the three principal cases have become entrenched in the law. As discussed below, however, further refinements have also been made to the law of job availability over the past five years.

1. Sufficiency of Proof Regarding Medical Appropriateness of Proposed Work: Procedure

A basic requirement of the supreme court was, of course, that before any job referrals be made, the employer secure medical evidence of a change in recovery which would permit the claimant to perform some level of modified work. A reading of the “concrete guidelines” indicates that the employer is to secure such medical

information and then refer jobs to the worker falling within the occupational category reflected in such information.

Controversy, however, immediately erupted in the course of hearings with regard to this requirement. The *Four-Way Construction* case had, in this regard, demanded immediately after *Kachinski* that the employer inform the claimant before the job referral process or at the time of referrals of the medical clearance for work. The controversy which arose dealt with a twist on this issue, i.e., whether the employer or vocational counselor was required to secure specific physician approval of each particular job, and inform the claimant of the approval at the time of the job referral. The controversy was real, as many referees viewed specific job approval as mandatory under *Kachinski* and would announce at the outset of litigated cases that the vocational rehabilitation attempts were defunct.\(^\text{133}\)

The commonwealth court has addressed this issue in five cases with some arguable contradiction present. Judge Barbieri has authored an opinion implying that specific job approval is required prior to job referrals,\(^\text{134}\) but since that time the commonwealth court has flatly held in four other cases that specific job approvals are not required. The first case to so hold was *Associated Plumbing and Heating v WCAB (Hartzog)*,\(^\text{135}\) and the issue was again addressed in *Lukens, Inc. v WCAB (Williams)*:\(^\text{136}\)

It is not necessary to obtain medical clearance for each job referral . . . .

[To the contrary,] Employer must prove that Claimant was apprised of medical approval for a category of positions.

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\text{In a recent workmen's compensation opinion, we noted that the additional step of submitting each job description to the physician was unnecessary when he had previously established restrictions for the claimant.}\(^\text{137}\)

\[
\text{It is submitted that the foregoing case, in which the court directly addressed the issue, articulates the current law.}\(^\text{138}\) The rule

\(^\text{133}\) See, for example, Torrey, Pa Workmen's Compensation Newsletter at 13 (cited in note 117).


\(^\text{137}\) *Lukens, Inc.*, 568 A2d at 984.

\(^\text{138}\) See also *School Dist. of Phila. v WCAB (Stutts)*, Pa Commw , 603 A2d 682, 686 (1992) ("this court has never held that a physician must review and approve each position prior to referral to a claimant"); *Jayne v WCAB (King Fifth Wheel)*, 137 Pa Commw 211, 585 A2d 604 (1991) (employer met burden of providing proper referral without first securing specific job approval). See also *Sule v WCAB (Kraft, Inc.)*, 121 Pa Commw 242,
is appropriate, in addition, because Kachinski made no mention of specific job approvals. Finally, as a practical matter, requiring such specific approvals before job referrals are made is to impose a nearly impossible burden. As one commentator stated at the time:

As a practical matter, if every job procured has to be sent first to both claimant's and employer's physicians for approval before it is referred to claimant, the job will almost never still be "open" by the time physicians have received and responded to the vocational counselor's correspondence.\textsuperscript{139}

Of course, this point is absolutely correct. In an era where physicians already complain of being overloaded with paperwork, and are often hostile to the litigation-laden workmen's compensation system, it is especially unrealistic that physicians will rush to analyze and then return specific job approvals in the course of his patient's vocational rehabilitation effort.

2. Sufficiency of Proof Regarding Medical Appropriateness of Proposed Work: Medical Evidence

A keystone of the Kachinski guidelines is the securing of medical clearance for the worker. As discussed above, this must be the first step in any vocational rehabilitation effort. Further, while it may be valuable to secure specific job approvals from physicians, it is not a requirement to do so and/or communicate them to the claimant before or at the time of the job referral.

The commonwealth court has addressed the substantive aspect of medical clearance in a number of cases. In a common-sense opinion, the court in Lukens Inc. v WCAB (Williams)\textsuperscript{140} clarified, for example, that the medical evidence need not show an actual "change" in the claimant's condition, as implied from the guidelines in Kachinski. Instead, it is sufficient that the medical testimony simply establish the current capacity of the claimant to do a certain level of work.\textsuperscript{141} In other words, the dynamic quality of an actual "change" or recent recovery does not necessarily have to be shown.

\begin{itemize}
\item 550 A2d 847 (1988).
\item 140. 130 Pa Commw 479, 568 A2d 981 (1989).
\item 141. Lukens, Inc., 568 A2d at 983 ("it is not a prerequisite to produce medical evidence of a change in condition when the Petition for Modification involves a claimant with no improvement whatsoever. Any other interpretation of the Kachinski court's language would be nonsensical").
\end{itemize}
As in any other case where medical testimony is required, the physician must be unequivocal in his opinion that the worker can do the work proposed. This rule, which is not surprising, is also an important one, as one defense of a claimant for not responding to job referrals, or rejecting actual offers, is that he cannot perform the work. If this is the claimant’s defense in a litigated case, one of his attorney’s tasks will surely be to attempt to shake the opinion of the employer’s physician that the claimant can work.

This was the scenario which unfolded in Pettigrew v WCAB (Yarway Co.). In that case, the employer’s physician cleared the claimant for sedentary work, but on cross-examination was revealed as being uncertain in his opinion that claimant could do work. The physician was closely pressed by counsel with regard to whether claimant, who had disregarded the job referrals, could do work while taking the various narcotics he admittedly was on. The physician responded that she remained of the opinion that the claimant could do sedentary work, “with the proviso that he be able to come off the medication.” Ultimately the physician issued a fatal equivocation, declining to render any opinion at all as to whether claimant could work while on medication at the particular time of the job referrals. In the commonwealth court’s view, the physician was simply not certain in her opinion. The grant of modification was thus reversed. This was plainly an appropriate result.

In an unsatisfactory opinion, the court has also implied that a physician’s acknowledgement that a claimant would experience pain upon the return to work has not really been shown to be capable of working within a particular occupational category. In this case, Chavis v WCAB (Port Authority of Allegheny Cty.), a referee had modified the claimant’s benefits after she returned to work. On appeal, the court examined the medical testimony which purported to establish the claimant’s ability to do light work. In its view, the admissions by claimant’s physician that after the claimant would do work on a “day-in, day-out basis, I imagine the pain would just get worse and worse and he would probably not be able to keep doing it,” indicated that work was not really available to the claimant:

143. Pettigrew, 590 A2d at 1367.
144. Id.
146. Chavis, 598 A2d at 99.
Pain is an excellent symptom of an injury . . . and pain from a work-related injury may be compensable where there is substantial evidence of its existence. . . . While the six positions referred to claimant by the vocational expert may have been available to him, the evidence demonstrates that Claimant could not perform the duties of those positions for any appreciable duration or without incurring chronic pain. Consequently, Claimant's disability continued, as the evidence fails to support the referee's findings that Claimant could perform the duties required of those job positions made available to Claimant. 147

Because the relied-upon medical testimony was thus insufficient, the grant of modification was reversed.

An analysis of the medical testimony in this case shows that both employer's and claimant's physicians had placed serious limitations on the claimant's ability to work. Perhaps the better resolution of the case would have simply been to declare that both physicians were equivocal in their opinions that the claimant could work; to declare, or at least imply, that because the claimant would have to work with pain a job is not available constitutes a significant departure from both Kachinski and normal concepts of disability law in general.

Of course, the notion that a claimant who would have to work with some degree of pain or chronic pain is forever totally disabled is unacceptable. There has, after all, always been a distinction drawn between pain and disabling pain. 148 Many workers, indeed, have pain yet can and do work. Individuals such as Franklin Roosevelt and John F. Kennedy come to mind as workers who suffered from chronic pain but led productive, vigorous lives and thrived and prospered. To allow a worker to remain on total disability because of complaints of chronic pain—as opposed to verifiable disabling pain—is unacceptable from a societal point of view. The distinction between chronic pain and chronic disabling pain should remain as a dichotomy taken for granted in workmen's compensation. 149

147. Id at 100-01.
149. The Chavis case can probably be read as consistent with this proposition. While the court did not recognize the difference between chronic pain and chronic disabling pain, the medical testimony analyzed probably does portray a worker suffering from chronic disabling pain.
3. **Sufficiency of Proof Regarding Medical Appropriateness of Proposed Work: Post-Injury Non-Work-Related Conditions**

One of the most surprising new elaborations of *Kachinski* is the rule announced in *Sheehan v WCAB (Supermarkets Gen. and ALEXISIS, Inc.)*. The *Sheehan* case addresses a fairly common question with respect to which there was no definite answer previously. What kind of job must the employer provide to a worker who has recovered sufficiently from his work injury to return to some level of work, but continues to be precluded because of a subsequent, non-work-related condition?

In the *Sheehan* case, the court held that the employer's burden is only to show a job within the claimant's medically established work-related restrictions—restrictions stemming from a subsequent malady need not be accommodated. This surprising result will be clearly illustrated from the facts of the case. The claimant had suffered a back injury while at work, which was acknowledged as compensable. This occurred on May 8, 1985. While recovering from that injury, he suffered, on July 4, 1985, a non-work-related heart attack.

Later, in November, 1985, the employer filed a suspension petition. The claimant, in this regard, had been offered his old job back, as modified by lifting limitations. He did not return, because he had not been cleared for a return to such work by his cardiologist.

The employer had not given any consideration, "when making the referral, to any restrictions on Claimant's ability to perform the modified work as a result of his heart attack." The referee suspended the claimant's benefits, even though it was true that he had not been cleared for a return to work by his cardiologist. The Board affirmed.

The claimant, in the commonwealth court, contended that the employer had not made a job within his physical limitations "actually available" to him. This is, of course, a requirement under *Kachinski*. The claimant argued, specifically, that the referee and the Board committed error "by failing to consider the medical limitations caused by his subsequent non-work-related heart attack when he was medically cleared for the job."

The commonwealth court rejected this assertion, holding that

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151. *Sheehan*, 600 A2d at 635.
152. Id at 636.
the employer had met its burden by offering a job within the claimant’s work-related restrictions:

Physical limitations taken into consideration to determine job availability cannot be construed to include those physical limitations resulting from a non-work-related injury with no causal connection to the prior work-related injury nor which are related to physical limitations existing prior to the injury.153

The court reasoned that:

To construe it otherwise would require the employer to compensate an employee for injuries occurring away from the job during the period that the employee is recovering from his or her work-related injury. The intent of the . . . Act is to compensate only work-related injuries or those causally connected thereto.154

Thus:

A referee need not take into consideration an injury suffered by a claimant which did not occur during the course of his or her employment nor was causally connected to the prior work-related injury when determining job availability.155

The court has recently applied the rule again in Tunnelton Mining Co./Pa. Mines Corp. v WCAB (Adams),156 reversing the referee’s refusal to grant modification. The reasoning was the same: “The purpose of workmen’s compensation is to provide benefits to employees who suffer work-related injuries . . . .”157

It is submitted that these new cases were correctly decided. The holding itself, however, is perhaps surprising, as the notion of “actual job availability” established in Kachinski implies that one must always take into account the injured worker’s “total body disability,” or complete character, in considering his or her suitability for a particular job. After all, Unora spoke of whole-person considerations—“anatomical factors . . . , mental, outlook, his industrial background, his education . . . .”158

The potential applications of the new case are considerable. As an example only is the often-encountered problem of the case of the young woman who suffers an injury and who, while recovering,

153. Id at 637.
154. Id.
155. Id (emphasis added).
156. Pa Commw , 601 A2d 483 (1991) (claimant’s tremulousness, caused by circulation problem or other undiagnosed systemic ailment, prevented claimant from doing light work, but this was not work-related and need not be taken into consideration).
157. Tunnelton Mining Co./Pa., 601 A2d at 485.
158. See note 48 and accompanying text.
becomes pregnant. It is not unusual for a pregnant claimant to refuse to return to work, even though cleared vis-a-vis the injury, on the grounds that she is in the course of her pregnancy and should not or cannot work.

Plainly, under the *Sheehan* case, this ground for refusing to return to work within the work-related restrictions is not valid. A referee should look at the claimant’s recovery, the work-related restrictions, and consider whether the job referred falls within those restrictions. The impairment due to pregnancy is irrelevant under the new precedent.

The reasoning of the case should perhaps also be advanced by defense counsel into the *vocational* arena. For example, if during the worker’s recovery he is convicted for post-injury distribution of cocaine, it is likely that a job for the worker will be hard to find. If potential employers decline to hire the worker because of his history of arrest, out-on-bail status, or felony conviction, but are willing to say that an offer would have been extended had the claimant not so sinned, the employer could well argue that it is post-injury vocational conditions that continue to disable the worker. Modification or suspension should then follow.

Certainly another theory to test, using this new case as support, is whether an employer is required to show a job within the post-injury restrictions which exist because of pre-injury conditions. For example, given the reasoning of this new case, it seems questionable whether an employer should have to find a job for a worker whose *non*-work-related, pre-injury condition has *worsened* to disabling levels during the period of work-injury recovery.

Such a situation would exist in the case of an older industrial worker who, at the time of the work injury—for example, a seriously deranged knee—has insidious but *non-disabling* arthritis of the spine. A time may come when the claimant can return to light work from the standpoint of the *knee*, but cannot work *at all* because of the insidious and worsening nature of the spinal arthritis.

Can the employer offer the claimant a light-work job and get an order of suspension when the hapless claimant necessarily declines to return to work? This scenario and other variations remain undecided. In this writer’s view, the utility of the *Sheehan* case beyond its actual or similar facts may be limited. This is so because the *Kachinski* doctrine is premised on *actual job availability*. This doctrine has traditionally suggested that the worker’s total body disability must be accommodated. While it is reasonable and just not to burden the employer with a claimant’s restrictions stem-
ming from obvious post-injury maladies, precisely how far the court will take the underlying reasoning is unclear.

4. "Effective Communication" of Open Jobs

The basic Kachinski requirement that the availability of jobs be communicated effectively to workers has been treated repeatedly in the commonwealth court. The precedents in this regard are fairly consistent, but in one respect, as will be seen, there is some confusion.

There is no confusion, however, with regard to the essential requirement that the fact of the release, the nature of the job, and a basic description of the job be communicated to the worker. For example, in York Terrace/Beverly Enterprises v WCAB (Lucas), the claimant had been certified by a physician as able to do sedentary work. The employer's personnel administrator, having learned of this, then determined that there was such a job available to the claimant at the employer's facility. The claimant then received a letter from the employer's counsel offering the job. The letter from the lawyer also stated that the claimant had been "medically cleared" for the particular position being offered, but apparently contained no elaboration. The letter omitted any mention of the doctor involved or what occupational category had been approved for her.

The claimant, allegedly because of this omission, did not return to work; "she did not follow up on the referral, because she did not think she was physically capable of returning to work." Although the referee thereafter found that the claimant could have performed the work, both the Board and the commonwealth court reversed.

Applying Kachinski, the court insisted that a claimant is not obliged to follow through on a job referral until he or she knows of the medical clearance for such a return. The brief inclusion of the lawyer's letter, recounted above, was insufficient.

A similar defective communication resulted in a tragic reversal of a modification order in Sheehan v WCAB (Supermarkets Gen.

161. Id.
162. Id at 763.
163. Id at 764. The doctor did later testify about his release of the claimant, but at that point no re-offer of the job was made. There was, accordingly, no evidence produced by the employer "that the job existed at the time [the doctor] gave his deposition." Id.
In that case, the claimant had been cleared for work and the employer thereafter offered the claimant a modified job. A letter sent to the claimant stated that his physician had established restrictions for him, but failed to state which physician and what the restrictions were. The claimant, also, was not sent the doctor’s report. The claimant ignored the job referrals, and the referee later modified his benefits. The court, however, held that the letter failed to effectively communicate the release and excused the claimant from following through on the referral.

