**[J-67-2025]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

**TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, McCAFFERY, JJ.**

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| GEORGE B. THOMAS, | : | No. 65 EAP 2024 |
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| Appellant | : | Appeal from the Order of the |
| | : | Commonwealth Court at No. 1414 |
| | : | CD 2021 entered on April 26, 2024, |
| v. | : | affirming the Decision of the |
| | : | Workers' Compensation Appeal |
| | : | Board at No. A21-0157 entered on |
| SYSCO FOODS (WORKERS' COMPENSATION APPEAL BOARD), | : | November 22, 2021. |
| | : | |
| | : | ARGUED: November 20, 2025 |
| Appellee | : | |

**OPINION**

**JUSTICE MUNDY** **DECIDED: November 17, 2026**

Under the Workers' Compensation Act ("WCA"),[1] an employer who wishes to modify, reinstate, suspend, or terminate the benefits actively being paid to a partially disabled claimant must establish, *inter alia*, the claimant's earning power as defined by Section 306(b)(2). *See Phoenixville Hosp. v. WCAB (Shoap)*, 81 A.3d 830, 841 (Pa. 2013). This section defines earning power as "the work the employe is capable of performing[,]" and authorizes an employer to establish earning power only by hiring a vocational expert to conduct a labor market survey—often called an earning power assessment—detailing jobs in the general labor market that the expert believes the claimant could perform. *See* 77 P.S. § 512(2). Pertinently, in the sentence immediately preceding this authorization, Section 306(b)(2) contains the mandate ("Mandate") that "[i]f

[1] Act of June 2, 1915, P.L. 736, No. 338, *as amended*, 77 P.S. §§ 1-1041.4; 2501-2625.

the employer has a specific job vacancy the employe is capable of performing, the employer shall offer such job to the employe." *Id.* As the WCA is silent as to how this Mandate is intended to be enforced, we granted allowance of appeal to determine the appropriate burden of proof; namely, whether an employer must affirmatively prove compliance with this Mandate by demonstrating that there is no job available in its employ before being able to establish earning power under Section 306(b)(2), or whether a claimant must raise the employer's noncompliance as a defense to a rebuttable presumption, with *prima facie* evidence of an opening at the employer. We also agreed to review a line of Commonwealth Court precedent, beginning with *Rosenberg v. WCAB (Pike Cnty.)*, 942 A.2d 245, 251 (Pa. Cmwlth. 2008), which held the claimant carries the initial burden.

## I. Background

On July 1, 2016, George Thomas ("Claimant"), while acting within the course and scope of his employment as a union forklift operator for Sysco Foods ("Employer"), suffered an injury necessitating the amputation of his lower left leg. *See* Workers' Compensation Judge ("WCJ") Op., 9/17/18, at 3 (adopting Stipulation of Facts, 9/7/18, at 1, ¶ 1). Employer assumed liability for this partial disability, then-classified as a left leg contusion, through the issuance of a Notice of Compensation Payable, establishing an average weekly wage of $1,052.35 and a corresponding weekly compensation rate of $701.60. *See id*. The parties subsequently agreed to reclassify the injury as a lower left leg amputation with a resulting adjustment disorder consisting of anxiety and depressed mood elements. *See id.* (adopting Stipulation of Facts, 9/7/18, at 2, ¶ 8). This change increased Claimant's weekly compensation rate to $978.00 based on a new average weekly wage of $1,483.85.[2] *See id.* (adopting Stipulation of Facts, 9/7/18, at 2, ¶ 7).

[2] There appears to be some uncertainty amongst the lower tribunals regarding the (continued…)

On March 7, 2019, Employer filed a petition for modification ("Petition") with the Workers' Compensation Office of Adjudication, claiming there was work generally available in the labor market that would provide Claimant with an earning power of $660.00 a week, which would reduce Claimant's weekly benefits to $549.18 a week.[3] *See* Petition, 3/7/19, at 1. In support thereof, Employer attached a labor market survey created by vocational expert John Dieckman, who conducted a functional capacity evaluation of Claimant and identified several jobs he believed Claimant could perform. *See* Vocational Assessment and Earning Capacity Evaluation, 12/28/18, at 10-22. Of particular relevance, Dieckman observed that "according to the functional capacity evaluation, [Claimant's] physical capabilities (medium) do not match [] [E]mployer's job demands (heavy). I confirmed with [] [E]mployer through Kathleen Easley that [Employer is] not able to offer employment to [Claimant] within his physical restrictions." *Id.* at 9.

Claimant answered the Petition by simply denying its allegations and demanding "strict proof [] at time of trial." *See* Answer to Petition, 4/1/19, at 1. The matter proceeded to discovery, at which time several depositions were held concerning whether Claimant was able to return to any employment. *See* WCJ Op., 2/8/21, at 4-10 (detailing the various depositions and reports entered into evidence). Importantly, when Claimant's counsel cross-examined Dieckman about possible employment at Employer, Dieckman confirmed he had based his recommendation upon his conversation with Easley, but was

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stipulated weekly wage. These rates, however, are not relevant to the present discussion and thus, further consideration of the same is unnecessary at this juncture.

