When Seeking Reinstatement of Workers' Compensation Benefits after Layoff from Modified Duty Work, a Claimant Must Prove That the Original Disability Has Continued and Is Once Again Causing Decreased Earning Power - *Bethlehem Steel Corp. v. W.C.A.B. (Laubach)*

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When Seeking Reinstatement of Workers' Compensation Benefits After Layoff from Modified Duty Work, A Claimant Must Prove that the Original Disability Has Continued and is Once Again Causing Decreased Earning Power

_Bethlehem Steel Corp. v. W.C.A.B. (Laubach)_

**Workers' Compensation — Reinstatement of Disability Benefits After Layoff From Modified Duty Work — Claimant's Burden of Proof** — The Pennsylvania Supreme Court held that an injured worker seeking reinstatement of benefits, after being laid off from modified duty work, need only demonstrate that the disability from his original work injury has continued and that it is once again causing him to suffer decreased earning power through no fault of his own.


On December 10, 1995, Bethlehem Steel Corporation laid off steelworker George Laubach, who was laboring in a modified duty position as a result of a compensable work-related injury sustained to his low back in 1992. Although Laubach's doctors never released him to return to full duty work at his pre-injury position, he was cleared for, and did return to, light duty work with Bethlehem Steel on January 28, 1993. He remained employed in this light duty position until the layoff, which occurred in the wake of the plant's closure by Bethlehem Steel. In the aftermath of the layoff, Bethlehem Steel declined to voluntarily reinstate total

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2. _Bethlehem Steel_, 760 A.2d at 379-80. Laubach had varying periods of partial disability benefits when his actual earnings fell below his pre-injury average weekly wage, alternating with suspension of benefits when his actual earnings exceeded his pre-injury average weekly wage. _Id._

3. _Id._ at 380. Although Bethlehem Steel did not close all of its sites, employment at an alternate location was never offered to Laubach. _Id._
disability benefits to Laubach. However, they did continue to make payment of partial disability benefits.

In response to Bethlehem Steel's refusal to reinstate total disability benefits, Laubach filed a penalty petition on January 15, 1996. Bethlehem Steel then proceeded to file a petition for modification/suspension of benefits based on Laubach's return to modified duty with fluctuating partial disability rates between June 25, 1995 and December 31, 1995.

Laubach prevailed at the workers' compensation judge level ("WCJ"). The "WCJ" handled Laubach's penalty petition as a reinstatement petition and awarded him total disability benefits. In granting the reinstatement of total disability benefits, the WCJ determined that Laubach had met the requisite burden of proof by showing that, at the time of his layoff, he was still working in a modified duty position, had never recovered sufficiently to return to his pre-injury position, and was laid off by the employer for economic reasons. The Workers' Compensation Appeal Board affirmed the WCJ's decision.

On appeal to the commonwealth court, Bethlehem Steel argued that the WCJ erroneously awarded the reinstatement of total disability benefits since there was no proof that Laubach's earning capacity had actually changed or decreased and Bethlehem had laid him off for economic purposes. However, the commonwealth court concurred with both the Board and the WCJ in affirming the prior decisions.

The commonwealth court explained the rule for situations where an employee has returned to work in a light duty capacity but still has work restrictions even though his disability payments are

4. *Id.* Total disability is "[a] worker's inability to substantially perform employment related duties because of physical condition." *Black's Law Dictionary* 191 (Pocket Ed. 1996).

5. *Bethlehem Steel*, 760 A.2d at 380. Partial disability is "[a] worker's inability to perform duties that he or she accomplished before an accident, even though the worker can engage in some gainful activity on the job." *Black's Law Dictionary* 191 (Pocket Ed. 1996).


7. *Id.*

8. *Id.* The WCJ did allow Bethlehem Steel's modification/suspension petition with respect to the six months prior to the layoff. *Id.*

9. *Id.*

10. *Id.*

11. *Bethlehem Steel*, 760 A.2d at 380. Earning capacity is defined as "[o]ne's ability or power to earn money given one's physical or mental capabilities. Also termed earning power." *Black's Law Dictionary* 214 (Pocket Ed. 1996).