The law in this regard is not totally formalistic. For example, if the claimant admits that she knows of the release, the omission of such advice in the referral letter or other offer is not fatal to an otherwise appropriate job referral. In *Adromalos-Dale v WCAB (U.S. Air, Inc.)*, the claimant admitted that she knew of some of the specific job approvals of her treating physician, and such admission was held to satisfy the requirement of notification to the claimant of clearance for some category of work. Similarly, if the job being referred to the claimant is already familiar to the worker, a recounting of the duties involved in the case is not required. In *Braun Baking v WCAB (Stevens)*, the employer offered the claimant modified work but failed to provide a job description. When the referee thereafter suspended the claimant’s benefits for refusal to return to work, the claimant appealed, complaining that the failure to provide the job description was in violation of the

165. The defective letter provided, in full:

It will be possible for you to return to work in a limited capacity. The restrictions outlined by your physician on October 19, 1985, can be observed with very little modification.

Your aisle assignment will be changed to meet the lifting requirement over the four to six week reindoctrination period.

Please contact the store for a return date.

Sheehan, 600 A2d at 638.

166. Id at 635. See also generally *Raleigh-Garrett v Henkels & McCoy, Inc.*, No A90-579 (App Bd, filed 7-31-91). In this case, the following referral letter was found defective:

We have been notified by Liberty Mutual Insurance Company that you are available for light duty.

Please report to James Helsel, Manager of Support Systems, on Monday October 27 at 8:00 a.m. for job assignment.

Both the referee and Board concluded, correctly, that this referral letter did not communicate the fact of the job release, or job duties, as required by the cases. Neither did the letter tell the claimant where to report.


Kachinski requirements.

The commonwealth court refused to reverse. The evidence developed by the employer showed that the claimant had already performed the modified duty and thus knew full well what the tasks were and that they fell within the occupational category which had been established for him.\textsuperscript{170}

The court has also held that if the requirements of a proposed job are obvious to the person being referred the job, a recounting of duties is not necessary. In \textit{M&D Auto Body v WCAB (Pallott)},\textsuperscript{171} the claimant had succeeded in fighting off modification by arguing that the vocational counselor had not, in the course of referring to the claimant a job of car salesman, described the duties involved. While this argument had impressed the referee, the commonwealth court reversed:

\textit{Four-Way Construction} requires that an employer "must at least provide the [c]laimant or his counsel a general job classification along with a basic description to give [c]laimant something to go on." \ldots Here, M&D's rehabilitation counselor told Pallott that a position selling cars was available. The nature of a car sales position is such that it does not require much additional information to permit a claimant to determine whether the position may be within his medical limitations. Therefore, we hold that M&D satisfied the notice requirement of \textit{Four-Way Construction}.\textsuperscript{172}

This common sense rule has apparently been contradicted, however, in \textit{School Dist. of Phila. v WCAB (Stutts)}.\textsuperscript{173} In that case, the claimant had been cleared for work and a vocational counselor thereafter referred to her several sedentary jobs, mostly telephone sales positions, "but failed to provide a basic description in its notices of the job duties or to state that the jobs were within the restrictions for which Claimant had been given medical clearance."\textsuperscript{174} The referee and Board had denied the employer's modification petition based on this and other deficiencies.

On appeal, the employer argued that the jobs were \textit{obviously} sedentary and—invoking the spirit of the original \textit{Kachinski} precedent—that the referee had been "hypertechnical" in the application of the \textit{Kachinski} requirements. This argument provoked an irritated response:

Although the jobs involved here may appear to be "obviously sedentary,"

\begin{footnotes}
\item[170] \textit{Braun Baking}, 583 A2d at 863.
\item[172] \textit{M&D Auto Body}, 599 A2d at 1020.
\item[174] \textit{School Dist. of Phila.}, 603 A2d at 682.
\end{footnotes}
we think that claimants must not be forced to rely on their own specula-
tions and suppositions in regard to such a crucial matter.

The burdens imposed on employers in regard to job referrals are not on-
erous. *Kachinski* itself rejected a requirement that an employer “specify
every aspect of every job in question” in favor of a requirement of a “basic
job description of the job in question . . . .” Further, this court has never
held that a physician must review and approve each position prior to reff-
erral to a claimant. . . However, where an employer fails to provide essen-
tial information in line with the requirements for proper notice, the claim-
ant should not suffer suspension.\(^{175}\)

There seems to be no basis for distinguishing these two recent
cases. Which case should control is a difficult call. Both articulate
reasonable rules. *M&D Auto Body* sets forth a rule which is sup-
ported by common sense and prevents game-playing by claimants
who wish to avoid following through on appropriate job referrals
with the formalistic excuse that they did not have an idea of what
duties are involved. On the other hand, the declarations of *School
Dist. of Phila.* are faithful to *Kachinski* and are not unreasonable.

It is submitted that the best rule is that of the *School Dist. of
Phila.* case, with the exception that if it is shown that the claimant
had a good idea of what the proposed job involved (as revealed, for
example, on cross-examination), and would not have to “speculate
or suppose” in this regard, the employer has nevertheless met the
burden of effectively communicating a job offer notwithstanding
the omission of recounting the job duties. Of course, the contro-
versy can be avoided altogether by employers making job referrals
which provide job descriptions. This is not, indeed, an “onerous
burden.”

It is important, of course, that the job described in a referral
letter accurately portray the actual job. A claimant who has
worked the same modified job at an earlier point, and can con-
tradict the job description from personal knowledge, may be able to
ignore a job referral totally and with his or her testimony on this
point defeat a resultant modification or suspension petition. Like-
wise, if the employer’s own witness as to the rigors of the job de-
scribes it as involving tasks more rigorous than described in the
referral letter, the premise of the petition could easily be
destroyed.\(^{176}\)

The commonwealth court has held that among the things the

\(^{175}\) Id at 685, 686 (citations omitted).

\(^{176}\) See generally *A.C.T.S. v WCAB (Titlow)*, 137 Pa Commw 241, 585 A2d 619
employer need not communicate is the fact of the legal consequences which may follow if the claimant fails to follow through on a referral. In Adromalos-Dale, a flight attendant had suffered a back injury and was off work. After her physician released her to do modified work, a rehabilitation counselor sent her job referrals, but the claimant utterly ignored them. She explained later that the jobs were not what she expected and that she had no interest in them. She also complained that the rehabilitation counselor had not advised her of the possible consequences of ignoring the referrals. In the end, however, the referee suspended the claimant’s benefits, finding that she did not act in good faith in not even trying to pursue the jobs referred to her.

On appeal the claimant argued that benefits should not be suspended when the vocational counselor or similar person fails to advise the worker of the consequences of non-cooperation. The commonwealth court, however, rejected this position and affirmed the suspension of benefits:

The disclosure requirement which Claimant advocates presupposes that a claimant will not act in good faith to follow up on job referrals unless she is threatened with an adverse consequence for failing to do so. Kachinski places a good faith burden on the claimant, however, and the claimant who fails to exercise good faith to follow up on job referrals cannot be heard to complain that she did not know adverse consequences would attach.

[Further, we agree that if the vocational counselor had to make this disclosure] it would put the rehabilitation counselor in the position of offering legal advice. We agree that Claimant’s position asks the rehabilitation counselor to go beyond his or her expertise, and we reject that argument. It is submitted that the foregoing case was correctly decided, as consistent not only with Kachinski but with the general rule that employers and insurance carriers are not duty-bound to advise workers with regard to their rights under the Workmen’s Compensation Act. Further, the rule should also apply to claims adjusters and in-house employment personnel—there is no duty on the part of such individuals to provide advice as to how a worker is or is not to respond to job referrals, nor the possible consequences of

177. Andromalos-Dale, 599 A2d at 305.
178. Id at 306.
non-compliance.

All of the foregoing cases obviously take into account the basic *Kachinski* principle that referred jobs be actually available—not theoretically available. This principle was applied in the context of what types of jobs must be communicated to an employee in *Moore v WCAB (Int’l Serv. Sys.)*.\(^{180}\) In this case the claimant had ignored job referrals for full-time light duty work for which she had been cleared. After the employer filed a modification petition, the referee concluded that the claimant had, indeed, ignored the referrals. She found, however, based upon the medical evidence presented, that the claimant could do only *part-time* modified work. Still, the referee modified the claimant’s benefits.\(^{181}\)

The commonwealth court reversed. It first reviewed the record and saw no communications of part-time light work to the claimant. Only full-time offers could be discerned. The referee thus could not properly have modified the claimant’s benefits:

> We can only assume that the referee and Board decided that the availability of a full-time position *subsumes* the availability of a *part-time* position. We hold, however, that such an assumption is without either a factual or a legal foundation. An employer’s need for a full-time employee does not in any way imply that such an employer would be willing to accept an employee who could only work some part of the time required to fill the vacant full-time position.\(^{182}\)

As the *Kachinski* doctrine is premised upon a showing of actual job availability, the foregoing case was decided correctly.

5. Geographic Locations of Referred Jobs

As evidenced from the recounting of the earlier law, a long-standing rule before the accession of the *Kachinski* regime was that, for a job to be *available* to the worker, it had to be within the general area of his residence.\(^{183}\)

This rule has been affirmed under *Kachinski* in three cases. For example, in *Titusville Hospital v WCAB (Ward)*,\(^{184}\) the employer had referred the claimant several jobs, some of which were a considerable distance from her home. The claimant complained that she did not have transportation to these proposed worksites, and the employer did not produce rebuttal evidence as to how the

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182. Id at 1050 (emphasis added).
183. See note 77 and accompanying text.
claimant could transport herself to these sites. The claimant did not apply for the distant employment and a referee ultimately reduced her benefits.

This decision was reversed by the Board and the commonwealth court agreed. In its view, "Absent proof by Employer that suitable work is available to Claimant in the area of her residence, Employer failed to show that such work is in fact within Claimant's reach." 186

A more narrowly defined rule with regard to what constitutes the "area of . . . residence" has been articulated in Scheib v WCAB (Ames Dept. Store). 186 In this case, the claimant had suffered an injured knee and was paid compensation. Later, job referrals were sent to her. The claimant ignored the referrals, testifying that she did so because (1) four of the jobs were located outside Millersburg, her hometown, and throughout her life she had only worked in town, where she also lived, and (2) she did not like the prospect of driving on the snow and ice which would likely be on the rural roads necessary to traverse to get to the four potential jobs. 187

While the referee was persuaded that the four jobs, located from eight to thirty-seven miles from Millersburg, were outside of the geographic area appropriate for the claimant—and were thus unavailable—the Board and the commonwealth court disagreed and insisted that the claimant's benefits be suspended for her refusal to follow through on the job referrals.

In this regard, the commonwealth court pointed out that the claimant had transportation, and hence would be able to drive to the potential jobs. This being the case, the claimant, in this particular case, had unjustifiably ignored referrals to potentially available jobs:

As long as the position is within a geographic area where others in the same community would accept employment, a person's personal preference as to where he or she would like to work is irrelevant. . . . 188

The employer in the case had apparently demonstrated, through its vocational counselor, that the distances involved in the four jobs were distances typically undertaken by other residents of Millersburg; hence, the employer had met its burden of referring available jobs.

185. Titusville Hosp., 552 A2d at 367.
187. Scheib, 598 A2d at 1034.
188. Id (emphasis added).
The new case sets forth an objective, rather than subjective, test as to the type of distance a claimant should be expected to travel. Plainly, the teaching of this case is that the vocational counselor should undertake some sort of analysis as to whether the proposed jobs he or she is directing to a worker is within the typical distance traveled by other local workers. A rule of reasonableness should, of course, still prevail, and attention must still be given to the availability of transportation to each individual claimant.

The pre-Kachinski case of Yellow Freight v WCAB\(^{189}\) plainly remains the law with regard to its admonition that a claimant who makes a good faith move from his original, time-of-injury residence must be provided with available work in the area of his new residence. This applies to workers who have moved out of state. Although Kachinski does not address this issue, the pervasive doctrine of actual job availability demands that this be the law.\(^{190}\)

An employer need not, however, show job availability in a myriad of places in the case of a hopelessly transient claimant. As the court held in Carrasquer v WCAB (Mader's Carpet Cleaning of Pittsburgh, Inc.):\(^{191}\)

Petitioner cites Yellow Freight . . . for the proposition that when a claimant changes his residence an employer seeking to suspend benefits must show available work in the area of the new residence. Although this is an accurate statement of our holding . . . , we feel that a departure from our analysis therein is warranted under the limited facts of the matter sub judice.

. . .

We do not feel that the burden of establishing work availability in several places or of guessing at which location it should be shown, should be borne solely by employer, when petitioner has chosen to maintain a transient lifestyle.\(^{192}\)

In the Carrasquer case, the employer successfully demonstrated job availability in Pittsburgh, where the claimant resided when he suffered his injury, and where he had spent some of his time thereafter (including, notably, a stint in the custody of the sheriff).\(^{193}\)

\(^{189}\) 32 Pa Commw 147, 377 A2d 1304 (1977).
\(^{190}\) The case has also been cited with approval in both Titusville Hosp. and in Carrasquer v WCAB (Mader's Carpet Cleaners of Pittsburgh, Inc.), 124 Pa Commw 385, 555 A2d 1388 (1989).
\(^{192}\) Carrasquer, 555 A2d at 1390.
\(^{193}\) Id.
6. Requirement of the Claimant’s “Good Faith” Response

The court cases since Kachinski discussing the requirement of the injured worker’s “good faith” response are among the more interesting generated in the contemporary law of job availability. While there is some level of certainty with regard to the law in this regard, the precise nature of the inquiry of the claimant’s “good faith” may not be settled fully. This issue is discussed more extensively below.194

a. The Claimant’s Personal Distaste for Proposed Work

Prior to Kachinski a general rule was recognized that a claimant’s personal distaste or dissatisfaction was not an excuse for ignoring a job referral or for refusing an actual job offer. This rule had its rather tenuous foundation in one sentence of dicta in the commonwealth court case of State Prods. v WCAB,195 in which the court remarked that “it is certainly true that the Claimant’s personal feelings about a particular job are irrelevant in this proceeding if Claimant is physically capable of performing the job.”196

After Kachinski the issue was frequently raised with regard to whether this rule survived. After all, the employer was required, under the new regime, to make a good faith referral of work before the claimant had a corresponding burden to follow through and seek out the work. If the employer did not bother to try to refer jobs which were satisfactory to the worker, did the worker really have a duty to respond? Further, in two cases filed immediately after Kachinski, the commonwealth court implied, in dicta, that the referral of low-paying or “menial” job to claimants was indicative of employer bad faith,197 relieving the claimant from the burden of responding.

The issue was resolved in Hendry v WCAB.198 In that case, the claimant had been employed as a skilled construction worker for many years when he injured his shoulder. After a clearance by his physician for work, a vocational counselor sent him referrals for non-construction-industry-related jobs, referred to by the court as “semi-skilled minimum wage jobs such as gas station manager,

194. See notes 221-45 and accompanying text.
196. State Prods., 434 A2d at 210.
sales-type jobs, attendant and clerk jobs . . . .” The worker refused to even apply for these jobs because, among other things, he thought that “working in a minimum wage job was not suitable, meaningful employment and would be degrading.” The referee and Board, however, found this excuse insufficient to excuse a follow through on job referrals, and the commonwealth court agreed:

Claimant contends that these alternative jobs were not suitable employment under Kachinski. Claimant also contends that the Employer acted in bad faith and is equitably estopped from reducing compensation because of Employer’s failure to offer him the position of carpentry foreman. . . .