[3] Under Section 413 of the WCA, 77 P.S. § 772, a WCJ may, *inter alia*, modify a notice of compensation payable "upon petition filed by either party with the department, upon proof that the disability of an injured employe has increased, decreased, recurred, or has temporarily or finally ceased[.]" This Court has explained that a disability "is understood under the [WCA] as 'the loss of earning power' caused by the work injury[;]" thus, a claim that an employee has more earning power than originally adjudicated is properly brought under a modification petition. *See Shoap*, *supra*.

unable to recall what position Easley held at Employer, or which subdivision of Employer, a multi-billion-dollar, multinational corporation, she worked for. *See* Dieckman Dep., 7/24/19, at 50-51. Dieckman vaguely believed she was part of a human resources department, but was unable to recall which position or subdivision thereof. *See id.*

On February 8, 2021, WCJ Nancy Farese denied the Petition. *See* WCJ Op., 2/8/21, at 18. Although WCJ Farese determined Claimant was able to work by finding Employer's experts credible and Claimant and his experts not credible, *see id.* at 11-12, she nonetheless concluded that "Dieckman's testimony that there were no light duty jobs available at [] [E]mployer is not supported by any testimony from [] [E]mployer; [] Dieckman identified an individual[,] Kathleen Easley[,] but was unsure as to which entity she had been employed." *Id.* at 15. WCJ Farese thus denied the Petition, reasoning that "Employer failed to offer credible evidence" necessary to "meet its burden in proving there were no light duty jobs available at the time of injury[.]" *Id.* at 16. *See also id.* at 17.

Employer appealed, claiming, *inter alia*, that "[t]he WCJ committed an error of law in denying the [] Petition," when finding "that Employer failed to offer credible evidence that there were no light duty jobs available for [] Claimant at [Employer]." *See* Employer's On-line Appeal and Proof of Service, 2/25/21, at 5 (unpaginated). Claimant cross-appealed, opposing Employer's credibility allegations and making a variety of other challenges which are not relevant to the present appeal. *See* Claimant's On-line Appeal and Proof of Service, 3/9/21, at 5 (unpaginated).

The Workers' Compensation Appeal Board ("WCAB") reversed in a unanimous opinion. *See* WCAB Op., 11/22/21, at 1. Relevant to our discussion *infra*, the WCAB concluded that it did not matter whether Employer had produced credible evidence, as Employer contested in its appeal, because as a matter of law, Employer was not obligated to present any evidence demonstrating the nonexistence of an available job at Employer

before relying on a labor market survey. *Id.* at 10. Relying entirely on Commonwealth Court precedent, including *Rosenberg*, *supra*, the WCAB opined that, although "[t]he [WCA] and its regulations require an employer to offer a suitable position before obtaining an earning power assessment, if one exists[,]" an employer's duty to demonstrate that no job is available is only triggered "once the issue is raised by [Claimant with] evidence of a possible opening with employer." *Id.* at 10. Thus, because Claimant did not explicitly raise this issue at any point in the proceedings below, the WCAB concluded that he failed to make a *prima facie* showing that would trigger Employer's obligation to show there was no job available. *Id.* at 11. Accordingly, and upon finding that Employer otherwise met the requirements for a successful modification petition, the WCAB reversed the denial of the Petition. *Id.* at 11-13.

Claimant timely appealed, alleging that the plain language of the Mandate and its related regulations require an employer to prove it has no available jobs before relying on a labor market survey. *See* Claimant's Cmwlth. Ct. Brief at 20-24.

A panel of the Commonwealth Court affirmed in a unanimous, unpublished memorandum. *See Thomas v. Sysco Foods (WCAB)*, 1414 C.D. 2021, 2024 WL 1827301 (Pa. Cmwlth. 2024) (unpublished memorandum). Significantly, the panel relied entirely on *Rosenberg* and its progeny, including *Reichert v. WCAB (Dollar Tree Stores)*, 80 A.3d 824 (Pa. Cmwlth. 2013), to conclude that Claimant was required to present *prima facie* evidence of an available position at Employer before Employer was obligated to provide evidence in opposition thereto. *Id.* at *7-10. As the panel explained: "[t]he [WCA] and applicable regulations are silent as to [] the burden of proof . . . [w]e resolved that issue in *Rosenberg.*" *Id.* at *8. Claimant timely appealed.

## II. Issue and Standard of Review

This Court granted allocatur to consider the following question, as posed by Claimant:

> Where the injured worker was a long[-]term member of a union with significant seniority subject to a collective bargaining agreement, should this Court limit [*Rosenberg*], revising the lower court's policy of shifting a burden that statutorily resides with the employer to prove all of the elements of a modification petition onto the disadvantaged injured worker to establish the existence of job vacancies within the employer's workforce he or she would have to discover and prove vocationally qualified, contrary to the mandatory language of Section 306(b)(2) of the [WCA]?

*See Thomas v. Sysco Foods (WCAB)*, 328 A.3d 1004 (Pa. 2024) (*per curiam*).

Generally speaking, "agency-level decisions—such as those of the WCJ and WCAB here—are to be affirmed on appeal so long as the essential findings are supported by substantial evidence and there has been no constitutional violation, procedural irregularity, or error of law." *IA Const. Corp. v. WCAB (Rhodes)*, 139 A.3d 154, 158 (Pa. 2016). Here, however, we granted review to address a pure question of law. Thus, our scope of review is plenary, and standard of review is *de novo*. *See Schmidt v. Schmidt, Kirfides and Rassias, P.C.*, 333 A.3d 310, 318 (Pa. 2025).

## III. Discussion

### A. Section 306(b)(2)

We begin with the language of Section 306(b)(2), which reads as follows:

> "Earning power" shall be determined by the work the employe is capable of performing and shall be based upon expert opinion evidence which includes job listings with agencies of the department, private job placement agencies and advertisements in the usual employment area. Disability partial in character shall apply if the employe is able to perform his previous work or can, considering the employe's residual productive skill, education, age and work experience, engage in any other kind of substantial gainful employment which exists in the usual employment area in which the employe lives within this Commonwealth. If the employe does not live in this Commonwealth, then the usual employment area where the injury occurred shall apply. **If the employer has a specific job vacancy the**

> **employe is capable of performing, the employer shall offer such job to the employe**. In order to accurately assess the earning power of the employe, the insurer may require the employe to submit to an interview by a vocational expert who is selected by the insurer and who meets the minimum qualifications established by the department through regulation. The vocational expert shall comply with the Code of Professional Ethics for Rehabilitation Counselors pertaining to the conduct of expert witnesses.