In that factual situation, if the employee is later laid off, he then gets the benefit of an automatic presumption that any disability (as shown by a reduction in his earning power) is still directly related to his work injury. To avoid this presumption, an employer would have to do one of two things: (1) the employer could produce evidence that modified duty work within appropriate restrictions had been offered to the employee; or (2) the employer could establish that the employee's disability or lost earnings were no longer causally related to his original work injury. As Bethlehem Steel failed to demonstrate either point, the court found that the WCJ had not erred in ordering the reinstatement of Laubach's total disability.

Bethlehem Steel appealed the commonwealth court's decisions and in doing so, conceded that the automatic presumption of relatedness did arise when they laid Laubach off from his light duty position, but argued that it did not operate to relieve the employee of establishing a causal link between his loss of earning power and his work injury. It further asserted that the employer was entitled to demonstrate that the employee's reduction in earnings was not the result of a loss of actual earning power due to the work injury, but that the decreased earnings arose for other reasons. The Pennsylvania Supreme Court agreed to review the case to examine the burden of proof required of a claimant seeking reinstatement of total disability benefits after being laid off from a modified duty position by his time-of-injury employer.

In an opinion authored by Justice Stephen Zappala, the court found that Laubach was entitled to reinstatement of his total

13. Id.
15. Bethlehem Steel, 760 A.2d at 380. Lost earnings are defined as “[w]ages or salary that could have been earned if death or a disabling injury had not occurred.” Black's Law Dictionary 214 (Pocket Ed. 1996).
16. Bethlehem Steel, 760 A.2d at 380. In the absence of evidence to the contrary, the court found that Laubach had never been given a full duty release to his pre-injury position, was working in a light duty capacity up to the time of the layoff, and therefore, received the benefit of the presumption that his decreased earning power was still directly related to the work injury. Id.
17. Id.
18. Id. Note the distinction that Bethlehem Steel is making between a loss of earning power, or the ability to earn wages, and a mere reduction or decrease in earnings which may be due to other factors. Id.
19. Id.
disability benefits in these circumstances.\textsuperscript{20} The court rejected Bethlehem Steel's contention that because Laubach's physical ability to work light duty had not changed, his earning power had not changed, and a layoff due to economic downturn did not entitle him to reinstatement of his total disability benefits.\textsuperscript{21} Justice Zappala found that Section 413 of the Workers' Compensation Act controlled,\textsuperscript{22} and relied on \textit{Pieper v. Ametek-Thermox Instruments Division}\textsuperscript{23} to establish that the burden of proof differs for claimants seeking reinstatement of benefits.\textsuperscript{24} In \textit{Pieper}, the court articulated that the burden of proof turns on whether the benefit status prior to seeking the reinstatement is one of termination or suspension.\textsuperscript{25}

Using \textit{Pieper} as a guide, Zappala confirmed that following a termination of benefits, a claimant seeking reinstatement has the responsibility of proving that his current disability is still causally related to the original work injury.\textsuperscript{26} In addition, under \textit{Pieper}, the terminated claimant will also have to prove that there has been a change in his physical condition that has either caused his level of disability to increase or brought about a recurrence of his disability.\textsuperscript{27}

In contrast, Justice Zappala notes that for the claimant whose benefits have been merely suspended, \textit{Pieper} articulates a two-prong test: (1) the claimant need only show that he is suffering a continuing disability from his original work injury; and (2) has

\begin{itemize}
\item \textsuperscript{20} \textit{Id.} at 381.
\item \textsuperscript{21} \textit{Bethlehem Steel}, 760 A.2d at 380-81. Bethlehem Steel maintained that as Laubach's reduction in earnings was solely due to the layoff, and not any change in his physical condition, reinstatement of total disability was not warranted. \textit{Id.} at 381.
\item \textsuperscript{22} 77 P.S. § 772.
\item \textsuperscript{23} \textit{Pieper v. Ametek-Thermox Instruments Div.}, 584 A.2d 301 (Pa. 1990).
\item \textsuperscript{24} \textit{Bethlehem Steel}, 760 A.2d at 381.
\item \textsuperscript{25} \textit{Id.}. Termination is when "all disability related to a compensable injury has ceased," and goes "hand in hand with a termination of the liability of the employer." \textit{Pieper}, 584 A.2d at 304. Suspension is when "the earning power of the claimant is no longer affected by his disability, whether it arises from his employer offering a suitable replacement employment, or from the ability of the claimant to secure other suitable employment that provides greater or equal compensation." \textit{Id.}
\item \textsuperscript{26} \textit{Bethlehem Steel}, 760 A.2d at 381.
\item \textsuperscript{27} \textit{Id.}
\end{itemize}
experienced a negative impact on his capacity to earn wages as a result of the work related disability through no fault of his own.28