Claimant’s contention that Kachinski requires that the job referrals to a claimant must be suitable, both medically and in the same industry or same status, is simply not supported by that decision. The rationale behind Kachinski was to ensure that job referrals were real, in other words, available, and that the person was capable of performing those functions. Merely stating that minimum wage jobs are degrading and result in a loss of self-esteem was never intended by the Supreme Court in Kachinski to allow a claimant to refuse alternative employment. . . .

Claimant’s contention that for an alternative job to be suitable, it must be in the construction industry and at the same wage as his former position, is simply incorrect.

This basic rule has been repeated in a number of kindred scenarios. For example, a claimant’s dislike of (1) driving on snow to worksites in her area, and (2) working outside of the downtown area of a small town, where she had traditionally worked, have been declared an insufficient excuse for ignoring job referrals. In the court’s words, a “person’s personal preference as to where he or she would like to work is irrelevant as long as he or she is physically able to perform the available job.”

Further, a claimant’s refusal to apply for the job of car salesman because he considered it “by nature a deceitful business and contrary to his personality” has been held an insufficient excuse. Indeed, in the quoted case, the referee’s denial of the employer’s petition was reversed, with the court ordering that the claimant’s benefits be modified. The claimant was also unsuccessful in appealing the reduction of his benefits where he complained that the employer’s “rehabilitation efforts were a mere attempt to avoid

199. Hendry, 577 A2d at 934.
200. Id.
201. Id at 933-34.
203. Scheib, 598 A2d at 1034.
204. M&D Auto Body, 599 A2d at 1020.
205. Id at 1021.
compensation liability because many of the referred positions were completely unrelated to any of Claimant’s interests or aptitudes.  

The claimant, in addition, cannot use as an excuse for not following through on job referrals the explanation that the proffered schedule did not meet with her personal needs. In *Swope v WCAB (Harry Prods., Inc.)*, the claimant while working prior to her injury had children at home and, to accommodate their care, was permitted by her employer to work a flexible shift. She then suffered an injury and went off of work. Later, she recovered and was offered appropriate light work. The offered shift, however, lacked flexibility and thus clashed with the claimant’s childcare responsibilities. In her view, because of this conflict, she should not be required to work and have to hire a babysitter.

This proposition was consistently rejected in the course of the ensuing litigation, with the commonwealth court ultimately responding that the employer need not satisfy the claimant’s preferences in terms of scheduling. Rejecting the argument that the employer’s “offer was not made in good faith and was unreasonable given the pre-existing arrangement,” the court admonished that there was no requirement, outside a medical limitation, that an employer provide a flexible hourly schedule.

b. The Claimant’s Sacrifice of Substantive Union Rights

Another rule, not fully accepted prior to *Kachinski*, was that an exception to the general rule of *State Products* existed with regard to a worker who would sacrifice significant union perquisites by accepting a modified work job which would result in a loss of significant union benefits. In *Fledderman v WCAB (Stackpole Carbon Corp.)*, the commonwealth court held that the partially recovered worker (a thirty-year union carpenter) who would, by bidding on a job with duties within his restrictions, (1) lose all his benefits, (2) suffer a cut in pay, and (3) lose other perquisites of work, was not bound to follow through on pursuing such modified duty. He could safely refuse the offer and stay on total disability. The commonwealth court, in this regard, endorsed a referee’s conclusion.

208. *Swope*, 600 A2d at 671.
that the job was unavailable in light of the penalties and hardship attendant upon his acceptance by him.\textsuperscript{211}

The issue has now been treated in an unsatisfactory post-Kachinski case, \textit{St. Joe Container Co. v WCAB (Staroschuck)}.\textsuperscript{212} In this new case, the claimant refused to return to work at a newly-created, non-union job doing light duty. The claimant had been a member of the union before his injury for thirty-six years and was eleventh or twelfth on the plant seniority list. It was stipulated, apparently, that if he had taken the non-union job for more than six months, he would have lost his union seniority. As the job was, however, apparently within the worker's restrictions, the referee indefinitely modified the claimant's benefits. The Board reversed, ruling that the claimant was entitled to reinstatement on total disability after the six months passed; at that point, in the Board's view, the job was no longer "available."

On appeal, the commonwealth court affirmed. While it was true that the new, non-union job also had benefit programs and other perquisites, the loss of union status which would have resulted after six months rendered the job unavailable. The court in this regard cursorily cited Fledderman and reinstated the referee's award.\textsuperscript{213}

\textit{St. Joe Container} is unsatisfactory because of its failure to provide a single word of analysis, implying instead that virtually any loss in union seniority by a worker because of the offer of modified work would render a job unavailable. The cursory citation to Fledderman was no basis for such an omission, as that case had extraordinary facts. As the dissenting Judge Silvestri pointed out, in Fledderman the factual picture was one of a worker suffering significant penalties because of his acceptance of a modified duty job.\textsuperscript{214} The picture in Fledderman was also complicated by the fact that the claimant was only off of his regular job for eleven weeks anyway,\textsuperscript{215} hence, as the court noted, he would have sacrificed decades of union seniority to start from scratch again when his disability was only fleeting—a massive sacrifice for a trivial injury and period of time off work. As discussed above, there was no such sacrifice in the \textit{St. Joe Container} case.

As the dissent also correctly pointed out, the seeming "blanket-
"rule" announced created a double-standard in the compensation law which favors union members:

[The Act] contains no provisions for continuation of disability benefits to claimants who refuse non-union work. The holding advocated by the majority engrafts upon the Workmen's Compensation Act, as well as upon Kachinski, an exception for union members; refusal of available work which neither the legislature nor the Supreme Court saw fit to provide.\textsuperscript{216}

If the \textit{St. Joe Container} case should thus be looked upon with grave reservation, it also seems to be the law and its strictures should be looked upon with vigilance by employers seeking to provide light duty to union-member employees. It is submitted, however, that the opinion does \textit{not} mean that any claimant who happens to hold a union card can pick and choose among proffered jobs. \textit{Some} tangible sacrifice, clearly identifiable, must be involved before a non-union or reduced-status job should be found unavailable. A rule which would permit a union member, as opposed to a non-union member, to remain on compensation while others must return to appropriate work has both equal protection implications and in any event would result in the courts generating a status society among disabled workers. Such a result is, of course, unacceptable.

c. \textit{Response by the Retired or Incarcerated Claimant}

It is not an excuse, under the current law of job availability, for a worker to decline to follow through on job referrals on the grounds that he or she is retired and has no intention of pursuing work. The receipt of social security retirement, or even social security disability, is not, similarly, good grounds for a refusal. This principle is at least inferable from \textit{Dugan v WCAB (Fuller Co. of Catasauqua)},\textsuperscript{217} in which the claimant had indicated unequivocally that "he [was] retired and will no longer attempt to obtain employment."\textsuperscript{218} In that case, the court eventually held that the employer did not have to show job availability \textit{at all} in the presence of such an attitude, as the worker had forever removed himself from the job market even though he had been cleared for a return to work. Such a response, of course, actually \textit{transcends} good faith or bad faith, and simply reflects the decision of an individual to divorce

\textsuperscript{216} \textit{St. Joe Container Co.}, 596 A2d at 1196 (Silvestri dissenting).
\textsuperscript{217} 131 Pa Commw 218, 569 A2d 1038 (1990).
\textsuperscript{218} \textit{Dugan}, 569 A2d at 1041.
himself from the workplace altogether.\textsuperscript{219}

Aged claimants are thus well advised not to respond to job referrals or the inquiries of vocational counselors with such replies. To the contrary, if cleared for work, a good faith effort must normally be undertaken to return to work (assuming, of course, that the medical and vocational restrictions are appropriate). It is possible that such action, if successful, could result in a reduction of retirement or other non-compensation disability or old age benefits.

An incarcerated claimant cannot seriously be expected to make a good faith effort to follow through on job referrals or accept job offers. Nevertheless, it is apparent that the commonwealth court views the claimant's inability to follow through to be due to his own fault, and the claimant's failure to follow through should result in reduction of benefits.\textsuperscript{220} Like an unequivocal retiree, the rationalization of this rule may also be the entirely reasonable proposition that the claimant has, through his own volition, removed himself from the job market and cannot respond to referrals of work.

d. The Claimant's Good Faith—The Nature of the Inquiry and a Proposed Test

Common sense would seem to demand that the issue of whether a claimant has undertaken a "good faith follow through"\textsuperscript{221} on a job referral is a pure question of fact for the referee to decide on a case-by-case basis. It is appropriate that the individual who actually sees the claimant and analyzes the evidence firsthand makes the critical determination of whether the worker has earnestly sought out the proffered work or has, to the contrary, acted in bad faith or actually "sabotaged" an interview.

The commonwealth court has, in fact, plainly implied this. In \textit{Murphy v WCAB (Roadway Express)},\textsuperscript{222} the court insisted that a finding of bad faith must be made by the referee before reduction in benefits can be ordered when the claimant actually follows through on a job referral yet \textit{fails} to get the job.

In \textit{Murphy}, the worker was referred to a job but did not get an offer of employment. The referee made no finding on why he did

\textsuperscript{219} Id ("claimant's loss of earnings was caused by his voluntary retirement and withdrawal from the labor market").

\textsuperscript{220} \textit{Brown v WCAB (City of Pittsburgh)}, 134 Pa Commw 31, 578 A2d 69 (1990).

\textsuperscript{221} \textit{Kachinski}, 532 A2d at 380.

\textsuperscript{222} 142 Pa Commw 416, 598 A2d 87 (1991).
not get the job, yet still reduced the claimant’s benefits. The Board affirmed but the commonwealth court found the omission of the fact-finding to merit remand:

Lack of good faith cannot be imputed to Claimant where he attempted to obtain a position with YMCA of Hanover and the evidence is uncontradicted that he applied for the position but was not hired. . . . [Kachinski] requires that an adverse credibility determination be made concerning the claimant’s testimony of good faith efforts to secure a job before any modification of claimant’s benefits.223

Because the court demands that a credibility determination be made on the good faith/bad faith issue, it seems apparent that such a determination should be deemed purely one within the power of the referee to make.

This proposition is borne out in another case, in which the commonwealth court insisted that the referee must make findings as to whether or not various excuses for the claimant not going to interviews constitute “reasonable bases” for the same. In Koolvent Aluminum Prods., Inc. v WCAB (Allman),224 the claimant had not gone to certain interviews, prompting the employer to file for modification. The claimant offered a number of excuses for those failures, including the explanation that he was “waiting to hear from another employer,” and also that he “had been involved in a fight” and was thus “out of town for a few days.”225

The referee mentioned these excuses, yet ultimately denied the modification petition. He made no findings as to whether the excuses were reasonable or were advanced in good faith by the worker.

The commonwealth court found this unsatisfactory. In its view, it could not determine whether the claimant had advanced the excuses in good faith or bad faith without a specific finding from the referee as to whether or not the proffered reasons “constituted reasonable bases for failure to follow up on three of the job referrals . . . . We do not believe that these reasons necessarily preclude following up in some way on job referrals.”226 Accordingly, the court returned the case to the referee to make specific findings as to whether the claimant’s excuses for not following through on the job referrals were made in good faith.

When such findings are ultimately made, they are surely en-

223. Murphy, 598 A2d at 90 (footnote omitted).
225. Koolvent Aluminum Prods., Inc., 578 A2d at 1022.
226. Id.
graved in stone in the vast majority of cases. The referee is the
finder of fact and is the only entity to make judgments as to a
claimant’s good or bad faith in the course of the job placement
process.

This is certainly the lesson of *Champion Home Builders v
WCAB (Ickes).* In that case, the claimant had been cleared for
work and then actually went on interviews. He failed to receive any
offers. The employer then sought modification on the theory that
the claimant had sabotaged the job interviews by revealing to the
potential employers various opinions of his own concerning his
ability to work.

The referee nevertheless denied the modification petition. The
commonwealth court affirmed, pointing to the referee as the all-
powerful and important figure in this regard. While it was true,
the court reasoned, that the claimant put down on his applications
information which might dissuade potential employers, no bad
faith was necessarily to be inferred.

The referee, in this regard, had interpreted the claimant’s re-
sponses as “trying to be honest . . . concerning his disability
[since] he was unsure of his physical ability to perform [the vari-
ous] job[s].” On this record, no error was found. The critical le-
gal principle employed was simply that it was the referee who, as
the fact-finder, has the ability to judge the bad faith or good faith
of the claimant’s response to a job referral.

While it should thus be beyond contention that the referee is the
arbiter of “good faith” in terms of the claimant’s response, the
commonwealth court has at times indicated a willingness to deter-
mine that certain responses are simply unacceptable as a matter of
law. For example, as discussed above, a claimant’s subjective dis-
pleasure with a job, its hours, status or wages, is irrelevant, and it
thus follows that vigorous articulation of these aspects of dissatis-

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227. The referee in workmen’s compensation cases is, of course, the finder-of-fact and
“arbiter of credibility.” See *Universal Cyclops Steel. Corp. v WCAB,* 9 Pa Commw 176, 305
A2d 757, 760 (1973) (citations omitted).
229. *Champion Home Builders,* 585 A2d at 554.
230. Id.
231. See also *Yezovich,* 601 A2d 1341 (1992) (referee’s factual finding that claimant
had not exercised good faith in pursuing job referrals was supported by evidence which
revealed that claimant did not properly fill out applications, at times did not file them at all,
and often delayed in pursing open jobs; referee’s finding that “claimant had no real inter-
est in obtaining work of any kind” was thus supported by substantial, competent
evidence).
faction by a claimant on an interview should be bad faith as a matter of law. Certainly it is no excuse, as a matter of law, for not going on an interview.232

This proposition is illustrated by the commonwealth court's recent overthrow of a referee's fact-finding on the issue. In M&D Auto Body, Inc. v WCAB (Pallot),233 for example, the referee had made a finding that the claimant, who thought that selling cars was distasteful to him and inconsistent with his personality, "lacked the personality or vocational ability to be a car salesman,"234 and thus excused his failure to follow through on a referral to such work. The court, however, overthrew that finding and reduced the claimant's benefits. In the court's view, the record indicated that the claimant was vocationally capable of performing the job, since he had a background in the automotive field, and the referee should not have taken into account the claimant's views and the fact that the worker thought the job was degrading.235

Likewise, a union worker's refusal to follow through on a referred job, though offering good wages, benefits and perquisites, is justified as a matter of law236 and it is apparently not "bad faith," if the job would entail sacrifice of union status or perquisites. A finding by a referee of bad faith on the basis of a worker passing up desirable, otherwise conforming jobs on this basis will likely be reversed.

Precisely what constitutes good faith or bad faith is thus to be determined on a case-by-case basis. Plainly, however, a worker who ignores job referrals without clear medical justification is at grave risk of being found to have lacked good faith.237 Further, the commonwealth court has indicated that if both the treating and independent medical examination physicians clear the worker for a return to employment, the claimant is virtually obliged to follow through lest he or she necessarily sacrifice disability payments. Indeed, in Acme Markets v WCAB (Pilvalis),238 the court implied that a referee may capriciously disregard the evidence if he fails to reduce the benefits of a worker who ignores jobs specifically ap-

232. See notes 197-206 and accompanying text.
235. Id at 1020-21.
236. See notes 209-216 and accompanying text.
237. See, for example, Cashmark v WCAB (Great A&P Tea Co.), 135 Pa Commw 464, 580 A2d 1189, 1191 (1990).
proved by both treating and independent medical examination physicians. Further, in cases of clear "sabotage" of interviews, it is not difficult for a referee to determine that a claimant has acted in bad faith. Behaving in a patently hostile or uncooperative manner, appearing unclean or unkempt, declaring that non-union businesses are a "rip-off," insisting that he or she is only at the interview because the "rehabilitation girl told me I had to," and skipping or arriving at job interviews late without justification are all simple examples of a claimant's responses which are likely to be found "in bad faith."