77 P.S. § 512(2) (emphasis added). As the above language demonstrates and the lower courts accurately observed, there is no indication as to how this Mandate should be policed; in other words, the statute is silent as to whether the claimant must preemptively allege job availability as a defense to any petition relying on a labor market survey to establish earning power, or whether proof of compliance is within the ambit of the employer's burden of proof when proving earning power. *See, e.g.*, *Rosenberg*, 942 A.2d at 251 (observing Section 306(b)(2) is silent as to the proper burden of proof for the Mandate).

**B. Parties' Arguments**

For his part, Claimant alleges that compliance with the Mandate should be an affirmative burden on an employer every time it attempts to prove earning power. *See* Claimant's Brief at 22-30. According to Claimant, "[t]he statute and regulations are explicit and unambiguous. The employer 'shall' offer an open and available qualified job to the injured worker, a pre-condition to filing a petition for modification, and establish it did not have an opening during the relevant period." *See id.* at 30. Accordingly, Claimant insists that the statute itself is unambiguous, and thus, this Court can look to the plain language of the statute, as its use of the word "shall" in this context provides a clear requirement that the employer must prove the nonexistence of an available job before relying on a market survey. At the same time, Claimant requests this Court look beyond the plain language of the statute, and review it with deference to the Department of Labor and

Industry's interpretation of its own regulation, 34 Pa. Code § 123.301(c),[4] which places this burden on the employer. *See id.* at 22-30.[5]

In the alternative, if this Court were to find Section 306(b)(2) ambiguous, Claimant urges this Court to utilize its "good faith" logic, as originally expressed in *Kachinski v. WCAB (Vepco Const. Co.)*, 532 A.2d 374, 380 (Pa. 1987), *abrogated in part by* Act of June 24, 1996, P.L. 350, No. 57 ("Act 57"), *as amended*, 77 P.S. § 512.[6] According to

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[4] The regulation sets forth, in relevant part, that

> (c) The employer's duty under subsections (a) and (b) [to offer an available job to the claimant] may be satisfied if the employer demonstrates facts which may include the following:
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> (1) The employee was notified of a job vacancy and failed to respond.
>
> (2) A specific job vacancy was offered to the employee, which the employee refused.
>
> (3) The employer offered a modified job to the employee, which the employee refused.
>
> **(4) No job vacancy exists within the usual employment area.**

34 Pa. Code § 123.301(c) (emphasis added).

[5] Claimant's contention that an agency regulation would assist this Court in concluding the statute is unambiguous is misguided. A statute is only unambiguous if the plain language of the statute resolves the dispute; all other considerations, including department regulations, are only relevant in an ambiguity analysis. *See Woodford v. Ins. Dep't*, 243 A.3d 60, 73 (Pa. 2020) ("When the text of the statute is ambiguous, then — and only then — do we advance beyond its plain language and look to other considerations to discern the General Assembly's intent.").

[6] Following our decision in *Kachinski*, which established a four-part test for determining the success of modification petitions, the General Assembly enacted Act 57, which, *inter alia*, replaced the *Kachinski* test with the modern earning power procedure of Section 306(b)(2). *See Riddle v. WCAB (Allegheny City Elec., Inc.)*, 981 A.2d 1288, 1292-93 (Pa. 2009) (detailing the Act 57 amendments to Section 306(b)(2)). Although some debate exists as to whether these amendments should be interpreted in favor of the employer as cost-containment measures rather than in favor of the worker per the WCA's humanitarian purpose, *see, e.g.*, *Shoap.*, 81 A.3d at 849-50 (Saylor, J., dissenting), such concern is not present here, as the language of the at-issue Mandate has remained unchanged since its inclusion in the original version of the WCA passed in 1915.

Claimant, *Kachinski* states that the employer must make a "good faith" effort to return the claimant to gainful employment, and the failure to do so precludes the employer from prevailing on any attempt to reduce benefits. *See* Claimant's Brief at 31-37. Along these lines, Claimant believes this Court should use this logic to determine that an employer's refusal to demonstrate the unavailability of jobs at the employer means it is not acting in good faith, and thus, should not be allowed to prevail on a modification petition. *See id.* In Claimant's view,

> the employers and insurance companies are using the vocationalist as a means to avoid the implementation of Section 306(b)(2) and 34 Pa. Code § 123.301(b), for cost avoidance and convenient disposal of injured workers, instead of a "good faith" effort to return the injured worker to gainful employment, primarily with the time-of-injury employer and secondarily within the general workforce. Returning to a "good faith" requirement serves the [WCA]'s legitimate goals and its remedial purpose.

*Id.* at 37 (citing *Hannaberry HVAC v. WCAB (Snyder, Jr.)*, 834 A.2d 524, 528 (Pa. 2003)).

In setting forth this argument, Claimant does not address the extent to which our holding in *Kachinski* was abrogated by Act 57. *See id.* Instead, Claimant simply insists that his interpretation is consistent with Act 57 and the WCA generally, as his view has the "humanitarian aim[]" of making an employer "help its injured workers to return to work, initially within its own workforce." *Id.* at 37. Thus, according to Claimant, a good faith effort of the employer to help a claimant return to work necessarily involves stating that there is no job available within the employer; the failure to do so means the employer is acting in bad faith and should not succeed on a petition for modification or termination. *See generally id.* at 31-37.

