

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Steven Waldman, :
Petitioner :
 :
v. : No. 1706 C.D. 2024
 : Submitted: March 3, 2026
Limerick Fire Department (Workers' :
Compensation Appeal Board), :
Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE STACY WALLACE, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE WALLACE

FILED: October 21, 2026

Steven Waldman (Claimant) petitions for review of the November 25, 2024 order (Order) of the Workers' Compensation Appeal Board (Board) affirming the decision (Decision) of a workers' compensation judge (WCJ) that granted Limerick Fire Department's (Employer) Petition to Suspend Compensation Benefits (Suspension Petition) under the Workers' Compensation Act (Act).¹ After review, we affirm.²

¹ Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§1-1041.4, 2501-2710.

² The vote of the panel of judges that resolved this case resulted in a 2 to 1 vote to affirm the Board. However, in keeping with this Court's internal operating procedures, all commissioned judges voted on this Memorandum Opinion (including those who were not on the panel), except for one **(Footnote continued on next page...)**

BACKGROUND

On January 19, 2020, Claimant sustained a work injury when he slipped and fell while working for Employer as a volunteer firefighter. Certified Record (C.R.) at 10-11.³ Employer issued a Notice of Compensation Payable (NCP) recognizing the injury as a low back strain. *Id.* at 11, 22. On March 22, 2023, Employer filed its Suspension Petition and a Petition for Modification of Benefits (Modification Petition) (collectively, Petitions) asserting work was generally available for Claimant within his medical and vocational restrictions based on a labor market survey (LMS) completed on January 25, 2023. *Id.* at 10, 22.

In support of its Petitions, Employer presented the deposition testimony of William Spellman, M.D. (Dr. Spellman), a board-certified orthopedic surgeon, who conducted an Independent Medical Examination (IME) of Claimant on October 20, 2022. *Id.* at 279. According to Dr. Spellman, Claimant reported that he was a full-time electrician and volunteer fireman. *Id.* Additionally, Dr. Spellman testified that Claimant reported continuing back pain following his slip and fall in 2020, which he rated as moderate intensity. *Id.* Dr. Spellman performed a physical examination of Claimant, which was benign and not consistent with Claimant continuing to have any physical problems with his back. *Id.* at 281. Dr. Spellman reviewed Claimant's medical records including Claimant's chiropractic records, Magnetic Resonance Images (MRIs) of Claimant's low back, and a functional capacity evaluation (FCE), which was completed by Pivot Industrial Services on August 26, 2021. *Id.* at 282. Dr. Spellman reviewed the FCE's recommendation that Claimant was capable of

judge who recused herself. This resulted in the voting judges being evenly split regarding the proper disposition of this matter. Accordingly, this opinion is being filed "as circulated," pursuant to Section 256(b) of this Court's internal operating procedures, 210 Pa. Code § 69.256(b).

³ References to page numbers in the Certified Record reflect electronic pagination.

performing medium-duty work, lifting up to 50 pounds occasionally, 20 pounds frequently, and 10 pounds constantly. *Id.* Dr. Spellman indicated the FCE's recommendations were consistent with his own examination and recommendations for Claimant. *Id.* at 282.

Following the IME, Dr. Spellman opined, to a reasonable degree of medical certainty, that Claimant was capable of returning to work in a medium-duty capacity. *Id.* at 283-84. Dr. Spellman explained he based his opinion on the benign nature of Claimant's physical examination, as well as his clinical history. *Id.* Dr. Spellman testified to receipt of employment positions from Hoover Rehabilitation Services (Hoover) outlining potentially suitable positions for Claimant. *Id.* at 284-85. Those six positions included the following: West Carver Electric as a service manager, North Penn YMCA as a building and grounds director, Precision Tech as a plant electrician, Global Advanced Medicals, as an electrical technician, and Donald Miller Electric, as a resident electrician (collectively, the Positions). *Id.* at 288. After reviewing the Positions and having further discussions with Hoover, Dr. Spellman ultimately approved the Positions as suitable for Claimant. *Id.* at 288.