The rationale for this lower burden of proof is twofold.29 First, in Pieper, the court held that in a suspension scenario, the causal connection between ongoing disability and original work injury is presumed since the original injury was either accepted by the employer or proven in the context of a claim petition.30 Secondly, in a suspension scenario, full recovery does not terminate the employer's ongoing responsibility, rather, the suspension is indicative of the fact that though the disability has not ceased, the claimant's wages have reached the point of being equal to or greater than his pre-injury earnings.31

Viewing the Bethlehem case in light of the principles articulated in Pieper, Justice Zappala noted that the analysis used by the court in Stevens v. W.C.A.B. (Consolidation Coal Company),32 issued just two days earlier, was useful for this case as well.33 In Stevens, the court had analyzed the same issue (claimant's burden of proof for reinstatement) in the slightly different factual scenario where the employee obtained employment within his physical restrictions elsewhere, but was then terminated.34 Although the employer argued that claimant's termination from the new job placed him in the position of having to demonstrate a causal connection between his loss of earnings and his work injury, the court disagreed and held that the two prong test of Pieper sets the standard for resolving this question.35

In addition, the supreme court dismissed the argument that a claimant fails the first prong of Pieper when he is fired from alternate employment because his earnings are then arguably lowered through his own fault.36 The court in Stevens looked to the Pieper test and determined that the claimant satisfied both

28. Id. at 381-82.
29. Id. at 381.
30. Id.
31. Bethlehem Steel, 760 A.2d at 381.
32. 760 A.2d 369 (Pa. 2000).
33. Bethlehem Steel, 760 A.2d at 383.
34. Id. at 382. The claimant had suffered a back injury and had undergone surgery, but as he was never released to his pre-injury position, he pursued additional education and found employment as a private investigator from which he was subsequently fired and he sought reinstatement. Id.
35. Id.
36. Id. In Stevens, there was no finding by the WCJ that claimant had acted in bad faith or deliberately caused himself to be fired. Id.
The fact that the claimant had never been deemed fully recovered, could not return to his pre-injury position, and had demonstrated that his earning power was again reduced through no fault of his own led the court to this decision. The Stevens court went on to indicate that once a claimant satisfies the Pieper test, the employer must demonstrate that employment has been offered within his work restrictions or a reinstatement of total disability benefits is warranted.

Applying this rationale to the case at hand, the court found that Laubach fulfilled the Pieper test since he never made a full recovery, was unable to perform his pre-injury duties, and the layoff from the modified duty position was not attributable to any fault on his part. As Bethlehem Steel made no showing that employment was available within Laubach's restrictions, the court held that Laubach was entitled to reinstatement of total disability.

Justice Nigro filed a concurring opinion, which indicated that the case could be analyzed more appropriately under Kachinski v. W.C.A.B. (Vepco Construction Co.), which set forth a four prong standard that an employer must meet upon returning an injured employee to work. The first requirement is that the employer must prove a change in claimant's medical condition when it desires to modify his benefits on the theory that he has some work abilities. Second, the burden is on the employer to establish a referral to an available job within the claimant's current restrictions. Third, the burden then shifts to the claimant to prove that he has made a good faith effort to follow up on the referral. Lastly, in the event the claimant does not obtain a job from the referral, he continues to be eligible for benefits.