One union-sponsored publication has wisely advised workers that they respond in the following manner, lest they needlessly sacrifice disability benefits:

Before you apply, make sure you have spoken with your doctor and have a good understanding of your actual physical restrictions.

When applying for jobs, be sure to:
1. Be prompt for the interview.
2. Be courteous.
3. Get the name of the person with whom you meet and keep notes as to when and where you applied and what was said.
4. Obtain a detailed description of the job, including its physical requirements.
5. Tell the interviewer of your doctor's restrictions and ask whether the job is within these restrictions.

The foregoing is consistent with the cases. Importantly, further, the communication to the potential employer of the fact that the potential employee has suffered an injury and has restrictions is not bad faith in lieu of any evidence that revealing the informa-

239. Acme Markets, 597 A2d at 298. In this case, the claimant was cleared for modified work by both the employer's and the claimant's physician, but she thereafter ignored effective job referrals. In the course of a subsequent modification petition, the employer produced as evidence both the general clearances and specific job approvals from the physicians indicating that the claimant could do the work. The referee, however, denied the petition, concluding that the claimant could not do the work. The Board affirmed.

The commonwealth court, however, reversed. The expert evidence was uncontradicted that claimant could do work. In the court's view, the referee had "capriciously disregarded" that evidence. In other words, as far as the court was concerned, a rationally thinking individual, faced with uncontradicted evidence that the claimant could work, had to accept it. It would be "capricious" to ignore or disregard the evidence. Senior Judge Barry dissented, alleging that the majority had intruded on the fact-finding power of the referee, and he was probably right. Id at 299 (Barry dissenting).

240. See, for example, Torrey, Pa. Workmen's Compensation Newsletter at Appendix I (cited in note 117).

241. Id.


243. See W & L Sales Co. v WCAB (Drake), 123 Pa Commw 158, 552 A2d 1177 (1989),
tion is a mere ruse to avoid being hired. Presumably the potential employer already knows of such information in a properly administered job search, since the major elaboration of *Young v WCAB (Weis Markets)*, demands at the outset that the job counselor ascertain whether the potential employer would seriously consider an application from the employee.

Although the determination as to lack of cooperation or "sabotage" will always be made on a case-by-case basis, it is submitted that the following criteria is appropriate as a test to determine whether the worker is appropriately responding to job referrals under *Kachinski*. In this regard, a claimant does not follow through in good faith if he or she:

(1) does anything of a *material* nature (a) at the interview or (b) in the interview/job referral process
(2) which a reasonable, honest and open individual
(3) would *not* do if he or she wished seriously to be considered for the potential job.

It should always be borne in mind, of course, that an excuse for not following through *at all* is reliance upon a medical opinion restricting the worker from the rigors of the proposed employment.  

7. Employer "Good Faith"

The *Kachinski* court also spoke, of course, of the employer's "good faith" in the context of the job availability/job placement process. The court, in this regard, declared that "the viability of this system depends on the good faith of the participants," and with regard to employers, insisted that the job "referrals . . . must be tailored to the claimant's abilities . . ., and be made in a good faith attempt to return the injured employee to productive employment, rather than a mere attempt to avoid paying compensation."  

The interpretation of this latter phrase has been the subject of significant debate. To a certain extent the language itself is unfortunate, as it seems to ignore the economic reality of the workmen's compensation system as an insurance program for replacement of

aff'd per curiam, 524 Pa 591, 574 A2d 603 (1990).
244. 113 Pa Commw 533, 537 A2d 393 (1988). See notes 122-28 and accompanying text.
245. See, for example, *Roadway Express, Inc. v WCAB (Lewis)*, 113 Pa Commw 230, 536 A2d 870 (1988).
wages. Although it is true that the compensation system was also the result of remedial legislation with a humane purpose, and that provision of an impaired worker with a job is an appropriate remedy in the system, the fact is that a responsibly acting insurance company or employer will always have, as a motive in demonstrating a worker's change from total to partial disability, a reduction in its compensation liability. Indeed, an employer or insurance company that does not move in such a direction and seek to avoid paying compensation is probably acting irresponsibly with regard to its duties to keep premiums reasonable and/or to make the insurer or employment entity profitable.

As a result of this oversight, arguments have occasionally been advanced that the employer or insurance carrier must possess virtually charitable motivations in the course of a vocational placement effort to make such an undertaking legitimate under Kachinski. Employer admissions as to interest in gaining an order of partial disability to reduce liability is thereupon painted as bad faith and an egregious sin. It is submitted, of course, that insisting that employers and insurance carriers undertake job placement motivated solely by the tenets of Judaeo-Christian ethics is both unrealistic and surely not intended by the Kachinski court. The employer's burden has not, in fact, been interpreted in this manner. The commonwealth court has, instead, deferred almost completely to the referee in making the determination of whether the employer's efforts have been undertaken in good faith. The court has also rejected the notion that the offer of lower status and lower paying jobs by an employer to an employee, or refusing to offer work at the time-of-injury employer, constitutes bad faith.

Illustrative of both of these propositions is Hendry v WCAB (Miller & Norford, Inc.), where the employer, rather than offering the claimant a light duty job at the original employment site, hired a vocational counselor to locate a variety of jobs outside of his field, some paying minimum wage and possessing little social status.

This approach was assailed in the commonwealth court by the claimant, who had appealed the reduction of his benefits. The allegation that the employer's behavior lacked good faith was rejected:

The rationale behind Kachinski was to ensure that job referrals were real, in other words, available, and that the person was capable of performing those functions. Merely stating that minimum wages jobs are degrading and

result in a loss of self-esteem was never intended by the Supreme Court in Kachinski to allow a claimant to refuse alternative employment. . . . Claimant argues that [not rehiring him] constitutes bad faith and estops Employer from asserting that there was suitable employment available. . . . Claimant’s contention that for an alternative job to be suitable, it must be in the construction industry and at the same wage as his former industry, is simply incorrect.

The court ruled in the same manner in Yezovich v WCAB (USX Corp.).249 In that case the claimant, whose benefits had been modified by the referee, argued that the employer’s “rehabilitation efforts were a mere attempt to avoid compensation liability because many of the referred positions were completely unrelated to any of Claimant’s interests or aptitudes.”250 This allegation was rejected, with the court adopting the view expressed in Hendry and pointing to the apparently undisputed medical clearance of the worker for modified work.251 In Swope v WCAB (Harry Prods., Inc.),252 likewise, the court rejected an argument that the employer had given the claimant a “bad faith offer”253 in not referring back to the worker her time-of-injury schedule which had accommodated her childcare duties.

That the commonwealth court considers the determination of whether an employer has acted in good faith to be one for the referee is certainly exhibited in Andromalos-Dale v WCAB (U.S. Air, Inc.).254 In that case, the rehabilitation counselor had not revealed to the claimant the possible consequences (reduction of benefits) of not following through on job referrals, and this failure was alleged to reflect bad faith. This argument met with disagreement by the court, which pointed to the referee’s findings and its own limited scope of review:

Claimant’s argument that the Employer and its rehabilitation counselor acted in bad faith is without merit. Questions regarding the weight and credibility of evidence are reserved for the referee, and we may not engage in substituting our opinions of credibility for the factfinder’s. . . . The referee expressly found that the Claimant in this case was not credible, and that the rehabilitation counselor was credible. The referee further found that the rehabilitation counselor acted in a reasonable and responsible manner, and

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248. Hendry, 577 A2d at 934-35.
250. Yezovich, 601 A2d at 1343-44.
251. Id at 1344.
253. Swope, 600 A2d at 670-71.
we may not conclude that the referee was obliged to believe any evidence.\textsuperscript{255}

A similar result ensued in the novel case of \textit{Jayne v WCAB (King Fifth Wheel)},\textsuperscript{256} in which the claimant was offered work at the time-of-injury employer, and was told to accept by 7:00 a.m. He failed to call, however, until 1:00 p.m., at which point the employer indicated that the job was no longer available. After a reduction in benefits, the claimant appealed, complaining that the "Employer's offer lacked good faith because when he called to accept the job, Employer withdrew its offer."\textsuperscript{257}

This was a fairly credible complaint; indeed, the employer "gave as its only reason for the withdrawal" the claimant's simple failure to follow the instruction.\textsuperscript{258} Nevertheless, the commonwealth court declined to overthrow the findings of the referee, implying, in fact, that it sensed that the claimant himself was responsible for the delay.

Obviously, some employer conduct will signal patent bad faith. The \textit{Kachinski} case, in this regard, does speak of a return to "productive employment." Thus, the hoary practice of returning industrial workers to unproductive make-work jobs—full-time sharpening of pencils, mopping the white lines in the company parking lot, etc.—is likely to be found to reflect bad faith. The key here is not that the job is "made up" or specially created, but that it is utterly unproductive.

Further, a claimant can always try to reveal presumptively legitimate employer conduct as actually lacking good faith. For example, if in \textit{Hendry} the claimant had determined that the employer had secretly decided to "dump" the claimant and had directed the vocational counselor "to send the creep to every low-class job in town," bad faith will likely be found. Likewise, if in \textit{Swope} the claimant had proven that the offer of conflicting work-shifts was motivated by a plot to rid the employer of an undesirable employee, bad faith would probably have been shown. Finally, if the employee could demonstrate that in \textit{Jayne} the employer was engaging in game playing and had rescinded the offer of light duty as part of a scheme to provoke litigation and have the claimant's benefits suspended, bad faith would probably be shown. A referee's finding of bad faith in these instances should be effective on appeal.

\textsuperscript{255} Andromalos-Dale, 599 A2d at 306-07.
\textsuperscript{256} 137 Pa Commw 211, 585 A2d 604 (1991).
\textsuperscript{257} Jayne, 585 A2d at 607.
\textsuperscript{258} Id.
when supported by substantial, competent evidence.

V. WHEN JOB AVAILABILITY MUST BE ShOWN

As evident from part II of this article, for fifty years Pennsylvania law included a law of job availability which dealt frequently with *when* job availability had to be shown, with little attention being given to *what* job availability really meant and *how* it was to be shown. The *Kachinski* case turned that trend on its head, defining job availability carefully and establishing guidelines for its demonstration, spawning at the same time a myriad of subsequent interpretative cases to further define the law.

Another line of cases, however, continued to deal with and expand the law dealing with *when* job availability must be shown. The leading cases of *Barrett* and *Petrone* established, of course, that it was always the employer that had the burden of proof in this regard. The only issue in this context was and is, accordingly, *when* the employer must take on this burden.

In the years between *Barrett* and *Kachinski*, a number of cases revealed the commonwealth court applying *Barrett* and imposing liability for total disability on employers (1) when they sought partial reduction in benefits but failed to show job availability,\(^\text{259}\) and (2) when they unsuccessfully tried to fight off claim petitions with open-ended disability, where there had been no intervening offer of conforming modified work.\(^\text{260}\) Some cases also dealt with the consequences of an employee's voluntary withdrawal from the marketplace\(^\text{261}\) or loss of earnings because of misconduct;\(^\text{262}\) in such instances, the employer was held not to be required to show job availability. These cases all remain good law, but the law has been tremendously supplemented.

A. Roots of the Present Law

As the commonwealth court, under the leadership of Judge Barbieri, began to construct what was to become the foundation of the *Kachinski* requirements, it also began to further expand the circumstances under which the employer had to take on the burden

\(^{259}\) See, for example, *Billante v Stouffer Foods, Inc.*, 7 Pa Commw 532, 300 A2d 284 (1973).

\(^{260}\) See, for example, *Steinle v WCAB*, 38 Pa Commw 241, 393 A2d 503 (1978).

\(^{261}\) *P.P.G. Indus., Inc. v WCAB*, 12 Pa Commw 61, 315 A2d 906 (1974) (claimant left work to go to ministry school).

of showing job availability. The cases generated the general rule (now subject to exceptions) that unless a worker is totally recovered, as certified by a physician, job availability must be shown for an employer to be entitled to an order of partial disability. This rule has as its basis the proposition that a worker who has suffered an injury is entitled to a presumption of continuing disability which is only defeated by medical evidence of total recovery or objective evidence of partial recovery, i.e., working at or being provided with an actually available job.

The cases generated during this new undertaking, which this writer will refer to as the Busche/Fells line of cases, are different procedurally from those before, because they all deal with job availability in the context of the claimant’s attempts to gain reinstatement to compensation, especially after an economic layoff or similar event. As implied by the general rule stated above, the new cases hold that such a worker is entitled to reinstatement unless there is a showing of a new job available within the prescribed medical and vocational restrictions.

The accession of this rule was a revolution in its own right and is greatly in contradiction to the prior practice and conception of workmen’s compensation. Traditionally, it was taken for granted that a worker who was capable of laboring but was then laid off, or had his job eliminated, or lost hours because of economic conditions, had suffered wage loss not because of his injury but because of non-work-related developments and was not to receive workmen’s compensation. Many years of cases had, after all, taught that workmen’s compensation was not supposed to compensate for non-work-related losses of earning power and was distinct from unemployment or welfare.

In addition, Section 413 of the Act seemed (and seems) to provide a basis for disallowing reinstatement of laid-off workers or

263. See Economy Decorators, Inc. v WCAB (Federici), 96 Pa Commw 208, 506 A2d 1357 (1986).
265. See notes 271-79 and accompanying text; 288-90 and accompanying text.
266. See, for example, Yednock v Hayle Brook Coal Co., 109 Pa Super 182, 185 (1933) ("The compensation act is not designed to afford insurance against unemployment, and the fact that work is not procurable does not prove that a man is not capable of performing it"). See also Babcock v Babcock & Wilcox Co., 137 Pa Super 517, 9 A2d 492, 495 (1939) ("It is the purpose of this act to compensate an injured employee for loss of earning power due to an accident but it is not intended to cover losses arising from fluctuations in the labor market").
others who had suffered a renewed loss of earning power for non-work-related reasons. It provides, in pertinent part, that:

where compensation has been suspended . . . payments under the agree-
ment or award may be resumed at any time during the period for which
compensation for partial disability is payable, unless it be shown that the
loss in earnings does not result from the disability due to the injury. 268

Of course, a worker who has returned to his time-of-injury job on a suspension, laboring at full tilt, but is then laid off, has suffered a loss of earnings which does not result from the disability due to the injury, but instead from economic conditions.

Finally, it is to be recalled that traditionally the showing of job availability was merely a conceptual matter, demonstrated by as little as a physician's testimony with regard to (1) partial medical recovery, and (2) the theoretical ability of the worker to do some sort of light duty occupation. 269 Only when the worker had a "non-descript" level of disability did the employer have to actually provide the worker a real job in order to gain an order of partial disability. Accordingly, the thought of bearing the burden of providing an actual job to the claimant for as long as he or she had impairment was totally inconceivable until the last ten years. It was during this period of time, as we have seen, that the commonwealth court launched the "cultural revolution" which discarded the notion of the conceptual showing of job availability, replacing it with the requirement that the job be actually communicated and be actually available.

The general rule stated above has nevertheless developed. The quick evolution of the rule in the case law is truly remarkable and, as submitted above, constitutes a revolution in its own right. Just as Kachinski and the cases which preceded and followed it changed the concept of what job availability consisted of, so has the new line of procedural cases changed the traditional requirement of a one-time requirement of showing job availability to a regime which requires a continual showing of an actually available job.

The following discussion recounts the evolution of the new rule. As will be seen, to a great extent the new general rule was developed without reference to either the statute or the principle that workmen's compensation is meant to cover loss of earnings for work-related injuries, not to be a vehicle for insuring employment.