Finally, Claimant emphasizes the existing burden-shifting framework is untenable because of an apparent conflict between two Commonwealth Court decisions, *S. Hills Health Sys. v. WCAB (Kiefer)*, 806 A.2d 962 (Pa. Cmwlth. 2002), as followed by *Valenta v. WCAB (Abington Manor Nursing Home & Rehab & Liberty Ins. Co.*), 176 A.3d 374 (Pa. Cmwlth. 2017), and *Rosenberg*, as followed by *Reichert*. *See* Claimant's Brief at 38-44.

Although Claimant's precise argument on this point is unclear, he appears to argue that the latter precedent diverges from the proper understanding of Section 306(b)(2) because of 34 Pa. Code § 123.301(c). *See supra* at 8 n.4; *see also* Claimant's Brief at 44-46. Consequently, Claimant asks this Court "to clarify the boundaries of the burdens of proof in a modification petition based upon a labor market survey," *id.* at 45, by placing a unilateral burden on employers to prove job unavailability. *See id.* at 45-46.[7]

Employer, in contrast to the public policy and statutory arguments proffered by Claimant, relies entirely on *Rosenberg* to support its position that a rebuttable presumption in favor of the employer, and a resulting shifting burden of proof, is the proper interpretation of Section 306(b)(2). *See* Employer's Brief at 13-14. Consequently, Employer claims, when applying this precedent to the facts of the instant case in light of the deference due to credibility determinations of the WCJ, *see id.* at 10-13, Claimant is entitled to no relief, as he failed to present a *prima facie* showing that there was an available position at Employer that Claimant could have worked instead.[8] *See* Employer's Brief at 13-16.[9]

**C. *Rosenberg* and its Progeny**

At the heart of this case is the lower court's decision in *Rosenberg*, upon which Employer wholly relies. Thus, we begin our review with a discussion of *Rosenberg*, a

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[7] *Amicus curiae*, the Pennsylvania Association for Justice ("Amicus"), filed a brief in support of Claimant. Amicus's arguments parallel Claimant's allegations that: (1) the plain language of the statute is clear; and (2) the regulations support Claimant's interpretation of the statute. *See generally* Amicus Brief at 6-26.

[8] Employer's argument appears to insinuate that *stare decisis* applies, and the Commonwealth Court's decision in *Rosenberg* binds this Court. It does not. *See, e.g., Klar v. Dairy Farmers of Am., Inc.*, 300 A.3d 361, 375 n.66 (Pa. 2023) (observing lower court precedent is not binding on this Court).

[9] Claimant submitted a reply brief, in which he disputes the facts as presented by Employer, and addresses issues raised in Employer's brief that were not encompassed in our grant of allocatur. *See generally* Appellant's Reply Brief at 3-5.

case where the claimant, a county correctional officer, was permanently injured while acting within the course and scope of her employment and as a result, began receiving compensation. *Rosenberg*, 942 A.2d at 246. The county eventually offered the claimant a light-duty clerical position at the county's board of elections, which she accepted, but the county terminated her employment after ten months because, per the county, there was no budget for a permanent light duty position. *Id.* However, shortly after terminating the claimant, the county posted a full-time job opening for that same position and soon after, filed a petition for modification of benefits, alleging, through a labor market survey, that there were jobs available in the labor market that the claimant was capable of performing. *Id.*

In response to this petition, the claimant provided evidence of the county's job opening to the WCJ, alleging that the county violated its obligation under Section 306(b)(2) by failing to offer her the open clerical position. *Id.* at 247. The WCJ granted the county's petition, without addressing the claimant's assertion, on the basis that an employer need not demonstrate job unavailability. *Id.* at 247-49. The WCAB affirmed on identical grounds. *Id.* at 249.

An *en banc* majority opinion of the Commonwealth Court, authored by Judge Robert Simpson, vacated the order of the WCJ and remanded for further evidentiary findings. *Id.* at 252. Importantly, the majority opined that any employer, such as the county, must demonstrate compliance with the Mandate set forth in Section 306(b)(2), but *only* when the claimant makes an allegation of noncompliance with *prima facie* evidence. *Id.* at 251. Addressing the matter before it, the majority held that because the claimant had raised such an allegation with *prima facie* evidence, the WCJ was required to address whether the county had rebutted that evidence. *Id*. In establishing a presumption and burden shifting scheme, the majority explained that

> Section 306(b)(2) of the [WCA] speaks in mandatory language on this point: "If the employer has a specific job vacancy the employe is capable of performing, the employer shall offer such job to the employe." Recognizing that the [WCA] does not address presentation of evidence, we are mindful that the burden of proof may be placed on a party who must prove existence of a fact rather than on a party who must prove its non-existence. *Barrett v. Otis Elevator*, . . . 246 A.2d 668 ([Pa.] 1969); *see In re Property Along Pine Road in Earl T*[*w*]*p.*, 743 A.2d 990 (Pa.[ ]Cmwlth.[ ]1999), *appeal denied*[,] . . . 759 A.2d 389 ([Pa.] 2000).
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> However, where, as here, the question of an available, suitable job with the employer is raised with evidence, the employer ignores the question at its peril. As with all other elements necessary to succeed in a modification petition, once the issue is raised by evidence of a possible opening with employer, the employer has the burden of proof. Consistent with the plain language of the [WCA], once the issue is raised with evidence, satisfaction of this element of proof is a prerequisite to employer's reliance on expert testimony of earning power.
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> In addition, without specifying the order in which evidence is produced, the regulations expand on the type of evidence by a claimant which may prevail on the issue of available employment with an employer. The time period in question starts with the notice of ability to return to work and continues until the filing of a petition for modification. 34 Pa. Code § 123.301(b). A claimant may prove that "[d]uring the period in which the employer . . . had a duty to offer a specific job, the employer . . . announced the existence of a specific job vacancy, that the [claimant] is capable of performing, which the employer intends to fill." 34 Pa. Code § 123.301(f)(2).