In applying these Kachinski criteria to the case at hand, Justice Nigro noted that Bethlehem Steel failed to satisfy the second prong, that the employer has the burden to establish that work is available within claimant's restrictions, after they withdrew the modified

37. Id. at 382-83.
38. Bethlehem Steel, 760 A.2d at 382-83.
39. Id. at 383.
40. Id.
41. Id.
42. 532 A.2d 374 (Pa. 1987).
43. Bethlehem Steel, 760 A.2d at 383 (Nigro, J., concurring).
44. Id. (Nigro, J., concurring).
45. Id. (Nigro, J., concurring).
46. Id. (Nigro, J., concurring).
47. Id. (Nigro, J., concurring).
duty position and laid Laubach off. Once Bethlehem Steel could no longer demonstrate actual job availability within Laubach's restrictions, because of the layoff, Laubach is then entitled to reinstatement of his total disability benefits. Justice Nigro stated that although the analysis used in the majority opinion is very similar, and reaches the same result, as his Kachinski evaluation, Kachinski is the better guideline for such problems given the myriad of possible factual scenarios. Justice Saylor, with Justices Cappy and Castille joining, concurred in the result and affirmed the reasoning used in the Stevens decision.

Workers' Compensation Judge David B. Torrey noted that while it is true that the claimant will always bear the burden of proof in a reinstatement petition, his burden hinges on disability determination, which as Torrey has observed, "is governed purely by decisional law" in Pennsylvania. Over time, the case law has inseparably intertwined this disability determination with the concept of the availability of work doctrine. This is due in large part to the fact that Pennsylvania is a "wage loss" state, which means that an employee who sustains an injury at work is considered totally disabled as long as he cannot return to his pre-injury job. The employee is entitled to total disability payments during this period. However, an employer can reduce its liability by establishing that there is work available within the injured worker's capabilities, and then the claimant is considered to be "partially disabled." If a partially disabled employee returns to work, but has a loss of earning power, he is entitled to payment of compensation benefits in the form of a differential. If, however, the partially disabled employee returns to work with no loss of

48. Bethlehem Steel, 760 A.2d at 383 (Nigro, J., concurring). Justice Nigro notes that prior to the layoff, Bethlehem Steel had in fact satisfied prong one and prong two by offering modified duty, and Laubach had satisfied prong three by working the modified duty job. Id. at 383-84 (Nigro, J., concurring).
49. Id. at 384 (Nigro, J., concurring).
50. Id. at 384 (Nigro, J., concurring).
51. Id. (Saylor, J., concurring).
52. TORREY & GREENBERG, supra note 14, §11:114 at 11-115, §5:49 at 5-56.
54. TORREY & GREENBERG, supra note 14, §5:2 at 5-11.
55. Id. §5:49 at 5-55.
56. Id. at 5-56.
57. Id. §5:25 at 5-42. A differential, also known as partial disability, is "sixty-six and two thirds percent of the difference between the wages of the injured employee at the time of his injury and the earning power of the employee thereafter." Id. §5:30 at 5-45.
earning power, his compensation benefits will be suspended. It is from this process that the case law has developed and the concepts of partial disability and job availability have become firmly enmeshed.

In the very early cases, the holdings required only that the employer show some kind of improvement in the totally disabled worker’s medical condition to entitle the employer to change the worker’s benefits to partial disability. In *Consona v. Coulborn & Co., (Royal Indemnity Co.)*, the superior court addressed the issue of whether an employer must show proof of job availability when a claimant is capable of light duty work. The court held that it would presume that light work was available if the employer proved that a claimant could do light work. However, under the facts of the case, the court found that a steelworker who had suffered a head injury and could only do light work at “irregular intervals” was entitled to total disability in the absence of an offer of suitable work from the employer. The court pointed out that, “[i]t is a matter of common knowledge that there is a general disinclination on the part of employers to give work to cripples.” Nevertheless, the court placed the burden squarely on the claimant if he was capable of light work, as it was then automatically presumed that light work was available.