268. Id.
269. See note 33 and accompanying text.
B. Establishing the New Law

The new regime was established in a series of commonwealth court opinions filed between 1983 and 1988. Many of these cases remain good law while others have probably been displaced by the recent case of Pieper v Ametek-Thermox Instruments Div.,\(^{270}\) the supreme court's declaration as to the law on when job availability must be shown. This case is discussed in a succeeding section.

The progenitor of the cases remains good law. In Busche v WCAB (Townsend & Bottum, Inc.),\(^{271}\) the court dealt with the issue of whether an injured worker who has returned to a specially-created job, which is thereafter eliminated, is entitled to resumption of total disability benefits. The worker in Busche had been provided with a sedentary job which, after four years, was phased out and the claimant was offered his regular job back.\(^{272}\)

At least one school of thought would insist that the worker was not so entitled—after all, the claimant's actual return to work and his proven history of labor was objective evidence that he was only partially disabled. Objective evidence had been shown once, and that resolved the partial disability question. If the claimant wanted resumption of benefits, he would have to show a worsening of his condition.\(^{273}\)

It was, significantly, Judge Barbieri who put this conceptual notion to rest. Invoking Barrett, the court conclusorily stated:

\[
\text{[Claimant's benefits were effectively suspended while he was back at the specially-created job, and] in cases such as this one . . . , if it is shown in the reinstatement proceeding that Claimant's total disability continued, relieved only by his period of reemployment in a "specially created job," proof of the discontinuance of such employment is Claimant's only burden and an employer who chooses not to continue payments must then . . . assume the burden to establish the existence of the selective job that Claimant is able to perform.}^{274}\]

It should be recalled that this rule was established at the same time that Judge Barbieri was spearheading the parallel drive in

\(^{270}\) 526 Pa 25, 584 A2d 301 (1990).

\(^{271}\) 77 Pa Commw 469, 466 A2d 278 (1983).

\(^{272}\) The Board, for example, often took this position. See, for example, Oshinski v WCAB (Lincoln Bank), 86 Pa Commw 181, 484 A2d 225 (1984) (Board ruled that the claimant, once she "established an earning power, despite her continuing disability, has thus shifted the burden of proof from the employer to herself [in the context of a reinstatement petition] requiring that she prove that her physical condition had changed . . . ").

\(^{273}\) Busche, 466 A2d at 279.

\(^{274}\) Id at 280.
terms of defining the elements of job availability.\textsuperscript{275} Accordingly, at this point it was understood that the above language meant that the employer would have to provide another specially created job at the worksite or another location if it wished to secure another order of suspension or modification to partial disability.

Any thought that the case was limited to its facts was soon put to rest. A few months later the court again held that a worker who had returned to modified work on a suspension, but was then laid off because of an economic downturn, was entitled to resume total disability in lieu of a showing of a new, actually available job.\textsuperscript{276} On this occasion, the Board had held to the contrary, implying that were the rule such, the employer would be "forever an insurer of job availability to a partially disabled claimant . . . ."\textsuperscript{277}

This concern of the Board was not directly answered by the commonwealth court. The court did say that if a worker were to lose earning power because of misconduct, or because of withdrawal from the marketplace, or because of a subsequent employer's discharge of the worker, the employer would not be responsible for showing job availability.\textsuperscript{278} In other circumstances, however, the court essentially held that the employer was a guarantor or insurer of work. The court was unsatisfied, in this regard, that a one-time showing should be the test, and then fully ratified the spirit of the Busche rule:

This is a situation which has a unique potential for abuse if the employer can forever meet the burden of showing job availability by providing a modified job for a partially disabled claimant . . . . We hold that under the present facts, the partially disabled claimant who has been laid off from a modified job provided by the Employer and seeks reinstatement of benefits, has met her burden of proof by showing that she is unable to perform her time-of-injury job. The Employer then has the burden of proving the availability of work which Claimant is capable of performing. . . .\textsuperscript{279}

Further expansion of the rule was soon to follow,\textsuperscript{280} and the

\textsuperscript{275} See notes 82-94 and accompanying text.
\textsuperscript{276} Smith v WCAB (Futura Indus.), 80 Pa Commw 508, 471 A2d 1304 (1984).
\textsuperscript{277} Smith, 471 A2d at 1305.
\textsuperscript{278} Id at 1306 n 4.
\textsuperscript{279} Id at 1306 n 4, 1307.
\textsuperscript{280} See, for example, Palmiere v WCAB (East End Trucking), 91 Pa Commw 137, 496 A2d 918 (1985) (claimant was entitled to reinstatement of total disability where he had undertaken light duty running his own grocery, but then, three years later, "lost that business"). See also Venanzio v WCAB (Eastern Express), 88 Pa Commw 204, 489 A2d 284 (1985) (claimant had no burden to show worsening of condition, in lieu of showing of job availability, where referee had previously found that worker could "return to his regular
Busche/Fells cases soon joined with the actual job requirement of 
Kachinski to create a basic vocational rehabilitation/job placement 
program for partially disabled workers in Pennsylvania.

A further landmark unfolded in 1985 with the commonwealth 
court’s decision in Economy Decorators, Inc. v WCAB (Fed-
erici).281 In that case, the claimant had been injured but returned to 
his regular job, as a paperhanger, for certain periods on a suspen-
sion. During one of these periods the claimant had wages less than 
his average weekly wage, and a referee awarded partial disability 
benefits for the period.282 This aspect of the award was challenged 
on appeal by the employer, which argued that it had presented evi-
dence that the reduced earnings during the critical period were due 
to “depressed economic conditions [which] resulted in decreased 
work availability and forced [the employer] to apportion all availa-
ble work among [its] employees. [During this time, the claimant] 
ever complained of difficulty in performing his work load... and 
he was anxious and able to accept additional overtime employment 
when available.”283

The commonwealth court, however, held that, without evidence 
of an available job with earnings sufficient to suspend the worker’s 
compensation, partial disability was owing. The reasoning was 
found in the Busche court’s prior holding:

The status of the employer’s liability under a workmen’s compensation 
agreement or award continues irrespective of whether or not payments have 
ceased to be made. . . .

We note that Busche and progeny are factually distinguishable from the 
case sub judice in that the employers there discontinued specially-created 
jobs. Nevertheless, we find the premise applicable here. . . . A presumptive 
partial disability exists by virtue of the order to suspend compensation; 
the employer can eliminate liability only by offering suitable work. As no 
such offer was forthcoming here, the employer has not met his burden. . . .

[T]he claimant simply must show that, while his disability continued, his 
loss of earnings has recurred.284
The articulation of the "presumption of partial disability" was to have significant influence on court decisions, as seen below. The supreme court has also discussed the notion but has altered it materially.\textsuperscript{285} At the time that the \textit{Economy Decorators} opinion was filed, however, there were significant questions raised as to the seemingly all-encompassing language of the court's decision, which remain as serious challenges to the correctness of the decision. Most importantly, the court recited the language of Section 413 as to the circumstances under which a claimant is entitled to reinstatement, but failed to recognize and enforce the clear provision applicable to the facts at hand that a worker is not entitled to partial disability when the employer demonstrates that the "loss of earnings does not result from the disability due to injury." In the case at hand, the employer had plainly shown that the loss of earnings was due to an economic downturn and that the claimant was more than eager to do all his job tasks.

As a result, it was plain that the claimant had not lost earnings because of his injury-related disability. Yet, the court ignored the statute and announced that a presumption of partial disability was to apply to allow reinstatement in the case, since the presumption could only be overcome by showing job availability.

It is submitted that this was simply plain error, generated by or refusal—to read the plain language of the applicable statute. A loss of earning power not caused by a work injury was never intended to be covered by workmen's compensation,\textsuperscript{286} and this principle is found not only in the cases but in the statute itself. To ignore these aspects of the law and impose an indefinite burden of showing job availability no matter what the cause of the loss of earnings is manifestly incorrect. It is significant, in this regard, that Judge Barbieri in his treatise mentions nothing about such a presumption and insists instead that a worker must show a change in condition before he or she is entitled to a resumption of benefits.\textsuperscript{287}

The rule has been partially overthrown in \textit{Pieper}, as discussed below. In the meantime, however, a flurry of cases from the commonwealth court rushed to ratify the purported ironclad force of the presumption. The cases continued to ignore Section 413 of the Act and its prohibition against providing workmen's compensation.

\textsuperscript{285} See notes 301-19 and accompanying text.
\textsuperscript{286} See note 268 and accompanying text.
\textsuperscript{287} Barbieri, \textit{Pennsylvania Workmen's Compensation} § 6.21(3) at 76 (cited in note 18).
to workers who suffer a loss of earnings for non-work-related reasons such as lay-off.

In *Fells v WCAB (Caterpillar Tractor Co.)*, the claimant had returned to his time-of-injury job but was then laid off due to economic conditions. The referee and the Board had denied reinstatement because the claimant had been working at his time-of-injury job and did not lose his earning power because of the work injury. Further, the claimant had not shown a worsening in his condition.

The commonwealth court reversed, addressing specifically the fact that the claimant had returned to his regular job and recounting in full its view of the burden of proof aspect of the job availability law:

> When a claimant seeks to have his or her suspension lifted, the claimant is required only to demonstrate that the reasons for the suspension no longer exist. . . . Simply stated, the claimant's burden is to show that he or she remained disabled, and that such disability has manifested itself in a loss of earning power.

> Employer argues that it is only required to show that work is available when the claimant is unable to perform his pre-injury job, and that since Claimant was able to perform that job, Employer had no such burden. This assertion is incorrect. . . .

> We do not believe that there is a viable distinction, for the purposes of workmen's compensation, between claimants who are under suspension agreements and capable of returning to their pre-injury jobs, and claimants who are under suspension agreements and able only to return to a modified or light-duty job. A presumptive partial disability exists whenever there is an agreement or an order to suspend compensation. . . . [T]he only way in which an employer can relieve its liability is by offering suitable work to the claimant, or by successfully filing a termination petition, in which case the employer has the burden of proving that the claimant's disability has ceased.

The *Fells* case was a landmark in its own right for the announcement that a worker's return to his regular work was not relevant in the burden of proof issue surrounding the job availability issue. The *Economy Decorators* case had already laid the groundwork for the holding in *Fells* by its announcement of the “presumption,” but the flat holding that the return to regular work was irrelevant was truly extraordinary. After all, the return to regular work with-

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289. *Fells*, 552 A2d at 335.
290. Id at 335-36 (citations omitted).
out limitations was impressive objective evidence of resolution to partial disability and would have been, under the prior practice, conclusive on the issue until the claimant showed a worsening of his condition—while working, after his layoff, or under some other circumstance. The Fells rule, which reinforced the notion that the employer always had to provide a job, even to an objectively recovered worker, truly extended the impression that a Pennsylvania employer would be "forever an insurer of job availability to a partially disabled claimant," even one who could do his regular work.

The other grave question surrounding Fells was the inherited defect of ignoring the Act's provision that reinstatement was not appropriate if the new loss of earnings was shown not to be caused by disability related to work. This rather critical point was also missed in the case of Scobbie v WCAB (Greenville Steel Car Co.), in which the court actually implied that the claimant—who had been cleared for his regular job but did not actually return to work because of the plant closing, but had been suspended nonetheless—did not even have the burden of moving forward with a reinstatement. The court implied instead that the employer was, presumably, to automatically reinstate the claimant in such circumstances:

We hold that a claimant is not required to file a petition to modify and "lift" the suspension to prove that which the authorities have already determined, that is, that his pre-injury job is no longer available.

As discussed below, the presumption of partial disability has been retained by the supreme court in modified form. It is submitted as a general proposition that the pre-Fells cases requiring a showing of job availability when the claimant is laid off from modified work remain good law, whereas the Scobbie and Fells cases have been effectively overruled.

292. Scobbie, 545 A2d at 467. See also generally Certainteed Corp. v WCAB (Williams), 126 Pa Commw 311, 559 A2d 971, alloc denied, 524 Pa 612, 569 A2d 1370 (1989) (rule of Fells applied under same circumstances); Andersen v WCAB (Nat'l Forge Co.), 113 Pa Commw 601, 537 A2d 971 (1988) (Fells applied). See also Rite Aid Corp. v WCAB (Bupp), 112 Pa Commw 548, 535 A2d 763, 765 (1988) ("claimant need only show that the work provided by the Employer on which the suspension is based, is no longer available to Claimant, whereupon total disability payments must be reinstated as of the date of termination of that employment"); Zimcosky v WCAB (U.S. Steel Corp.), 118 Pa Commw 208, 544 A2d 1106 (1988) (applying general rule in case of plant-wide layoff); Baughman v WCAB (Laurel Environmental Servs., Inc.), 121 Pa Commw 627, 550 A2d 1061 (1988), alloc denied, 525 Pa 613, 577 A2d 545 (1989) (applying general rule in case of layoff; procedural history confused).
C. Reading the Statute—Retreat from the General Rule

While the majority view of the commonwealth court prior to Pieper was represented by the Busche/Fells line of cases, two decisions stand out which reveal at least two members of the court recognizing the Act's prohibition against compensating a worker for non-work-related disability.

This aspect of the law was specifically recognized in Christopher v WCAB (Dravo Corp.), filed in 1989. In this case, the claimant had been injured at work and was on a suspension while working for a subsequent employer. He was discharged from that position for "non-performance, bad attitude, and problems with expenses, and not as a result of physical complaints or inability to physically perform his work." The referee refused to reinstate benefits, notwithstanding the renewed loss of earning power, and the commonwealth court ratified the decision. The court recognized the presumption formulated in the cases, but then held that it could be rebutted with certain evidence, a ruling similar to the pre-Busche/Scobbie line of cases:

Since a presumption of partial disability exists by virtue of the order to suspend Claimant's compensation, Claimant need only establish continuing disability and recurrence of loss of earnings resulting from a work-related incident.

Substantial evidence of record demonstrates [in this case] that any recurrence of loss of earning power suffered by Claimant results from non-work-related factors, i.e., unsatisfactory efforts and performance at his new position, and not from a work-related disability. Because Claimant's poor job performance triggered his loss of earnings, Employer need not prove continued available work.

The scholarly Judge Barry, concurring in the decision, pointed out that the foregoing declaration was correct in light of the language of Section 413, noting also that recognition of this principle was a "departure from our previous case law," i.e., the relatively recent Busche/Fells line of cases:

[This] is not an unwelcome change. I find support for the majority's statement of the law in section 413(a) of the Pennsylvania Workmen's Compensation Act which provides ... that "where compensation has been suspended ... payments under the agreement or award may be resumed at

294. Christopher, 556 A2d at 545.
295. Id at 545-46.
296. Id at 546 (Barry concurring).
any time during the period for which compensation for partial disability is payable, unless it be shown that the loss in earnings does not result from the disability due to injury.\textsuperscript{297}

This was, of course, a completely correct statement of affairs and marked the first time since \textit{Busche} that the commonwealth court acknowledged the role of the latter clause. It is submitted that the statute should in the future be given effect as was intended and as now endorsed by the concurring judge.