*Id.*

Judge Doris Smith-Ribner, joined by Judges Pellegrini and Friedman, dissented, opining that Section 306(b)(2) does not create a presumption of compliance; instead, the Mandate always places this burden of proving compliance on the employer, regardless of whether the claimant alleges the employer violated the Mandate. *Id.* at 256 (Smith-Ribner, J., dissenting). Explaining she would have reversed the WCJ's conclusion as plain error, Judge Smith-Ribner elaborated that,

> [t]here is abundant support for the conclusion that in general Section 306(b)(2) requires an employer that relies on expert testimony to establish earning power to establish the absence of a suitable position with the employer as part of its case-in-chief. First, such a procedure is eminently sensible. In the seminal workers' compensation case of *Barrett*[, *supra*], [our] Supreme Court noted that when the existence or nonexistence of a

> fact can be established by one party much more easily than by the other party, the burden may be placed on the party who can discharge it most easily. Whether an employer has a suitable position available is a matter peculiarly within that employer's knowledge and is not likely to be within the claimant's knowledge. Whatever inkling an employee might have concerning possible positions cannot compare to the comprehensive knowledge of the employer of its own operations. Enforcement of the mandatory duty to offer a suitable job if one is available plainly should not be made to turn on the chance that an individual employee, perhaps one among hundreds or more, somehow gains knowledge of a suitable position somewhere in the employer's business.
>
> An employer's burden in this regard is not an onerous one. . . . In general, some employer representative with requisite authority [] testif[ies] under oath and subject to cross-examination that no suitable positions existed within the applicable period.
>
> Equally as important, the Department of Labor and Industry, Bureau of Workers' Compensation has provided a definitive administrative interpretation of Section 306(b)(2) in its adoption of 34 Pa. Code § 123.301, relating to employer job offer obligation[.] . . . Subsection (c) provides that the employer may fulfill its obligation by proving either that it notified a claimant of a job or offered a job but the claimant failed to respond or refused, or that "(4) [n]o job vacancy exists within the usual employment area." Subsection (f) prescribes the manner for the claimant to rebut if the employer has presented evidence that no job vacancy exists.
>
> There is no ambiguity in this statutory/regulatory scheme: an employer must provide notice of or an offer of a suitable job that it has available or it must prove that no vacancy exists. The regulation makes express what is clearly implied by Section 306(b)(2).

*Id.* at 254-55.

*Rosenberg* became binding precedent in the Commonwealth Court, which has not wavered in subsequent cases, even when confronted with 34 Pa. Code § 123.301.[10] *See,*

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[10] 34 Pa.Code § 123.301(a) states that:

> For claims for injuries suffered on or after June 24, 1996, if a specific job vacancy exists within the usual employment area within this Commonwealth with the liable employer, which the employee is capable of performing, the employer **shall offer** that job to the employee prior to seeking a modification or suspension of benefits based on earning power.

*Id.* (emphasis added).

*e.g.*, *Kleinhagan v. WCAB (KNIF Flexpak Corp.*), 993 A.2d 1269, 1275 (Pa. Cmwlth. 2010); *Reichert*, 80 A.3d at 831. *But see Valenta*, 176 A.3d at 384 (observing, in *dicta*, that Section 306(b)(2) appears to require the employer to demonstrate job unavailability in light of 34 Pa. Code § 123.301, but declining to address contrary Commonwealth Court precedent because that requirement was satisfied).

**D. Analysis**

At the outset, we acknowledge the following undisputed points. First, neither party contests that compliance with the Mandate of Section 306(b)(2) is a prerequisite to reliance on a vocational expert to establish earning power. Rather, the parties merely disagree on whether Employer should have to prove such compliance. Similarly, neither party argues, contrary to the language used by Claimant in framing this issue, that the union status of the claimant is of any significance in the context of resolving this matter. Thus, the only question before this Court is whether the General Assembly intended to place an affirmative burden on all employers to prove compliance with this Mandate before conducting a labor market survey, or whether it intended to make this Mandate a defense available to all claimants in response to an employer's reliance on a vocational expert, thereby placing the burden, and risk of potential waiver, onto claimants.

"When interpreting the statutory components of the WCA, we are required to ascertain and effectuate the intent of the General Assembly." *Cruz v. WCAB (Kennett Square Specialties)*, 99 A.3d 397, 406 (Pa. 2014). *See also* 1 Pa.C.S. § 1921(a) (observing the goal of statutory interpretation of any statute is to effectuate the General Assembly's intent). Although the best indication of the General Assembly's intent is the plain language of the statute, *see* 1 Pa.C.S. § 1921(b), where the statute is non-explicit, such as here, we may apply our principles of statutory interpretation. *See, e.g.*, *A.S. v. Pa. State Police*, 143 A.3d 896, 903 (Pa. 2016). "Of particular relevance in this matter,

we are mindful that the WCA was intended to benefit the injured employee, and, therefore, must be construed liberally in the employee's favor in order to effectuate its humanitarian objectives." *Cruz,* 99 A.3d at 406. *See also Shoap,* 81 A.3d at 838 (observing liberal construction to be afforded statutes within the WCA); *Hannaberry HVAC*, 834 A.2d at 528 (same); *Herold v. Univ. of Pittsburgh*, 329 A.3d 1159, 1189 n.22 (Pa. 2025) (same). This is true even when the concern is the proper allocation of a burden of proof. *See, e.g.*, *Cerny v. Schrader & Seyfried, Inc.*, 342 A.2d 384, 386-87 (Pa. 1975) (finding pro-employee rationale from *Barrett*, *supra*, sufficiently persuasive to allocate burden onto employer instead of employee); *Cruz*, *supra.*