In *Unora v. Glen Alden Coal Co.*, the Pennsylvania Supreme Court affirmed the doctrine of *Consona*, which agreed that the availability of light duty work was presumed, but also added the new caveat that the court should factor the claimant’s vocational background into the question. The employer still had no burden to show the availability of a specific job if the court deemed the employee only partially disabled. However, the court directed that factors, including the worker’s mental health, work background, and education level, were to be weighed when determining whether an injured worker was totally or partially disabled. In the event that it was shown that an injured worker could “handle only a

58. Id. §5:25 at 5-42.
59. TORREY & GREENBERG, supra note 14, §5:50 at 5-57.
61. Consona, 158 A. at 300.
62. Id.
63. Id.
64. Id.
66. Unora, 104 A.2d at 107.
67. Id.
specially-created job, one light of effort and responsibility but laden with rest and comfort (employment plums that do not often dangle from the tree of everyday economics), the burden is on the defendant-employer to show that such a job is in fact within reach.\textsuperscript{68} Even with the burden of this additional criteria, Torrey pointed out that the employer's threshold was rather low as "the requirements of \textit{Unora} were usually deemed satisfied by the physician's opinion that the claimant was, for example, capable physically and vocationally of working at a job such as an elevator operator."\textsuperscript{69}

In 1967, the landmark case of \textit{Petrone v. Moffat Coal Company} radically changed the rule previously articulated in \textit{Consona} and \textit{Unora}.\textsuperscript{70} In articulating the new law, the supreme court placed the burden of proof on the employer to demonstrate work availability for an otherwise partially disabled employee.\textsuperscript{71} In \textit{Petrone}, a coal miner who developed anthracosilicosis was found capable of light duty work as an elevator operator or power lawn mower, and thus the court deemed him not totally disabled.\textsuperscript{72} In overturning this finding, Justice Musmanno found that the logic and rationale of the prior practice, of presuming light duty work was available if the claimant had some work capabilities, was not consonant with the interpretation of the meaning of "disability" under the Act as previously articulated in \textit{Unora}.\textsuperscript{73} In \textit{Petrone}, Musmanno announced the revolutionary new rule that the employer must demonstrate that actual modified work was available, in addition to a showing that the injured worker was capable of a modified duty capacity.\textsuperscript{74} His theory placed the burden on the employer because, "[i]f light work is available, it is easier for defendant to prove its existence than for claimant to prove its nonexistence."\textsuperscript{75}

Following quickly upon the heels of \textit{Petrone}, in 1968, the Pennsylvania Supreme Court decided \textit{Barrett v. Otis Elevator Company}, which confirmed that an employer had the burden to

\textsuperscript{68}. \textit{Id.}

\textsuperscript{69}. \textsc{Torrey & Greenberg, supra} note 14, \S 5.50 at 5-59.


\textsuperscript{71}. \textit{Petrone}, 233 A.2d at 894.

\textsuperscript{72}. \textit{Id.} at 892. Anthracosilicosis is, "a form of pneumoconiosis in which carbon and silica deposits accumulate in the lungs due to breathing coal dust." \textsc{Taber's Cyclopedic Medical Dictionary} 110 (16th Ed. 1989).

\textsuperscript{73}. \textit{Petrone}, 233 A.2d at 893-94. Justice Musmanno pointed out that in \textit{Unora}, the court held that "the word disability is to be equated with loss of earning power." \textit{Id.} at 893.

\textsuperscript{74}. \textit{Id.} at 894-95.

\textsuperscript{75}. \textit{Id.} at 895.
prove job availability in all contexts, including claim petitions. The court relied on *Petrone* in holding that once an injured worker demonstrated that he cannot perform his time-of-injury job, the burden of proof then shifts to the employer to establish that alternate work within his physical abilities is available to the claimant. The holding of *Barrett* established this as the rule, regardless of whether the employer was seeking to modify the injured worker's benefits or the injured worker was attempting to obtain benefits via a claim petition.

The first major case to deal with the question of partial disability and job availability in a reinstatement petition context was *Busche v. W.C.A.B. (Townsend and Bottum, Inc.)*. In *Busche*, a plumber underwent coronary bypass surgery after he sustained a work-related heart attack and returned to work with his employer in a specially-made, light duty position that paid him his pre-injury wages, thereby suspending his compensation benefits. Eventually, the employer eliminated the light duty position and offered the injured worker full duty employment as a plumber. The court relied on the language of *Unora*, regarding “specially made jobs,” and the holdings in *Petrone* and *Barrett* to establish a new rule for reinstatement proceedings. Under the new rule, if the injured worker could show that but for his “specially created job” he would have remained totally disabled, then the only burden of proof he had in a reinstatement action was a showing that the “specially created job” had been discontinued. By way of clarification, the court stated, “under section 413 of the Act, 77 P.S. § 772, Claimant simply must show that, while his disability has continued, his loss of earnings has recurcd.” As the employer failed to offer other work within the claimant’s restrictions, claimant was entitled to reinstatement of total disability benefits.