Employer also submitted the testimony of Yvette Duncan (Duncan), a certified Rehabilitation Counselor and Rehabilitation Specialist for Hoover. *Id.* at 207-08. Duncan testified that in her role, she meets with injured workers to conduct vocational assessments, conduct LMS activities, locate employment for injured workers within their restrictions and geographic area, review medical documentation, analyze labor market nuances, and assist claimants with returning to work. *Id.* Duncan indicated she received an assignment to conduct an LMS activity for Claimant on November 8, 2022. *Id.* at 216. She conducted a vocational evaluation with Claimant on December 6, 2022. *Id.* Regarding Claimant's

vocational background, Duncan noted Claimant was a journeyman electrician who worked in the field for approximately 30 years in a variety of roles. *Id.* at 217. After reviewing Dr. Spellman's report and his physical capabilities checklist for Claimant, Duncan identified the Positions she felt Claimant capable of performing with respect to his vocational background and physical restrictions. *Id.* at 218. Duncan forwarded the Positions to Dr. Spellman, which he approved as suitable for Claimant. *Id.* at 221. Duncan then notified Claimant of the Positions via job lead letters. *Id.* at 222. In her job lead letters, Duncan included descriptions of each position, such as physical duties, hours, and pay that would be involved, as well as instructions regarding how to submit an application for each position. *Id.* at 223. Additionally, Duncan testified that she created an Earning Power Assessment Report dated January 25, 2023. *Id.* at 224. Duncan considered the Positions to be open and available positions Claimant was physically and vocationally capable of performing. *Id.* In her Earning Power Assessment Report, Duncan opined, to a reasonable degree of professional certainty, that Claimant was qualified to perform the Positions and, by taking an average of the wages for the Positions which ranged from \$900 to \$1,730 per week, she calculated Claimant's earning power capacity to be \$1,220 per week. *Id.*

Claimant testified on his own behalf. Claimant stated he continues to have ongoing pain in his lower back. *Id.* at 178, 180. He indicated he applied for the Positions with all six companies per his instructions by Hoover. *Id.* at 179. According to Claimant, he did not receive any job offers from the applications he sent. *Id.* at 180. The only response he received from his applications was from Donald Miller Electric, which requested his resume. *Id.* at 180. Claimant testified he did not believe he could return to work full-time or part-time as an electrician

because “of the chronic back pain and what it takes to be an electrician for doing it for 35 years, . . . [he] couldn’t do it.” *Id.* at 180. When asked specifically what he would not be able to do, Claimant explained: “Lifting wire spools, lifting wire, carrying ladders, hanging ceiling fans. It all requires lifting more than 20 pounds.” *Id.* at 180-81.

The WCJ found the testimony of Dr. Spellman, with respect to Claimant’s physical capabilities, to be credible. *Id.* at 24. The WCJ found Claimant’s job restrictions set by Dr. Spellman credible after considering Dr. Spellman’s findings upon physical examination and Claimant’s testimony regarding his ongoing symptomatology and medical treatment. *Id.* at 24. The WCJ noted Claimant did not present medical evidence challenging Dr. Spellman’s assessment. *Id.* Moreover, the WCJ deemed Duncan’s testimony regarding Claimant’s earning capacity to be credible, as she testified to all necessary elements of her preparation of the LMS and earning power assessment, including having confirmed that there was no work available with Employer within his work restrictions. *Id.* The WCJ noted she accepted Duncan’s testimony based on her calculations of Claimant’s earning capacity based on the wages advertised by the prospective employers and took the average of the six approved jobs to reach the figure of \$1,220.00. *Id.* Regarding Claimant’s testimony, the WCJ explained she

carefully considered Claimant’s testimony. Claimant argues, in his brief, that Employer did not prove that the job positions remained open until such time that Claimant was afforded an opportunity to apply. However, Claimant did apply, according to his sworn testimony, to all identified job positions and was not offered a job. This defeats Claimant’s argument.

Id. at 24. The WCJ noted Claimant had the opportunity to go out on his own and find a job within his physical capabilities himself and has not done so. *Id.*

Accordingly, the WCJ concluded the average of the weekly wages for the Positions is above Claimant's pre-injury average weekly wage and, therefore, the WCJ suspended Claimant's temporary total disability benefits as of January 25, 2023, the date of the LMS. *Id.* at 25.