Unlike the standard of proof, which exists "to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication[,]" a burden of proof, properly understood, "allocates that risk between the parties." *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 408 (Pa. 2014) (internal citation omitted). Our case law confirms that two key considerations govern the establishment or adjustment of a burden of proof: evidentiary concerns and public policy ramifications. *See, e.g.*, *id.* at 409 ("The determination of whether [the shift of the burden of proof onto a defendant] is suitable rests [] primarily on considerations of whether the shift vindicates the public policy at issue. In addition, we consider difficulties of adducing evidence to prove a negative, the parties' relative access to evidence, and whether placing the burden of proof on one party is necessary to help enforce a further right, constitutional or otherwise."). *See also Commonwealth v. Sanchez*, 36 A.3d 24, 66-68 (Pa. 2011) (holding requirement that capital defendant proves his own mental incapacity is permissible because it supports the public policy of discouraging manipulation of evidence to avoid incarceration, and would be a difficult evidentiary burden to place onto the Commonwealth, as it would require the Commonwealth to prove

a negative). The factors identified in the Statutory Construction Act, as always, aid in our analysis of public policy. *See* 1 Pa.C.S. § 1921(c) (identifying factors to be used in our analysis).

With respect to the former, broadly speaking, a burden of proof is typically placed on the party making the affirmative allegation. *See, e.g.*, *Sanchez,* 36 A.3d at 66-67 (affirming propriety of placing mental incapacity defense burden on criminal defendant, in part, because affirmative defenses are typically placed on the defendant); *Petrone v. Moffat Coal Co.*, 233 A.2d 891, 895 (Pa. 1967) ("If light work is available, it is easier for the defendant to prove its existence than for the claimant to prove its non-existence."). However, this is not an inexorable command. As this Court has explicitly observed: "[i]f the existence or non-existence of a fact can be demonstrated by one party to a controversy much more easily than by the other party, the burden of proof may be placed on *that* party who can discharge it most easily." *Barrett*, 246 A.2d at 672 (emphasis added). *See also O'Neill v. Metro. Life Ins. Co*., 26 A.2d 898, 903 (Pa. 1942) ("[A] defense affirmative in character does not always cast the burden of proof upon a defendant.").

Indeed, in *Barrett*, we explained that the "special allocation" of the burden of proof onto a party to prove the non-existence of a fact can occur in "a limited class of cases, *i.e.*, [where] the burden of proving a fact is said to be on the [p]arty who presumably has peculiar means of knowledge." *Barrett*, 246 A.2d at 672 n.6 (citation omitted). *See also Sanchez*, 36 A.3d at 67-68 (observing that placing the burden on a defendant regarding his own mental state is favored, as "the capital defendant generally has superior knowledge and access to evidence regarding his mental capabilities[,]" and there is potential for manipulation of evidence by the defendant if the burden of proving the nonexistence of that mental state was placed on the Commonwealth). In these scenarios,

"the proof of a negative does not appear so difficult that the burden of proof should be placed on the party who wishes to establish the affirmative." *Barrett*, 246 A.2d at 673.

The admonishments within *Barrett* are of particular salience here. In *Barrett*, this Court was confronted with a similar question pertaining to workers' compensation law; namely, whether an employer should bear the burden of proving the availability of any type of work to succeed on a modification petition, or whether the claimant should bear the burden of proving the unavailability of such work. *Id.* at 671. Pertinently, the *Barrett* Court opined that either allocation was permissible, despite the general presumption of favoring affirmative allegations, because,

> [i]f for no other reason than the quantity of evidence, it certainly is more difficult to prove [c]onclusively that no jobs are available than to prove [c]onclusively that a job is available, but conclusive proof is not required on this issue. Given that a preponderance of the evidence is all that is required, the proof of a negative does not appear so difficult that the burden of proof should be placed on the party who wishes to establish the affirmative.

*Id.* at 673.

We may also consider the "consequences of a particular interpretation" on the truth-seeking function of our judiciary. *See* 1 Pa.C.S. § 1921(c)(6). *See also Sanchez*, *supra*. In *Sanchez*, this Court observed that placing the burden of showing capacity to stand trial on the Commonwealth, instead of the burden of showing incapacity on the capital defendant, was undesirable because doing so would prevent the court from determining the true mental capacity of the defendant, as a burden on the Commonwealth would give defendants "less incentive to cooperate in psychiatric investigations, because an inconclusive examination will benefit the defense, not the prosecution. A defendant may also be less cooperative in making available friends or family who might have information about the defendant's mental state." *Id.* at 68.

These concerns all favor the placement of the burden of proof as a part of the employer's overall burden, and not as a defense of the claimant. No reasonable person

can dispute the conclusion that an employer bears "superior knowledge and access to evidence" regarding its own employment capabilities. *See id.* at 67. Whether a multinational employer with entire departments dedicated towards staffing concerns, or a simple mom-and-pop shop, only the employer itself has the "peculiar means of knowledge" of its current employment capacity. *See Barrett*, 246 A.2d at 672 n.6 (citation omitted). It is abundantly clear that a claimant would be at a unique disadvantage in collecting such information for use in proving his potential defense, as he would only have the knowledge available to him through external sources, such as job postings or depositions.

Notably, this is a relatively easy burden for the employer to satisfy; in other words, "the proof of a negative does not appear so difficult that the burden of proof should be placed on the party who wishes to establish the affirmative." *Id.* at 673. An employer under this rule would be perfectly justified in relying on any one of its human resources employees' testimonies that there are no jobs available, and a WCJ may find that testimony sufficient to satisfy this obligation.