The Commonwealth court had occasion in 1988 to again address

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77. Barrett, 246 A.2d at 673-74.
78. Id.
80. Busche, 466 A.2d at 278-80. Claimant’s sole occupation had always been as a plumber, he was 58 years old, and had not performed actual plumbing work since his return to modified duty work. Id. at 279.
81. Id. at 279.
82. Id. at 280.
83. Id. at 281.
84. Id.
85. Busche, 466 A.2d at 280.
the issue of an employer's burden of proof for job availability in the reinstatement context in the case of *Fells v. W.C.A.B. (Caterpillar Tractor)*.86 *Fells* was remarkable in that it held that an employee whose benefits were suspended when he returned to his pre-injury job was entitled to reinstatement of total disability when laid off due to economic reasons.87 The court found that the claimant's testimony and medical documentation confirmed that he had continuing back problems, that it was "undisputed that Claimant was laid off from his pre-injury job due to economic problems," and that the employer had not offered other employment to him.88 Invoking *Busche*, the court held that "when a claimant seeks to have his or her suspension lifted, that claimant is required only to demonstrate that the reasons for the suspension no longer exist."89 The employer's argument that the employee had returned to his pre-injury job, and that this relieved it of having to show job availability, was rejected.90 The court went on to say that there was no "viable distinction" between a claimant who had returned to his pre-injury job with a suspension of his benefits and a claimant who had returned to a modified duty job with a similar suspension of his benefits.91 The rationale advanced by the court was that when a claimant is under a suspension, for whatever reason, the employer is effectively acknowledging that his disability continues.92 Thus, the court held that "a presumptive partial disability exists whenever there is an agreement or an order to suspend compensation."93

In *Pieper v. Ametek-Thermox Instruments Division*, the Pennsylvania Supreme Court first reviewed the issue of the burden of proof required for a claimant seeking reinstatement after a layoff and articulated a new test in the process.94 In *Pieper*, the claimant sustained a low back injury and underwent surgery, but was eventually able to resume full-time work with the employer.95

87. *Fells*, 552 A.2d at 335-36. Claimant was a tow truck operator who sustained a low back injury and received benefits, but was then able return to work at his pre-injury position. *Id.*
88. *Id.* at 335.
89. *Id.*
90. *Id.*
91. *Id.* at 335-336.
92. *Fells*, 552 A.2d at 336. The court pointed out that the way the employer could avoid acknowledging any ongoing disability was to prevail in a termination proceeding, which would prove all disability had ceased. *Id.*
93. *Id.*
94. *Pieper*, 584 A.2d at 301.
95. *Id.* at 302. Claimant did agree to a termination at one point, by signing a final
However, just two days after resumption of full-time work, he was laid off and consequently petitioned for reinstatement of his benefits.\(^9_6\) The WCJ granted reinstatement of Pieper's benefits, and the Workers' Compensation Appeal Board affirmed the order.\(^9_7\) Ametek appealed to the commonwealth court, alleging that the claimant failed to prove that his condition had deteriorated and had not demonstrated a causal connection between his work injury and his loss of earnings.\(^9_8\) The commonwealth court reversed.\(^9_9\)

Justice Cappy, in resolving the issue, observed that the burden of proof was different for a claimant seeking reinstatement after a termination of benefits versus a claimant seeking reinstatement after a suspension of benefits, and outlined the differences in detail.\(^10_0\) He pointed out that a termination of benefits, by its very nature, operates to relieve the employer of any ongoing liability for the injury.\(^10_1\) If a claimant seeks reinstatement after a termination, he will then bear the burden of proving a direct connection between his previous work injury and his current condition in order to be eligible for reinstatement of his benefits.\(^10_2\) In addition, the claimant under a termination must also prove that his level of disability has increased or recurred and his physical condition has somehow worsened.\(^10_3\)