Claimant appealed the WCJ's Decision to the Board, and the Board affirmed in its Order. Claimant now appeals to this Court. On appeal, Claimant argues the WCJ's Decision and the Board's Order indicating Claimant has an earning capacity of \$1,200.00 weekly is not supported by competent evidence and pertinent authority. Claimant's Br. at 5. In response, Employer asserts the WCJ's Decision granting Employer's Suspension Petition was based on substantial, competent evidence. Employer's Br. at 4.

DISCUSSION

This Court reviews workers' compensation orders for violations of a party's constitutional rights, violations of agency practice and procedure, and other errors of law. 2 Pa.C.S. § 704. We also consider whether substantial evidence supports the findings of fact necessary to sustain the Board's decision. *Id.* Substantial evidence is such relevant evidence as a reasonable mind might accept as sufficient to support a conclusion. *Waldameer Park, Inc. v. Workers' Comp. Appeal Bd. (Morrison)*, 819 A.2d 164, 168 (Pa. Cmwlth. 2003) (citation omitted). When performing a substantial evidence analysis, we view the evidence in the light most favorable to the party who prevailed before the WCJ. *Id.* Additionally, we draw all reasonable inferences from the evidence in support of the prevailing party. *Id.* It does not matter if there is evidence in the record that supports contrary findings; rather, we consider whether there is substantial evidence to support the findings the WCJ actually made. *Hoffmaster v. Workers' Comp. Appeal Bd. (Senco Prods., Inc.)*,

721 A.2d 1152, 1155 (Pa. Cmwlth. 1998). So long as substantial evidence supports the WCJ's findings, those findings are conclusive on appeal. *Glass v. Workers' Comp. Appeal Bd. (City of Philadelphia)*, 61 A.3d 318, 325 (Pa. Cmwlth. 2013).

To amount to substantial evidence, the evidence must be competent. *Fessler by Fessler v. Workers' Comp. Appeal Bd. (Nationwide Ins. Co.)*, 484 A.2d 422, 425 (Pa. Cmwlth. 1984). Regarding medical testimony, competent evidence means medical testimony that is "unequivocal and positive." *Roeberg Enter., Inc. v. Workmen's Comp. Appeal Bd.*, 400 A.2d 911, 912 (Pa. Cmwlth. 1979). "Medical testimony will be found unequivocal if the medical expert, after providing a foundation, testifies that in his professional opinion that he believes a certain fact or condition exists." *Campbell v. Workers' Comp. Appeal Bd. (Pittsburgh Post Gazette)*, 954 A.2d 726, 730 (Pa. Cmwlth. 2008). However, medical testimony is equivocal if, "after a review of a medical expert's entire testimony, it is found to be merely based on possibilities." *Id.* We review a medical expert's testimony "as a whole and may not base our analysis on a few words taken out of context." *Amandeo v. Workers' Comp. Appeal Bd. (Conagra Foods)*, 37 A.3d 72, 80 (Pa. Cmwlth. 2012)

Moreover, while this Court considers the competency and sufficiency of the evidence presented to the WCJ, the WCJ's assessment of credibility is not subject to our review on appeal. *Davis v. Workers' Comp. Appeal Bd. (City of Phila.)*, 753 A.2d 905, 909 (Pa. Cmwlth. 2000). The WCJ is the ultimate fact finder in workers' compensation cases and is entitled to weigh the evidence and assess the credibility of witnesses. *Montano v. Advance Stores Co., Inc. (Workers' Comp. Appeal Bd.)*, 278 A.3d 969, 978 n.4 (Pa. Cmwlth. 2022) (citing *Sharkey v. Workers' Comp. Appeal Bd. (Fed. Express)*, 786 A.2d 1035, 1038 (Pa. Cmwlth. 2001)). The WCJ is

free to evaluate the evidence offered and accept or reject any witness's testimony, in whole or in part. *Davis*, 753 A.2d at 909. This Court “may overturn a credibility determination only if it is arbitrary and capricious, so fundamentally depended on a misapprehension of material facts, or so otherwise flawed as to render it irrational.” *West Penn Allegheny Health System, Inc. v. Workers’ Comp. Appeal Bd. (Cochenour)*, 251 A.3d 467, 475 (Pa. Cmwlth. 2021) (citation omitted).