By contrast, if a claimant were to be required to bear this burden, he would have to subpoena, depose, or otherwise adduce evidence of an available opening, likely through hostile means. And there is no guarantee that, even with a deposition, the claimant would get such information, as it is readily understood that something uniquely in the mind of a particular party can only be disclosed by that party. *See City of Pittsburgh v. WCAB*, 67 A.3d 1194, 1210 (Pa. 2013) ("Our holding will not impose a prohibitive burden on employers, nor does it subject employers to the unreasonable task of proving the claimant's state of mind."). Thus, a claimant would have to face a far more circuitous route to prove that which could be easily proven by the employer through simple, friendly testimony from its own employee.

Finally, an allocation onto the claimant in a modification or termination petition would have the negative consequence of facilitating the same type of gamesmanship we warned against in *Sanchez*. *See Sanchez*, 36 A.3d at 68. *See also* 1 Pa.C.S. § 1921(c)(6) (noting that the intention of the General Assembly may be ascertained by considering the consequences of a particular interpretation). To wit, if the burden were to be placed on the claimant, even at a *prima facie* level, the claimant would have to rely on the employer's cooperation in producing documents and relevant deponents, while at the same time, the employer would be incentivized to manipulate the evidence by objecting and obstructing the various discovery requests the claimant would need to file to assist in proving his case. *Cf. Sanchez*, *supra*. We see no need to inject such opportunity for mischief into the present matter, given the ease with which an employer can meet the burden. Put simply, it would be unfair and unjust to force claimants to retain such a difficult burden when it could be so easily proven by the employer who retains that particular knowledge. This is thus an example of one of the "limited class of cases" where the burden of proving a negative is far simpler than proving the affirmative allegation, and thus, must be allocated accordingly. *See Barrett*, 246 A.2d at 672 n.6.

The potential public policy ramifications further support placing the burden of proof on the employer *a fortiori*. As noted *supra*, it is imperative that an articulated burden of proof "effectuate[s] the intention of the General Assembly." 1 Pa.C.S. § 1921(a); *accord Cruz*, *supra*. In this case, while the best indication of the General Assembly's intent with respect to a burden of proof of the at-issue statute would be its plain language, *see* 1 Pa.C.S. § 1921(b), Section 306(b)(2) is discernably silent on this point. *See* 77 P.S. § 512(2). Consequently, we must consider what public policy would favor, keeping in mind the circumstances under which Section 306(b)(2) was enacted, the mischief it intended to remedy, and the object it intended to attain. *See* 1 Pa.C.S. § 1921(c)(2)-(4).

The WCA "was a humanitarian measure enacted in response to a strong public sentiment that the remedies afforded by actions of tort at common law [] had failed to accomplish that measure of protection against injuries and of relief in case of accident which it was believed should be afforded to the workman." *Blake v. Wilson*, 112 A. 126, 128 (Pa. 1920) (internal citation omitted).[11] Consistent with this policy to protect workers, this Court has repeatedly interpreted the burden of proof as being on the *employer*, and has not created presumptions of shifting burdens against the claimant, absent some *indicia* by the General Assembly. *See, e.g.*, *City of Pittsburgh*, 67 A.3d at 1204-05 (refusing to adopt a presumption that an injured worker has retired by accepting a pension where there is no evidence of intent by the General Assembly to do so). Acting in this manner is consistent with (1) the "object to be attained" by the WCA, *i.e.*, compensation for workers injured while duly performing their duties, and (2) the "mischief to be remedied," *i.e.*, preventing the employer's attempts to escape liability for such injuries. 1 Pa.C.S. § 1921(c)(3), (4). *See also, e.g.*, *Vista Int'l Hotel v. WCAB (Daniels)*, 742 A.2d 649, 657-58 (Pa. 1999) (concluding that the employer ought to bear the burden of proving that the claimant's benefits should be terminated or suspended even if it fires the claimant, for the obvious public policy rationale that concluding otherwise "would require the

[11] In the "Grand Bargain" of the WCA,

> workers gave up the right to sue their employers for job-related injuries and uncertain common law tort remedies in return for certain, but reduced, benefits, without an assessment of fault of the employer. In turn, employers embraced a no-fault system and gave up the unholy trinity of defenses in return for the elimination of trial by jury, and the potential of punitive damages and exorbitant unexpected costs.

*Herold*, 329 A.3d at 1182. As no arguments were present to this Court regarding how the Mandate is a potential cost-containment measure, we are only concerned with interpreting the Mandate as a humanitarian measure.

suspension of benefits in a broad array of cases involving involuntary terminations that occur due to no fault of the claimant[.]").

Although abrogated in part by Act 57, our decision in *Kachinski*, and in particular, our explanation of public policy with respect to the appropriate burden of proof in workers' compensation matters, is particularly insightful. In that case, this Court was endeavoring to discern the appropriate burden to be bestowed upon an employer in modification or termination matters. We explained:

> [a] recipient of workmen's compensation is by definition a person who has been injured during the operation of the employer's business. Although the employer is not personally responsible for an employee's injury, the employer, as the owner of the production process, nonetheless 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 in the workplace.

*Kachinski*, 532 A.2d at 379 (emphasis added).