On the other hand, Justice Cappy noted that for the claimant in a suspension scenario, the court presumes a causal connection between the work injury and the ongoing disability.\(^10_4\) This connection is to be presumed for two reasons: (1) the employer has either willingly accepted the original injury or the employee has sufficiently established it by prevailing on a claim petition,\(^10_5\)

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\(^9_6\) \(\text{Id. at 302-303.}\)
\(^9_7\) \(\text{Id. at 303.}\)
\(^9_8\) \(\text{Id.}\)
\(^9_9\) \(\text{Pieper, 584 A.2d at 303.}\)
\(^10_0\) \(\text{Id. at 303-04.}\)
\(^10_1\) \(\text{Id. at 304. Justice Cappy states "A termination of benefits is supported by a finding that all disability related to the compensable injury has ceased." Id.}\)
\(^10_2\) \(\text{Id.}\)
\(^10_3\) \(\text{Id.}\)
\(^10_4\) \(\text{Pieper, 584 A.2d at 305. Justice Cappy indicated "[a] suspension of benefits is supported by a finding that the earning power of the claimant is no longer affected by his disability, whether it arises from his employer offering suitable replacement employment of from the ability of the claimant to secure other suitable employment that provides equal or greater compensation." Id. at 304.}\)
\(^10_5\) \(\text{Id.}\)
and (2) the employer's liability has not been relieved or terminated, as there is no finding that the claimant has made a full recovery. Without a full recovery, the disability persists, and so does the liability of the employer.

After confirming that the claimant who is suspended enjoys the automatic presumption of a causal connection, Justice Cappy then ratified the rule of Busche, which states that the claimant need only establish “that his disability has continued, and his loss of earnings has recurred.” However, Justice Cappy also articulated a two-prong test that the claimant must satisfy. Under the test, the claimant must first demonstrate that he is suffering from a decreased earning power because of his disability, through no fault of his own. The claimant must then satisfy the second prong of the test, which mandates he show that the disability, which resulted from his original work injury, has continued over time.

Applying this test to the facts of the case, the court first determined that Pieper’s benefits had only ever been on suspension and the court then implemented the two-part test to Pieper’s case. As to the first prong, it was not disputed that Pieper had been laid off and he was deemed to have proven his earning power was adversely affected. With regard to the second prong, the court found that the medical evidence did establish that Pieper’s disability had been of a continuing nature. With both parts of the test thus satisfied, the court held that Pieper was entitled to reinstatement of his benefits “in the absence of any evidence that other employment was available to him.”

The supreme court recently examined a slightly different nuance

106. Id. Justice Cappy points out that “[t]he 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.” Id.
107. Id.
108. Id. at 306.
109. Pieper, 584 A.2d at 305. The two-prong test is needed because many month or years may have gone by before a claimant finds that his economic position has changed and he applies for reinstatement. Id.
110. Id. at 305.
111. Id. This is not the same as re-proving causal connection, but “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.” Id.
112. Id. at 306. The court found that “the record evidence fails to establish a ‘termination’ of the liability of Ametek.” Id.
113. Id. at 308.
114. Pieper, 584 A.2d at 308.
115. Id.
of the reinstatement scenario in Stevens v. W.C.A.B (Consolidation Coal). In Stevens, the claimant had never achieved a full recovery from the work injury and was terminated from his job with a different employer “based on unsatisfactory job performance.” The employer argued that the claimant was not entitled to reinstatement in this situation since he failed to carry the burden of proof that he sustained a loss of earnings due to his work injury. The employer argued that because Stevens had been fired, he did not meet the criteria of Pieper, which holds that the renewed loss of earnings must be “through no fault of his own.” Justice Zappala rejected this argument and held that in the two-prong test of Pieper, “the fault concept was tied to the availability of work.” In fact, Justice Zappala specifically found that Stevens did satisfy the Pieper test since he had made a good-faith effort to perform the new job and his disability from the original work injury was ongoing and prevented him from returning to his pre-injury job. As Stevens passed the test of Pieper, it was then incumbent upon the employer to show evidence of available employment, and lacking such evidence, “the reinstatement of benefits was proper.”