A further retreat from the notion that the presumption of partial disability could \textit{only} be defeated by a showing of job availability was evident in \textit{York City School Dist. v WCAB (Peyser)}.\textsuperscript{298} In that case, the claimant had suffered a work-related knee injury and was working at what was apparently a new job, on a suspension. A year later he experienced new problems and went off work, seeking reinstatement. The employer defended against the case by alleging that the new problems were unrelated and constituted a new injury. The claimant apparently argued that since he went off of work while on a suspension, his benefits should be automatically reinstated, but the court in any event rejected such a notion. Instead, it permitted the employer to assert an “affirmative defense” of the sort implied as available from Section 413:

\begin{quote}
Where a reinstatement petition has been filed following a suspension, the burden is on an employer, \textit{in the nature of an affirmative defense}, to demonstrate that the disability is, in fact, attributable to a new injury for which a different employer might be liable.\textsuperscript{299}
\end{quote}

The permitting of an “affirmative defense” to establish that impaired earnings are due to non-work-related causes is, of course, a far cry from the suggestion in \textit{Scobbie} that an employer must \textit{automatically} reinstate a claimant.\textsuperscript{300} Plainly, under the better cases a suspended claimant always has at least the burden of moving forward after suffering a renewed loss of earning power, at which time the employer has the opportunity to present evidence that the loss of earnings are \textit{not} from a work impairment. This proposition is supported now not only by the statute, which should be authority enough, but by the \textit{Christopher} and \textit{York City} cases.

\textsuperscript{297} Id. See also \textit{Zimcosky v WCAB (U.S. Steel Corp.)}, 118 Pa Commw 209, 544 A2d 1106 (1988) (Crumlish dissenting).

\textsuperscript{298} 136 Pa Commw 110, 582 A2d 423 (1990).

\textsuperscript{299} \textit{York City School Dist.}, 582 A2d at 425.

\textsuperscript{300} See note 292 and accompanying text.
D. The Supreme Court Speaks: Pieper v Ametek-Thermox Instruments Div. and the Current Regime

The current regime is at least partly defined by the supreme court's case of *Pieper v Ametek-Thermox Instruments Div.*,\(^ {301} \) in which the court adopts in part the "presumption" notion developed by the commonwealth court, but then apparently rejects the idea that this is to apply to a worker who has actually returned to his regular job at the time of or after the suspension.

The claimant in *Pieper* had returned to work and apparently signed a supplemental agreement. As found by the supreme court, his benefits were effectively suspended in that agreement.\(^ {302} \) The claimant returned to his time-of-injury job. After the suspension, the claimant was laid off and thereupon received unemployment compensation for the maximum twenty-six week period. He sought reinstatement on total disability thereafter, alleging that he was still disabled and that his condition had continued directly from the earlier, pre-suspension injury. The employer refused any "automatic reinstatement" and benefits were denied.\(^ {303} \)

The case reached the Pennsylvania Supreme Court after the commonwealth court had affirmed the denial of reinstatement in an unreported opinion. The issue in the case was the nature of the burden of proof on a claimant who has been on a suspension to gain entitlement to reinstatement.

The supreme court ultimately held that the claimant was entitled to reinstatement in this particular case. In the course of so holding, however, the court set forth in precise terms the claimant's burden. In this regard, the court first purported to ratify the many commonwealth court cases which held that a suspension of

\(^{301}\) 526 Pa 25, 584 A2d 301 (1990).

\(^{302}\) *Pieper*, 584 A2d at 306. According to the litigants in the case, however, the claimant's benefits were actually *terminated* by the agreement. Interview with Pamela Cochenour, Esquire, September 8, 1991. In fact, in the course of the appeal the claimant acknowledged this fact. Research by this writer likewise indicates that the parties had previously agreed that the claimant's benefits were terminated prior to the reinstatement attempt, and the commonwealth court had properly taken this for granted in their decision. The supreme court's refusal to acquiesce in this crucial, stipulated fact was thus perplexing and frustrating to the parties. On remand, the commonwealth court filed a decision again insisting that the worker's benefits had been *terminated*, but acquiescing in the supreme court's ruling. *Pieper v Ametek-Thermox Instruments Div.*, 1992 WL 42396 (Pa Commw).

For purposes of the appeal and purposes of precedent, however, the case is properly considered to have involved a suspension since the court so demanded in the opinion. It may be that the court specifically wished to set forth new law on the occasion of the appeal and thus contrived its own facts.

\(^{303}\) See *Pieper*, 584 A2d at 303.
compensation created a "presumption" of continuing disability:

In such suspension situations, the causal connection between the original work-related injury and the disability . . . is presumed . . . [because, among other reasons,] there is no contention by any party that the liability of the employer [had] terminated. The only fact established at a suspension of benefits is that the earning power of a claimant has improved to a point where benefits are no longer necessary. Since the disability continues to exist, the liability of the employer has not terminated. Therefore, in these situations the causal connection between the original work-related injury and the disability goes unquestioned.

Thereafter, if the economic picture of a claimant changes and he applies for reinstatement of benefits, he need not re-prove the casual connection between the original disability and the fact that it was suffered at work per his original claim, since causation was established at the time of the original claim.\textsuperscript{304}

This language does indeed seem to ratify the "presumption of continuing disability" formulation generated by the commonwealth court. A closer analysis, however, demonstrates that the concept is apparently different. The commonwealth court desired to create a presumption of true continuing disability in the physical impairment sense, i.e., a rule that although the worker could technically do his regular job tasks, he still possessed a residual disability that affected him on an active basis. This rule in turn justified the notion of requiring a virtual automatic reinstatement upon renewed loss of earnings; since the claimant was presumed still impaired, it was only right to make the employer immediately have the burden of showing job availability upon the renewed loss.

The supreme court, on the other hand, makes reference to continuing disability, but concentrates on a presumption of causal connection rather than disability in its impairment context. The distinction is evident in the ultimate formulation set forth by the court, which does not seem to give the claimant any advantage at all in terms of a presumption of continuing impairment, instead putting the burden on the worker to show that disability continues. The two prong burden of proof on the suspended claimant is as follows:

[While there is a presumption as to causation,] since many months or years may pass before the economic condition of a claimant forces him to apply for reinstatement of benefits, the law requires a claimant to prove two things in order to show that the reasons for the suspension no longer exist.

\ldots

\textsuperscript{304} Id at 304-05.
First, he must show that through no fault of his own his earning power is once again adversely affected by his disability. And second, that the disability which gave rise to his original claim, in fact, continues. . . . Because of the passage of time, the law does require that he prove by a preponderance of the evidence that it is the same disability that the law presumes occurred during his original employment and for which he initially received workmen's compensation benefits. In otherwords, that his disability has not ceased during the passage of time.308

In the particular case at hand, the court examined the evidence and determined that the claimant had met his burden of proof to gain reinstatement, having satisfied the two prong test. The court in this regard studied the claimant's physician's testimony, and determined that it stood for the fact that the worker had a continuing herniated disc syndrome that caused real impairment.306 As there was impairment (limitations on work activity), the claimant was thus not fully recovered, and the employer had not shown job availability307 so that the claimant had met his burden of proof.

What is to be said in summary with regard to this now leading case? Certainly there is no rule of "automatic reinstatement," as implied in the Scobbie case. The claimant who has been on suspension plainly has the burden to move forward and satisfy the two prong burden. If the claimant has lost wages because of his own fault, he plainly is not entitled to compensation. Job availability need not be shown with regard to such an individual. If the claimant has lost wages again because of a change in "economic condition," (i.e., a lay-off), he must secure medical evidence that he still possesses physical impairment which keeps him from his job or, at the very least, that he has continued physical disability of some kind—pathology, residual symptoms, etc. If there is no such showing, he is not entitled to reinstatement, notwithstanding the fact that he has been on a suspension.

It is submitted that this latter formulation should apply only to workers who have returned on a suspension to their original work. These were the facts of Pieper, although the supreme court did not explicitly recognize the distinction between the worker who has returned to work on a suspension at modified work as opposed to regular duty.308

305. Id at 305.
306. Id at 306-08.
307. Id at 308.
308. A worker who has never returned to regular duty in the first place has never displayed objective evidence of substantial recovery as have workers returning to their time-of-injury jobs.
It is submitted that *Pieper* has effectively overruled, in significant part, the *Fells* and *Scobbie* cases. A worker who has returned to his time-of-injury job does have a burden of proof to get back on compensation upon an economic layoff.

Precisely how *Pieper* is to be interpreted is undetermined at the time of this writing. The court's opinion is based on a sound principle, but nevertheless leaves many questions unanswered and lacks the comprehensiveness and thoughtful character of *Kachinski*. In other words, while the law of *what* job availability consists of has been subject to careful scrutiny by the supreme court, such attention has still not been paid by the supreme court to the issue of *when* job availability must be demonstrated.

In lieu of "concrete guidelines" on the latter issue, it is submitted that the present law can summarized as follows. An employer seeking an initial modification or suspension must always show job availability.\(^\text{309}\) A claimant who files a claim petition and continues to be disabled throughout the litigation is entitled to an open-ended award of total disability in lieu of a showing of job availability.\(^\text{310}\) A claimant who has returned to modified work on a partial disability or complete suspension is entitled to reinstatement to total disability at the time of economic layoff or downturn, in lieu of a showing of job availability.\(^\text{311}\) A worker, however, who returns to his original work on a suspension is not entitled to reinstatement upon economic layoff but must instead prove that he has continued disability reflected by physical impairment or at least by residual pathology or symptoms.\(^\text{312}\)

An employer need not show job availability where a worker has lost wages because of his own fault\(^\text{313}\) or because of another non-injury-related discharge from work.\(^\text{314}\) An employer need not show


\(^{310}\) *Barrett v Otis Elevator Co.* 431 Pa 446, 246 A2d 668 (1968); *Steinle v WCAB*, 38 Pa Commw 241, 393 A2d 503 (1978).

\(^{311}\) *Busche v WCAB (Townsend & Bottum, Inc.*), 77 Pa Commw 469, 466 A2d 278 (1983).

\(^{312}\) *Pieper*, 556 A2d 544 (1989). The commonwealth court has not been recognizing this rule with any particular interest. See, for example, *Williams v WCAB (AT&T Technologies, Inc.*), Pa Commw, 601 A2d 473 (1991).


\(^{314}\) *Christopher*, 556 A2d 544 (1989). It is submitted that the employer need not demonstrate a case of willful misconduct in such cases. The issue is whether the renewed loss of earnings is because of disability from the work-related injury. Section 413 of the Act, 77 Pa Stat Ann § 772 (Purdon Supp 1992).
job availability when the partially-recovered claimant has removed himself from the job marketplace, such as by going to school full-time\textsuperscript{318} or by retiring with no intention of ever working again.\textsuperscript{316} An employer probably should show job availability when the claimant is in jail.\textsuperscript{317}

Job availability need not be shown when the medical evidence demonstrates complete recovery without residuals. In other words, in a successful termination petition, job availability need not be demonstrated.

It should be noted that, at the time of this writing, there is still uncertainty in the law of when job availability is to be shown. The commonwealth court has been particularly reluctant to recognize the “two-prong” burden articulated by the supreme court in \textit{Pieper} relative to workers who have returned to regular work on suspensions. Instead, it continues to cite its own, pre-\textit{Pieper} cases, dismissing wholesale the notion that an employer can avoid showing job availability by pointing to the fact that it was economic conditions, not physical impairment, that caused the worker’s renewed loss of earnings.\textsuperscript{318} Attentive commentators agree that there is significant dispute on this issue.\textsuperscript{319}

\section{E. The Proposed Statute}

The \textit{Busche/Fells} line of cases raised great concerns, as dis-

\begin{itemize}
\item \textsuperscript{315} \textit{P.P.G. Indus. Inc. v WCAB}, 7 Pa Comw 588, 300 A2d 902 (1973).
\item \textsuperscript{317} See, for example, \textit{Brown v WCAB} (City of Pittsburgh), 134 Pa Comw 31, 578 A2d 69 (1990), alloc denied, 527 Pa 652, 593 A2d 423 (1991).
\item \textsuperscript{318} See, for example, \textit{Williams v WCAB} (AT&T Technologies, Inc.), Pa Comw , 601 A2d 473 (1991) (per Judge Barbieri, “alleged economic reasons and seniority may not represent excuses for non-payment of benefits due the Claimant.” The claimant had returned on suspension with restrictions).
\item \textsuperscript{319} Remarks of Mr. David S. Hawkins, Ass’t Secretary, Workers’ Compensation Appeal Board, to the author, November 14, 1991.

That uncertainty exists on this point is reflected in the leading treatise that, in its most recent edition, does not take a hard position on the interpretation of \textit{Pieper}. Instead, the authors simply insist that the \textit{Busche/Fells} line of cases “must be interpreted in light of . . . \textit{Pieper} . . . .” S. Siegel, et al, \textit{Pennsylvania Workers’ Compensation Practice and Procedure} 121 (Pennsylvania Bar Institute, 1992).
cussed above, that the employer's workmen's compensation responsibility was being converted into a program to make the employer "forever an insurer of job availability." This worry was real, at least until Pieper, because cases such as Fells held that the claimant who returns to his time-of-injury job on a suspension was entitled to a virtual automatic reinstatement to compensation when economic conditions change and layoffs follow. This would be the case even if the claimant had been working free of pain or impairment at his old job for many years.

This concern has generated the offer of proposed new legislation, perhaps motivated also by frustration that the courts refused to pay attention to the current statute. Other circumstances resulting in renewed loss of earnings are treated in the legislation as well.

The proposed amendment to Section 306 of the Act\(^{320}\) provides, in pertinent part:

(a) . . . Nothing in this act shall require payment of compensation for any period during which the employe is incarcerated, nor for any period during which the employe is enrolled in any educational institution, without the written approval of the insurer or self-insured . . .

(b)(1) For disability partial in character, connected with and arising out of the compensable injury or disease [the claimant shall receive two-thirds of the difference between the claimant's average weekly wage at time of injury and the earning power of the claimant thereafter]. . . .

(2) A reduction of the employe's post injury earnings attributable to any of the following extraneous and economy-driven factors shall not be considered, standing alone, a loss of earning power arising out of or connected with the employe's injury or disease: across-the-board wage reductions impacting on the employe and his coworkers; a layoff due to lack of work with the employer; plant closures; reduction of available work hours; a reduction of overtime available to the employe and his coworkers; a voluntary decision to change jobs or area of residence; retirement; other economic developments which serve to reduce the amount of work available to the employe and his coworkers.

(3) In the event of a layoff or plant closure, the employe receiving partial disability benefits shall continue to receive said benefits with the benefits to be an average of the partial disability payments he received over the fifty-two weeks prior to the layoff or plant closure. These payments shall continue for the remainder of the five hundred week maximum period during which partial disability benefits may be received, or until, if ever, a change occurs in his disability status.

[T]he employe receiving partial disability benefits at the time of the layoff or plant closure, as well as employe whose benefits had been suspended upon their return to work, are eligible to receive a resumption of temporary total disability benefits if they can show, by clear and convincing evidence,

\(^{320}\) 77 Pa Stat Ann § 542 et seq.
the continued presence of residual disability attributable to their work injury or disease serving to place them at a substantial disadvantage relative to their coworkers in securing new work elsewhere within a geographic area reasonably proximate to their residence. . . . 321

The reader who has traced the development of the Busche/Fells line of cases will readily perceive that this proposed legislation is advanced in direct reaction to the growth of the doctrine which those cases established, i.e., the seemingly permanent requirement to show the actual availability of employment, even to fully employed workers who happen to be on suspensions.

It is submitted that the legislation above, or in substantially similar form, is necessary to correct those unfortunate cases. An analysis of the cases demonstrates that they were generated in unfortunate denial of the existence of Section 413 of the Act and the fundamental principle that workmens' compensation is not meant to compensate for unemployment. 322 The current regime has laudable aspects, but legislation is necessary to ensure that the Pennsylvania employer is not, to repeat the pervasive motto of the cases, "forever [the] insurer of job availability to a partially disabled claimant . . . ."