From this discussion of public policy, it is clear that the humanitarian purpose of Section 306(b)(2) favors placing this burden of proof unilaterally on the employer. The obvious intention of Section 306(b)(2) is to "remedy the mischief" of employers not retaining their injured workers, by demanding that employers offer any available job they may have to said workers. Consequently, to place an affirmative burden on the employer to demonstrate that it is not attempting to rid itself of its injured workers through a labor market survey would aid in "attaining the object" of the Mandate by guaranteeing that the employer cannot offer a job because none exists. *See* 1 Pa.C.S. § 1921(c)(3), (4). *See also Vista Int'l Hotel*, *supra*. More generally, this burden is also in line with the longstanding commonsense perspective of this Court: once a worker has established an

entitlement to benefits, the employer should bear all burdens in reducing such benefits. Indeed, we have expressly disfavored placing presumptions against the claimant in such circumstances. *See, e.g.*, *City of Pittsburgh,* 67 A.3d at 1204-05. Such policy is in line with the WCA and its public policy of favoring the injured worker over the employer. *See, e.g.*, *Cruz*, 99 A.3d at 406-07.

If any question remains, we note that *Kachinski* emphasizes the result reached here. Under Employer's interpretation of the statute, this Court would have to effectively place on the claimant "the duty to find alternate work" at the employer "under pain of foregoing the compensation to which he has become entitled." *Kachinski*, 532 A.2d at 379. To do so would be "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 in the workplace." *Id*. Although Act 57 amended the *Kachinski* four-part test, as noted by this Court in *Shoap*, nothing in those amendments suggests that the General Assembly intended to undermine the fundamental, universally understood salutary purpose of workers' compensation law as set forth in *Kachinski*.

With these considerations in mind, we hold that the Mandate requiring an employer to offer an available job to a claimant before establishing earning power via a labor market survey also requires the employer to affirmatively demonstrate compliance with this prerequisite by proving, by a preponderance of the evidence, that there is no available job for the claimant. While a claimant may introduce evidence of an available job opening to rebut the employer's offer of proof, the claimant is not required to, as the claimant does not have the burden. Consequently, the Commonwealth Court erred, both here and in its prior line of precedent, *see, e.g.*, *Rosenberg*, *supra*; *Reichert*, *supra*; and *Kleinhagen*, *supra*, when opining to the contrary.

With respect to *Rosenberg*'s rationale, although the majority in that case correctly articulated the general rule regarding affirmative allegations, it failed to consider why that rule exists, and when to apply its exception. As explained *supra*, although the party that would make the affirmative allegation should typically bear the burden of proof, this is only because of certain considerations, such as the ease by which the party making the allegation may prove it, and the public policy demanding that plaintiffs prove their case over defendants disproving the same. In the instant scenario, those considerations place this Mandate into the "limited" class of cases where the party bearing peculiar knowledge of the topic at issue should bear the burden of proof, and not the one who would make an affirmative allegation. The knowledge of the availability of a job with the employer is one specially within the employer's knowledge rather than the claimant. To force claimants to find the existence of a job at the employer, through job postings or hearsay testimony, would prove far more difficult than simply requiring employers to have one of their own employees testify about jobs at the employer.[12]

**E. Reinstatement of WCJ Order**

Given the sufficiency of the factual determinations made by WCJ Farese, we find that a remand for further factfinding is unnecessary. Even without the benefit of today's decision, Employer acted consistent with 34 Pa. Code § 123.301(c) and attempted to provide evidence that there was no job available in its workforce, as Dieckman testified

[12] Additionally, the *Rosenberg* majority plainly misread 34 Pa. Code § 123.301(f)(2) by suggesting that this regulation "expand[s] on the type of evidence by a claimant which may prevail on the issue of available employment with an employer[.]" *Rosenberg*, 942 A.2d at 251. While Subsection (f)(2) does speak to the evidence a claimant may present to demonstrate there was job availability at his employer, Section (f) limits this presentation by allowing only such testimony, "**[i]f** the employer has presented evidence that no job vacancy exists[.]" 34 Pa. Code § 123.201(f) (emphasis added). In other words, Subsection (f)(2) does the exact opposite of what the Commonwealth Court in *Rosenberg* suggests: it requires the employer, not claimant, to provide evidence of job availability, and if the *employer* does so, the *claimant* is allowed to rebut. *See id*.

to that effect below, and reiterated this finding in his report. *See* Vocational Assessment and Earning Capacity Evaluation, 12/28/18, at 9; Dieckman Dep., 7/24/19, at 50-51. WCJ Farese found Dieckman's testimony lacking in this regard, as he was unable to confirm what entity Easley had been employed with, or her exact job title. WCJ Op., 2/8/21, at 15-17. This is an exercise of discretion well within the fact-finding authority of a workers' compensation judge. *See, e.g.*, *IA Const. Corp.*, 139 A.3d at 161. Employer has thus simply failed to provide the evidence necessary to succeed in its Petition, as rightly determined by WCJ Farese, and the Petition must be denied. As further hearings would only facilitate the relitigation of this issue, which the principle of judicial economy aims to minimize, we direct that on remand, the February 8, 2021, order of WCJ Farese be reinstated without additional proceedings. *See Kramer v. WCAB (Rite Aid Corp.)*, 883 A.2d 518, 531 n.11 (Pa. 2005).[13]

## IV. Conclusion

In light of the foregoing, we reiterate that, as part of its burden of proof to establish earning power under Section 306(b)(2) by a preponderance of the evidence, an employer must prove the nonavailability of a suitable position within its workforce. Consequently, we overturn *Rosenberg* and the cases that followed, to the extent they determined that a claimant bears the burden of proof with respect to establishing the availability of a job at their employer, including the Commonwealth Court's memorandum decision in the case *sub judice*. Accordingly, we reverse the order of the Commonwealth Court, and remand for the reinstatement of the WCJ's order. Jurisdiction relinquished.

Chief Justice Todd and Justices Donohue, Dougherty, Wecht, Brobson and

[13] Because we have determined that Claimant is entitled to relief on grounds distinct from those presented in his brief, we find it unnecessary to discuss his contentions in detail and express no position on his argument regarding the applicability of *Kachinksi*'s good faith rationale.

McCaffery join the opinion.