In Bethlehem Steel, Justice Zappala has once again ratified the rule enunciated in Pieper and confirmed its status as the current law with respect to a claimant’s burden of proof when seeking reinstatement after being laid off from a modified duty position. The case affirms that Pennsylvania case law has appropriately intertwined the concepts of partial disability and the doctrine of job availability, and confirmed that those concepts are so interdependent that a court cannot separate them when looking at the question of what should happen when an employee working modified duty is subsequently laid off.

The progressive elevation of the employer’s burden to show that light duty work is available when it attempts to modify or suspend an injured worker’s benefits has been slow but steady. In the earliest days of Consona, when all that the employer had to show was that the worker had made some minimal improvement in his medical condition, it was inequitable to assume that light duty

117. Stevens, 760 A.2d at 372-73.
118. Id. at 374. Their rationale was that in this instance, the loss of earnings was not attributable to his work injury. Id.
119. Id.
120. Id. at 371.
121. Id. at 377.
work was realistically there for the taking.\textsuperscript{122} Even the caveat of \textit{Unora}, which required the factoring of an injured employee's vocational background into the assessment of whether light duty work was truly available, did not alleviate the glaring slant of the law running in favor of the employer to the general detriment of the injured worker.\textsuperscript{123} In the late 1960's, the Pennsylvania Supreme Court took an appropriate step toward leveling the playing field. In \textit{Petrone}, the court began to shift the balance by discarding the assumption that light duty work was available and making the employer prove that it actually existed.\textsuperscript{124}

This decisional law eventually benefited injured employees who, although not fully recovered, returned to work in light duty positions and had their benefits suspended, only to find themselves having to litigate to obtain benefits if the employer later laid them off. The holdings of \textit{Busche} and \textit{Fells} turned the tables 180 degrees and established that the employee who returns to modified duty work is entitled to the presumption that his disability continued, even if his loss of earnings did not.\textsuperscript{125} This concept is entirely in keeping with the reality that faces an injured worker who is doing light duty work with no loss of earnings, but has not yet achieved a full duty release. The current caselaw places the employee in a more tenable position and lightens his burden of proof for reinstatement in the event his employer chooses to stop making the light duty work available and lay him off prior to his full recovery from the work injury.

The decision in \textit{Pieper} clearly and rationally explained why the burden of proof differs for the worker who is terminated versus the worker whose benefits were suspended when he returned to modified duty.\textsuperscript{126} The two-prong test, which Justice Cappy articulated in \textit{Pieper}, has sharpened and clarified the burdens on both sides of the fence.\textsuperscript{127} By maintaining the presumption that a worker in modified duty has some ongoing level of disability, the court has made it easier for that worker to get reinstatement of benefits after a layoff, by requiring him only to demonstrate his loss of earnings has recurred through no fault of his own.\textsuperscript{128}

\begin{itemize}
\item \textsuperscript{122} \textit{Consona}, 158 A. at 300.
\item \textsuperscript{123} \textit{Unora}, 105 A.2d at 104.
\item \textsuperscript{124} \textit{Petrone}, 233 A.2d at 891.
\item \textsuperscript{125} \textit{Busche}, 466 A.2d at 278; \textit{Fells}, 552 A.2d at 334.
\item \textsuperscript{126} \textit{Pieper}, 584 A.2d at 301.
\item \textsuperscript{127} \textit{Id}.
\item \textsuperscript{128} \textit{Id}.
\end{itemize}
flipside, the employer still has an opportunity to cut its losses by offering other modified duty work to the injured employee, and can avoid reinstating benefits if they establish the light duty job availability. This is eminently fair since the employer still has the ability to control their workers' compensation costs by providing other work within an injured worker's capabilities, and yet it discourages employers from engineering abusive or retaliatory layoffs of people who are working light duty.

The ratification of the rule of Pieper in the Bethlehem Steel decision is entirely in consonance with safeguarding and providing benefits for injured employees, while still affording employers an opportunity to mitigate their workers' compensation losses. Bethlehem Steel confirms a logical evolution of the law that fairly weighs the considerations and needs of both employees and employers. Furthermore, it provides workable guidelines and lucid criteria for the Workers' Compensation Judge who is charged with resolving the question of what happens to an injured employee on light duty in the aftermath of a company layoff.

Anita A. Reno

129. Id.