VI. POLICY CONSIDERATIONS IN THE LAW OF JOB AVAILABILITY AND VOCATIONAL REHABILITATION IN WORKMEN'S COMPENSATION

A. Policies in the Law of Job Availability

Determining precisely what was the driving force behind the commonwealth court's development of the present law of job availability and partial disability is difficult. The court set forth no discernible policy analysis along the remarkable road from requiring employers merely to demonstrate partial medical recovery to gain an order of partial disability, to requiring actual job offers within prescribed limitations on a virtual lifetime basis. Instead, the change was effected essentially by interpretation of precedent which was both creative and tenuous.

There are, however, discernable hints as to the original intentions in this regard. First, it is submitted that Judge Barbieri, architect of the current regime and the court's unquestioned authority on compensation matters, was dissatisfied with the traditional

322. See note 42 and accompanying text.
practice and rule, which permitted a showing of job availability in a virtual vacuum without actual communication of the existence of such work to the involved worker. He thus delivered, on a virtual *ex cathedra* basis, the rule that a “job open” was not necessarily a “job available” under the leading supreme court cases—*Unora* and *Petrone*—and demanded that a job should only be considered available if its existence was fully communicated to the worker at a time he or she could technically perform its tasks, at a time when the job was actually open.\(^3\)\(^2\)\(^3\) It is probable that the belief was that only with this type of showing should the employer be considered to have shown on a realistic basis that the individual was actually capable of real work. It is also likely that the court thought inequitable the fact that some employers, thought more responsible than others, already *provided* modified work to gain entitlement to partial disability, while others, especially insurance companies, could legitimately seek under the traditional practice the expedient method of reducing benefits merely by having a doctor testify as to the claimant’s theoretical ability to do some level of work. The inequity was thus remedied by imposing in every case the burden of showing the availability of an actual job.

While the architect of the current regime was Judge Barbieri, the supreme court in *Kachinski* took on the job of explicitly setting forth a basis for the change in the law. The court, in this regard, set forth what was probably latent in the commonwealth court decisions:

> [The employer’s responsibility to a worker under workmen’s compensation,] though not without its limits, requires at a minimum some effort on the part of the employer to make the injured employee whole. To impose on the injured party the duty to find alternative work under pain of foregoing the compensation to which he has become entitled is . . . a concept far removed from the salutary purpose of workmen’s compensation to provide relief due to injuries caused in the workplace. . . .

Therefore, we adopt the Commonwealth Court’s interpretation of “available” as requiring a showing of actual job availability.

. . .

One injured at work, stranded on partial disability, deserves more than a generic list describing where he might find some suitable work.\(^3\)\(^2\)\(^4\)

The *Kachinski* court thus conceptualized the employer’s responsibility of finding the claimant a suitable job as part of the essen-

\(^3\)\(^2\)\(^3\). *King Fifth Wheel Co. v WCAB (Rhodes),* 79 Pa Commw 300, 468 A2d 1211 (1983).

\(^3\)\(^2\)\(^4\). *Kachinski*, 532 A2d at 379, 380.
tial remedy of workmen's compensation. Payment of lost wages and medical expenses, under this view, is not the beginning and end of compensation benefits; instead, the claimant is to be provided with the rudimentary vocational rehabilitation "service" of being either directed to or placed in real work to restore wage loss and a productive life.

Because this is the evident policy and intent of the Kachinski court, the subsequent blossoming of more detailed requirements as to the showing of job availability can be viewed as somewhat justified, if perhaps hypertechnical and vexing at times. The cases have further defined for employers precisely what must be done to properly direct injured workers back to work. The court has, plain and simple, created a judge-made plan of vocational placement which will have many details and nuances. The outlet for the details of the plan will be in the court cases.

As discussed below, it is submitted that this phenomenon is an admirable development, given the omission from the Pennsylvania Act of any entitlement to vocational rehabilitation services and the concurrent lack of any administrative authority over the rehabilitation process.

No such laudatory words can be afforded to the case law development which has made the employer a virtual insurer for all times of job availability. The rule of Busche and Smith, discussed above, holding that a worker is entitled to total disability when laid off from modified work, is reasonable and sensible. In such instances the claimant has plainly not recovered, and the responsibility of providing a worker with such objective disability yet another actual job is just and consistent with the Kachinski court policy.

The rule of Economy Decorators and Fells, however, demanding that the employer indefinitely show job availability to a worker who has returned to work at his time-of-injury job, though on a suspension, takes the remedy of job availability entirely too far. As demonstrated above, the rule developed in hostility to both the policy of workmen's compensation only to cover work-related disability, and Section 413 of the Act.

The extension of the job availability requirement in this context was also effected on a virtual ex cathedra basis, with the court flatly declaring that there was no difference, for workmen's com-

325. See notes 271-79 and accompanying text.
326. See notes 280-92 and accompanying text.
pensation purposes, between a worker who has returned to modified work on a suspension and one who has returned to regular work on a suspension. It is respectfully submitted that such a statement is crucially inaccurate, because such a worker by virtue of the fact of his work generates objective evidence of such lack of impairment that he should be able to perform the normal job tasks of his trade or practice. There is no just reason to afford him a presumption of impairment or continuing pathological condition that would in turn justify an automatic reinstatement of benefits. This fact was, of course, ultimately recognized in the supreme court's *Pieper* decision.

The point of this criticism is that, unlike the principled, policy-driven heritage of *Kachinski*, the *Economy Decorators/Fells* rule grew out of an unfortunate failure to be attentive to an extant statute and imposed on employers a liability that was neither intended by the legislature nor anticipated by employers. As discussed above, the latter rule has apparently been overthrown by the *Pieper* decision, but how the commonwealth court will interpret that opinion remains to be seen.

**B. Vocational Rehabilitation in Pennsylvania**

As discussed at the outset of this article, Pennsylvania has no vocational rehabilitation provision in its workmen's compensation statute. There is, accordingly, no requirement that an employer provide vocational rehabilitation services, no right of a claimant to seek out vocational rehabilitation services, no power of the referee to order such a program, and, of course, no unit of the Bureau of Workers' Compensation or Department of Labor and Industry to either direct or monitor such activities. It is thus perhaps a sur-

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328. See note 305 and accompanying text.

329. See note 1. See also generally Irvin Stander, *Guide to Pennsylvania Workers' Compensation* 310 (Pa L J, Phila., Pa 1979) ("It is obvious that Pennsylvania lags far behind many other states in providing any kind of meaningful rehabilitation services in workers' compensation, even on a voluntary basis").

330. As Referee Stander pointed out in 1979, there is a provision of the Act which directs that the Bureau "shall furnish to persons adversely affected by occupational disease appropriate counseling services, vocational rehabilitation services, and other supportive services designed to promote employability to the extent that such services are available and practical." Section 435 of the Act, 77 Pa Stat Ann § 991(e) (Purdon 1992). See Stander, *Guide to Pennsylvania Workers Compensation* at 310 (cited in note 329). As he pointed out at that time, however, the statute is limited only to diseases and, in any event, has not been implemented with any vigor. That remains the case in 1992. The reason for this probably
prise to posit that "vocational rehabilitation" under the Pennsylvania Act is a crucial element of the law and that private companies providing such services are part of a thriving business enterprise and provide a mandatory service to countless employers and insurance companies.

The answer, of course, is that the Kachinski requirements, as further extended through the life of many claims through the Busche/Fells line of cases, form the basis for a rudimentary vocational rehabilitation program. It stands to reason that, if the employer or insurer in Pennsylvania is only entitled to reduce or suspend benefits to an injured worker by showing an available job, the process of job finding will be undertaken, by necessity, with vigor and frequency.

The cynic will respond that merely pointing a worker to jobs does not constitute "vocational rehabilitation," but in fact most commentators consider that, in the workmen's compensation context, such a process does in fact count as rehabilitation. This is not to say that other more aggressive or exotic methods of rehabilitation, such as counseling, retraining, and schooling, are not in certain cases reasonable and appropriate and also constitute vocational rehabilitation, but it does legitimize use of the term in the

lies in its self-limiting final clause, which seems to remove from the provision any mandatory character.

The Commonwealth also has a Bureau of Vocational Rehabilitation (BVR), founded pursuant to federal mandate. As referee Stander also pointed out in 1979, "its liaison with workers' compensation cases has been a 'sometimes' thing." This likewise remains the case, and there is no coordination whatsoever between that agency and the Bureau of Workers' Compensation, nor is there any mandate that such coordination be undertaken. The BVR does not have active job placement services immediately available to partially disabled workers. (In Indiana, there is such coordination. See generally Vance, 24 Valparaiso L Rev at 272-81, 302-04 (cited in note 1). Vance is critical of such an arrangement and favors a comprehensive program under the auspices of the workmen's compensation administration.

As a result, employers are on their own to turn to private rehabilitation companies if they wish to undertake voluntary vocational rehabilitation and/or vocational placement activities. A counselor doing a careful and industrious job can turn to the BVR to secure approval for state and federal programs that encourage placement of injured workers. Interview with Colleen Miller, CRC, East Pittsburgh, Pa, (Mar 6, 1992).

331. See, for example, Comment, Vocational Rehabilitation in the Workers' Compensation System, 33 Ark L Rev 723, 728 (1980). See also J. Gregory Householter & Arnold G. Rubin, An Overview of Industrial Vocational Rehabilitation Statutes and Approaches, 74 Ill Bar J 342, 344 (Mar 1986) (stating that the "stated goal of vocational rehabilitation should be to return the injured employee to the same economic condition as prior to the accident"). See also Vance, 24 Valparaiso L Rev at 282 (cited in note 1) (noting that the goal of vocational rehabilitation in workmen's compensation is "prompt return of the worker to gainful employment" as opposed to the broader mandate of the federal/state program mandating efforts to "maximize the human potential" of the client).
Pennsylvania context.

In any event, Pennsylvania thus possesses a basic, judge-created form of vocational rehabilitation by requiring a showing of job availability on a nearly continuous basis. In addition, of course, an employer is always free to voluntarily provide more extensive services such as counseling, retraining and schooling, though a claimant’s refusal to undertake such efforts will probably not result in a forfeiture of benefits.\(^3\) A mutually agreeable commutation or settlement of benefits can also be undertaken for the claimant to plan for his own retraining or new business venture. If found to be undertaken seriously by the Board or referee, such a proposal could be and is, at times, approved.\(^3\)

It should be noted, of course, that this basic vocational rehabilitation effort is often thought mandatory under the Pennsylvania Act because total disability is potentially payable for the life of the claimant,\(^3\) and there is no purely medical determination of partial disability which would permit an employer to reduce its liability. A real job must always be shown in conjunction with the clearance for work.

Whether this judge-made system of “leveraged rehabilitation” is the best system available is subject to serious question. An analysis of the approach of other states—normally found in a statute, not court decisions—suggests that a more satisfying approach to vocational rehabilitation should be considered.

C. The Philosophy of Vocational Rehabilitation and the Approach of Other Jurisdictions—In Brief

The vast majority of states, regardless of how compensation for total disability and partial disability is paid, possess statutory pro-

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332. Prior to the Kachinski regime the commonwealth court held that a workmen’s compensation claimant “cannot be compelled to participate in a vocational rehabilitation program,” but also acknowledged that such a worker’s “refusal or failure to do so will not prejudice the employer.” Holmes v WCAB (Pisani Bros., Inc.), 86 Pa Commw 543, 485 A2d 874, 876 (1984). It is conceivable that this holding, which is not inconsistent with Kachinski, could be used as a basis for an argument that an injured worker who refuses to engage in retraining or further education, and thus precludes any hope of placement, is subject to suspension of benefits during the period of refusal. Such an argument would have to be supported by expert vocational testimony that, had the claimant cooperated, employment could be secured for the claimant.


334. Section 306(a) of the Act, 77 Pa Stat Ann § 511 (Purdon 1992) (compensation is payable “for the duration of total disability”).
visions governing a worker's right to vocational rehabilitation.\textsuperscript{335} These states typically require that the bureau of compensation or other administrative office either initiate and/or monitor the process.\textsuperscript{336}

In certain states the process is truly vital to the rights of the worker. In many other jurisdictions, after all, the rule survives that an employer can reduce liability with regard to a partially recovered worker without showing "job availability."\textsuperscript{337} Such workers are often reduced to a benefit rate that could not possibly support the worker or his or her family, and the need for formal rehabilitation, with the claimant intimately involved in the process, is a vital aspect of the rights of a truly impaired worker who wants to be employed.

The legal literature is ripe with analysis of and recommendations concerning vocational rehabilitation in the context of workmen's compensation, and attentiveness to this commentary is crucial to the understanding of the structure of the law of other states.

As all commentators acknowledge, the growth in vocational rehabilitation statutes was spawned in significant part by the findings and recommendations of the National Commission on State Workmen's Compensation Laws (hereinafter "the Commission") in its


\textsuperscript{336} See DeCarlo & Minkowitz, \textit{Workers Compensation Insurance Law and Practice} at 242 et seq (cited in note 6) (listing whether each state has a vocational unit in compensation bureau).

\textsuperscript{337} In New York, for example, the determination of whether a worker is totally or partially disabled is usually a purely \textit{medical} question, not one controlled by an analysis of his "industrial disability." As Minkowitz points out in his commentary to the involved provision, "If an employee [under the precedents] was partially medically disabled but unable to work, a partial award was [nevertheless] made." Martin Minkowitz, \textit{Practice Commentaries}, Workers' Compensation Law § 15 at 16 (McKinney, Supp 1992) This rule, as they point out, may be on the wane in that state. See \textit{Kowalchyk v Wade Lupe Const. Co.}, 151 A2d 927, 543 NYS2d 200 (1989) (claimant may be entitled to total disability when he is "totally industrially disabled," even though not "totally medically disabled"), See Minkowitz, \textit{Practice Commentaries}, Workers' Compensation Law § 15 at 16 (cited within this note).

In Maryland, the effects of injury on the individual claimant's vocational prospects is taken into consideration in the determination of total or partial disability, but a showing of actual job availability is not required. See generally Richard Gilbert & Robert L. Humphries, \textit{Maryland Workers' Compensation Handbook} § 7.4 at 138-39 (Michie 1988 & Supp 1990).
1972 report. The Commission, of course, found deficiencies in several areas, and vocational rehabilitation did not escape the attention of the analysts. Although several states already had vocational rehabilitation included in their statutes, the Commission found that "vocational guidance and instruction services are spotty and placement services for rehabilitated workers are generally inadequate." The Commission likewise noted that "in most states the needed liaison with available agencies is poorly developed or the number of suitable agencies is limited." The Commission recommended in general that the agency responsible for the workmen's compensation program undertake vocational rehabilitation responsibilities:

We recommend that the medical-rehabilitation division be given the specific responsibility of assuring that every worker who could benefit from vocational rehabilitation services be offered those services. We also recommend that the employer pay all costs of vocational rehabilitation necessary to return a worker to suitable employment and authorized by the workmen's compensation agency.

The philosophy driving the view that vocational rehabilitation is a critical element of the workmen's compensation remedy is evident from a basic Pennsylvania source—the Kachinski case. Restoring the claimant to productive employment, in the Pennsylvania Supreme Court's view, is an obligation of the employer in making the claimant whole after the industrial injury for which the employer is responsible.

This philosophy is stated eloquently and with some elaboration by Larson in his treatise:

The conviction is gradually gaining ground that the compensation job is not done when the immediate wound has been dressed and healed. There remains the task of restoring the man himself to the maximum usefulness that he can attain under his physical impairment.

As a matter of underlying philosophy, it is [thus] not difficult to demonstrate that rehabilitation is properly an inherent part of the workmen's

339. Id at 20.
340. Id at 78.
341. Id at 82, Recommendation 4.7.
342. Id at 82, Recommendation 4.8. An excellent summarization of and comment on the National Commission recommendations, and those of other advisory entities, in the context of vocational rehabilitation is found in Vance, 24 Valparaiso L Rev at 263-69 (cited in note 1). See also Croft, 3 Alaska L Rev at 58-59, 62 (cited in note 1); Stand er, Guide to Pennsylvania Workmens' Compensation at 304-10 (cited in note 329).
343. See notes 104-05 and accompanying text.
compensation system's function . . . . Even as a purely legal concept, one could put the matter this way: Restitution is the proper remedy when money damages will not restore something that is unique. How much clearer is it that, when the loss is the loss of use of a limb rather than of mere chattels, restitution is the most appropriate remedy.344

As pointed out in the exhaustive study by Croft, “state legislatures and courts differ greatly in their expressions of the philosophy behind, and purpose of, workers’ compensation vocational rehabilitation.”345 In addition to the restitution notion expressed by Larson,346 other ascertainable “underlying concepts” of the rehabilitation effort in compensation include: (1) the notion that vocational rehabilitation preserves the “intrisic dignity of man, his feeling of self-worth and his right to life, liberty and the pursuit of happiness,”347 (2) the tenet that restoration of the worker to an actual job is a purpose of workmen’s compensation,348 and (3) the “efficiency” consideration, i.e., the fact that “well-managed, cost-effective rehabilitation will enable many disabled workers to return to productive jobs and thus reduce compensation costs.”349

Precisely how far the vocational rehabilitation remedy extends is another question. The most ambitious view of the extent of vocational rehabilitation is expressed by one commentator as being the restoration of handicapped workers to “‘the fullest physical, social, vocational, and economic usefulness of which they are capable,’ a goal commonly accepted as the ultimate aim of all rehabilitation

345. Croft, 3 Alaska L Rev at 59 (cited in note 1).
348. Croft, 3 Alaska L Rev at 60 (cited in note 1). For this proposition the author quotes the policy statement of the Minnesota workmen’s compensation statute’s vocational rehabilitation provisions:

Rehabilitation is intended to restore the injured employee, through physical and vocational rehabilitation, so the employee may return to a job related to the employee’s former employment or to a job in another work area which provides an economic status as close as possible to that the employee would have enjoyed without disability. Rehabilitation to a job with a higher economic status than would have occurred without disability is permitted if it can be demonstrated that this rehabilitation is necessary to increase the likelihood of reemployment. Economic status is to be measured not only by opportunity for immediate income but also by opportunity for future income.

Id, quoting Minn Stat Ann § 176.102(1) (West Supp 1985).
Typically, however, it is acknowledged that the extent of vocational rehabilitation in the case of an injured worker is going to be, and is, appropriately limited. The vocational rehabilitation in the compensation system of an injured worker, normally a mature adult, is manifestly different, for example, from the efforts to be undertaken with regard to a catastrophically injured child or adolescent. It is also different from those to be rehabilitated within the requirements of the federal/state vocational rehabilitation program, which seeks to "maximize the human potential."

Perhaps in recognition of this fact, at least one state has developed a hierarchy of sorts with regard to rehabilitation efforts, with return of the worker to his old job, with modification, as the most desired goal, and with actual retraining in a different field used "only as a last resort." This is not an uncommon sentiment, even among great advocates of vocational rehabilitation in the workers' compensation context.

The variety among the states in terms of vocational rehabilitation statutes is considerable. As the author of one admirable survey asserts, "No two states provide identical vocational rehabilitation programs for their injured workers . . . . Also, definitions of terms are not uniform across the fifty states." Both the quoted writer and Croft, cited earlier, have nevertheless sought to classify the various state vocational rehabilitation statutes in their near epic works on this issue.

Two states contiguous to Pennsylvania stand as typical examples. New York, for example, possesses a non-mandatory system of vocational rehabilitation and has a vocational rehabilitation unit in its workers' compensation bureau. Employers and carriers pay monies into a state Vocational Rehabilitation Fund, which pays rehabilitation costs except for temporary total disability received in

353. See, for example, Vance, 24 Valparaiso L Rev at 282 (cited in note 1).
354. See, for example, Householter & Rubin, 74 Ill Bar J 342 (cited in note 331) (surveying and classifying various approaches); Croft, 3 Alaska L Rev at 205-80 (cited in note 1) (surveying and classifying various approaches).
356. See id at 286-89; Croft, 3 Alaska L Rev at 66-92 (cited in note 1).
357. See DeCarlo & Minkowitz, Workers' Compensation Insurance and Law Practice at 238-39 (cited in note 6).
the course of the process." A weekly maintenance is paid during the process.

Maryland maintains a mandatory vocational rehabilitation statute that has been the subject recently of new amendments. Under the amended Maryland law, an injured employee is "entitled to vocational rehabilitation services" when he is "disabled from performing work for which [he was] previously qualified as the result of an accidental personal injury or occupational disease. . . ." There is no absolute rule as to "when vocational services should be requested or implemented." However, after a claimant has been on temporary total disability for six months, the employer is obliged to file a form with the Commission informing it of that fact and indicating whether vocational rehabilitation has been initiated and its status.

When the Workers’ Compensation Commission becomes involved, either on its own or at the prompting of one or both of the parties, it has affirmative duties and, under the law shall:

1. refer a covered employee who is entitled to vocational rehabilitation services . . . to an appropriate vocational rehabilitation provider; and
2. obtain from the provider a vocational rehabilitation plan that includes
   (i) a vocational assessment; and
   (ii) recommendations for vocational rehabilitation services reasonably necessary to return the injured employee to suitable gainful employment.

After this is secured and shared with the claimant and employer, enforcement mechanisms are triggered. The law provides, in this

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361. Id at § 9-672(a).
364. Gilbert & Humphreys, Maryland Workers’ Compensation Handbook at 19-20 (cited in note 337):
Although not specified by the Act, the parties may (and indeed are encouraged) to reach a stipulated agreement concerning a rehabilitation plan. The plan is then sent to the Commission’s Rehabilitation Division with a request that the plan form the basis of an order. The Commission’s Rehabilitation personnel review the sufficiency of the plan and communicate with the parties regarding any necessary changes or additions. The Rehabilitation Division then presents the plan to the Commission with a recommendation for disposition and an order is issued shortly thereafter.
regard:

(d) Hearing—(1) Within 15 days after the day of written notification by the Commission of the contents of the vocational rehabilitation plan, any party in interest may request a hearing to contest the plan.

(2) At the hearing, the parties may present additional evidence as necessary.

(3) After the hearing, the Commission shall:
   (i) wholly or partly accept the vocational rehabilitation plan; and
   (ii) pass an appropriate order about vocational rehabilitation of the covered employee.366

Definitions exist to guide vocational rehabilitation efforts once the plan is in place. "Suitable gainful employment" is defined as "employment, including self-employment, that restores the disabled covered employee, to the extent possible, to the level of support at the time the disability occurred."367 The term is further defined by requiring that "the qualifications, interests, incentives [and] predisability earnings," among other things, be considered in the determination of whether such employment is available.368

"Vocational Rehabilitation Services" are defined to include virtually everything conceivable, including assessments, evaluation, counseling, and job development and placement.369 In the course of receiving such services, for which the employer is, of course, responsible, the claimant is entitled to continue to receive temporary total disability.370 Further, the worker is entitled to maintenance payments and transportation costs if undertaking rehabilitation away from the area of his or her residence.371 Reports are to be submitted to the Commission in the course of the rehabilitation effort, which, when consisting of training, is not to exceed twenty-four months.372 Refusal by the claimant to take part puts the claimant at risk of forfeiting benefits for the period of the refusal.373

An analysis of the Maryland law indicates that it presents a seemingly workable method that is probably superior to the court-created rudimentary law of job availability existing in Pennsylvania. On a fundamental level, because the law is based on statute it

366. Id at § 9-673(d).
367. Id at § 9-670(b).
368. Id at § 9-673(b).
369. Id at § 9-670(d).
370. Id at § 9-674(b)(1).
371. Id at § 9-674(c).
372. Id at §§ 9-675, 9-672.
373. Id at § 9-674(b)(2).
is less likely to be significantly altered by judicial activism, whim or unintended error. Fewer court precedents being generated is likely to reduce litigation and appeals. Further, the Maryland law gives the claimant some control over the rehabilitation effort, something Pennsylvania workers currently do not possess, being dependent on the interest of the employer or carrier, which holds complete control over the process. For these reasons, among others, the Maryland law may be looked to as a potential model for a Pennsylvania statute on vocational rehabilitation.

VII. CONCLUSION

This article has sought to accomplish three things. First, the author has sought to trace the history of the judge-made law of job availability to its roots to better understand the development and source of the current law. This effort has hopefully conveyed what the author perceives as a true phenomenon—the creation of a practical, rule-intensive, rudimentary form of vocational rehabilitation by the courts based upon creative use of precedent and reliance upon decades-old abstract principle. While the “job availability” requirement has been extended too far—to require that the Pennsylvania employer become a virtual insurer of employment in perpetuity to an injured worker—there can be no question but that the creation of the Kachinski regime was motivated by the most humane of motives.

Second, the author has sought to set forth the blackletter law of the current regime. As asserted at the outset, it is submitted that without some working familiarity with the leading cases and background of the judicially created rules, the participant in the workers' compensation system will not be able to assess reliably the rights and remedies of both employer and worker in the context of partial disability and vocational rehabilitation. Hopefully, this article will provide a basis for such working familiarity.

Third, this article has raised the issue of a probable need in Pennsylvania for a vocational rehabilitation statute. The issue itself can only be resolved after further study, with particular emphasis on how provisions such as those of Maryland—a modern, reasonable and balanced law—would operate in the context of the Pennsylvania workmen's compensation system, which has its own peculiar heritage and personality.

Plainly, the imposition of such a law by itself would be inappropriate without a change in the current level of, and time limits on, benefit entitlement. Some mechanism must exist in terms of bene-
fit reduction to make the typical Pennsylvania claimant, blessed with total disability until the employer places him in a job, interested in aggressive rehabilitation efforts available under a statutory plan. In Maryland, significantly, such leverage exists since the employer is entitled to an order reducing or eliminating benefits when the worker has reached the point of “maximum medical improvement.” When such reduction occurs and the claimant is truly disabled, it will likely be the claimant who then becomes concerned with his own rehabilitation.

It is not difficult to posit, in any event, that the state of vocational rehabilitation under the Pennsylvania Act is not what it could be. As discussed at the outset, the fact that the law is found exclusively in the court cases makes the rules governing partial disability and vocational rehabilitation virtually inaccessible to employers and employees for whom the workers’ compensation laws were enacted. As also asserted at the outset, the absence of any codification of at least the basics is inappropriate in the field of workers’ compensation, in which a pervasive goal has been to minimize court battles and the excessive involvement of lawyers. The fact that the rules and nuances are found in the court-created program and must become mastered by lawyers, rehabilitation counselors and job finders results in the misdirection of valuable dollars away from rehabilitation and toward these service providers.

The court-created program has also resulted in a system where vocational rehabilitation is completely controlled by the employer and insurance carrier. Of course, this is not entirely unjust, since it is the employer who must pay the costs of rehabilitation. Still, the distrust which has been generated because of this phenomenon, and the fact that the rehabilitation service providers report directly and exclusively to the employer, is hard to underestimate. The typical Pennsylvania claimant is advised that the rehabilitation


375. See notes 5 to 6 and accompanying text. This writer once had an injured worker as a client who had been a union worker for many years. After his injury, many months of physical therapy, and partial recovery, he began to receive job referrals from a counselor. Some of the referrals were only questionably appropriate from a vocational point of view, and the worker found most of them degrading or menial. This writer’s advice that he nevertheless apply and be interested was often met with resistance, notwithstanding the explanation that this was what the myriad court precedents probably demanded. He finally demanded to see “the statute or regulations, right from the law, that says I have to go through all of this.”
counselor is a mere "spy," and claimants' counsel seek out potential clients by cynically inquiring in advertisements whether the worker "has been 'contacted by 'rehabilitation'?"\(^{376}\) as if such contact signalled imminent danger.

The union-sponsored handbook *Injured on the Job*\(^{377}\) reveals in all its glory the distrust and cynicism existing under the current regime:

Employers frequently hire "vocational rehabilitation services" to testify against workers that there are jobs available to the worker within the restrictions imposed by the work-related injury. The process usually begins with the "counselor" interviewing the worker, accompanying the worker to physical examinations, and then referring to the worker a list of jobs. Do not be coerced by the counselors' "charm" or "pushy tactics."

You do not have to meet with, or be interviewed by, either a rehabilitation nurse or a job placement service. You should remember that the service is being paid by the company to cut off Workers' Compensation.\(^{378}\)

The cynicism expressed in the foregoing quote is perhaps extreme and not justified in many cases. Nevertheless, there is no doubt but that the current regime has generated such feelings and attitudes toward the system. Creation of a balanced, comprehensive statutory system which makes the claimant a player in vocational rehabilitation is likely to (1) eliminate this acute cynicism,\(^{379}\) (2) extinguish the never-ending mushrooming of court precedents on job availability, (3) reduce litigation, and (4) bring Pennsylvania into the fold of the vast majority of states that long ago enacted legislation to govern the process.

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\(^{376}\) Such an advertisement appeared, for example, in the advertising vehicle called the "Pennysaver" (Carnegie-Bridgeville ed) on February 10, 1992, at page 13, and was placed by the leading firm for injured workers in the Pittsburgh area. It provides in full: WORK INJURY? CONTACTED by "Rehabilitation"? Workers Compensation reducing your benefits? Free discussion — Attorney [. . . ]

*Pennysaver* 13 (Carnegie-Bridgeville ed, Feb 10, 1992). While such an advertisement is unfortunate, the current system has generated such distrust of the process that it is hardly a surprise.

\(^{377}\) Cited in note 242.

\(^{378}\) Id at 105-06.

\(^{379}\) In the Maryland system there seems to be less distrust of the rehabilitation process and rehabilitation counselors and experts. This is in part due, no doubt, to the fact that the rehabilitation counselor must report not only to the sponsoring insurance company but also to the Commission and to claimant. The rehabilitation counselor under such circumstances is less likely to be viewed as merely another partisan agent of the employer, as is usually the case, rightly or wrongly, under the Pennsylvania practice. Interview which Chuck Smolkin, CRC, Baltimore, Md (Feb 6, 1992). As discussed above, the Maryland system also encourages cooperation in the rehabilitation effort. See note 374 and accompanying text.
January 1, 1992

Mr. David B. Claimant  
301 Peach Street  
Carnegie, PA 15106  

Dear Mr. Claimant:  

I am writing with regard to a modified duty offer of employment for you. As you know, you have been cleared for full-time sedentary employment by Dr. Smith. We have previously forwarded to you his report, which was sent to our insurance carrier last week. We also sent you a form listing the restrictions he has established for you. He still doesn’t think you can go back to your regular full-time job loading the truck and doing your deliveries.

At the present time, we can offer you a job at the order and solicitation desk, assisting me and Fred taking orders for our deliveries to clients. You would be making and taking calls relative to the next weeks’ orders. You would not have to lift anything over ten pounds. Further, you can sit down or stand up as you need while you help us out. This job falls within the sedentary duty occupational category which Dr. Smith has authorized for you.

Mr. Claimant, I am ready to adjust the office and the job in case you have any special problems which we can’t foresee right now. I’m flexible.

The pay for this job is $5.00 per hour. The hours are 7:00 a.m. until 4:00 p.m., Monday thru Friday, and 8:00 a.m. until 12:00 noon on Saturdays.

If you want to come back to work at this job, please call Fred or myself and he will put you on the schedule. You would be doing this job at our office in Aliquippa on Sheffield Avenue.

I look forward to seeing you back to work with us.

Very truly yours,

James E. Boss