As to the Modification and Suspension Petitions, Section 413 of the Act, 77 P.S. § 722, authorizes a WCJ to modify or suspend a claimant’s workers’ compensation benefits where the claimant has some earning power. *Fedchem, LLC v. Workers’ Comp. Appeal Bd.*, 221 A.3d 348 (Pa. Cmwlth. 2019). Specifically, Section 413(a) of the Act states, in relevant part:

A [WCJ] . . . may, at any time, modify, reinstate, [or] suspend . . . a notice of compensation payable . . . upon petition filed by either party . . . , upon proof that the disability of an injured employe has increased, decreased, recurred, or has temporarily or finally ceased Such modification, reinstatement, [or] suspension . . . shall be made as of the date upon which it is shown that the disability of the injured employe has increased, decreased, recurred, or had temporarily or finally ceased[.]

77 P.S. § 772. The term “disability” under the Act is synonymous with “loss of earning power.” *Donahay v. Workers’ Comp. Appeal Bd. (Skills of Cent. PA, Inc.)*, 109 A.3d 787, 792 (Pa. Cmwlth. 2015) (citation omitted). Thus, “[i]f the reduction in earnings is not tied to a loss of earning power attributable to the work injury, no disability benefits are due.” *Id.* at 793. Disability compensation is based upon the difference between a claimant’s pre-injury wages and his post-injury earning power. *Fedchem*, 221 A.3d at 354.

An employer bears the burden of proving a claimant’s earning power. *Id.* at 355. Notably, the determination of a claimant’s earning power is a question of fact

to be resolved by the WCJ. *Select Sec., Inc. v. Workers' Comp. Appeal Bd. (Kobrin)*, 901 A.2d 1129, 1132 (Pa. Cmwlth. 2006) (citation omitted). Section 306(b)(2) of the Act sets forth how a claimant's "earning power" is to be determined, stating:

"Earning power" shall be determined by the work the employee 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 employee is able to perform his previous work or can, considering the employee'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 employee lives within this Commonwealth. If the employee 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 employee is capable of performing, the employer shall offer such job to the employee. In order to accurately assess the earning power of the employee, the insurer may require the employee 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. Thus, an employer may establish a claimant's earning power by offering the claimant a job or by locating appropriate positions through "expert opinion evidence." *Fedchem*, 221 A.3d at 355. Once an employer proves a claimant's earning power, the claimant may refute the employer's evidence by showing that the employer's labor market survey was erroneous, or that "the claimant's actual experience with the employers identified in the [LMS]" shows that the positions were not available. *Id.* (citation omitted).

In *Phoenixville Hospital v. Workers' Compensation Appeal Board (Shoap)*, 81 A.3d 830 (Pa. 2013), the Pennsylvania Supreme Court addressed whether a

claimant's benefits could be modified under Section 306(b)(2) of the Act when the claimant applied for specific, recommended jobs but did not receive an offer of employment. The employer sought to modify the claimant's benefits based on two LMSs that provided jobs within the claimant's physical restriction in the relevant geographical area. *Id.* at 833. The Supreme Court interpreted Section 306(b)(2) of the Act's "substantial gainful employment which exists" section to require proof of the "existence of meaningful employment opportunities, and not the simple identification of jobs found in want ads or employment listings." *Id.* at 842-43. The Court held the identified jobs must "remain open until such time as the claimant is afforded a reasonable opportunity to apply for them." *Id.* at 845. Additionally, the Court held a claimant must be given an opportunity to present evidence about the claimant's experience in applying for the identified jobs, including evidence that the positions were already filled by the time the claimant had a reasonable opportunity to apply for them. *Id.*

In *Smith v. Workers' Compensation Appeal Board (Supervalu Holdings Pa, LLC)*, 177 A.3d 394, 404 (Pa. Cmwlth. 2018), *appeal denied*, 189 A.3d 983 (Pa. 2018), this Court confirmed the "employer bears the burden of proving all facts entitling it to a modification of benefits, including the continued availability of the jobs identified as proof of earning power." We noted the modification of benefits based on earning power associated with identified jobs cannot be granted "without evidence in the record that the specific positions remain open until such time as a claimant is afforded a reasonable opportunity to apply for them." *Id.* While the employer must establish evidence that the identified jobs remained available, this Court explained that if a claimant offers evidence regarding his pursuit of the jobs, such evidence can be considered when assessing their availability. *Id.* We noted

that evidence the claimant “was interviewed for some identified positions constitutes substantial evidence that those positions remained open and available.” *Id.* Thus, the Court affirmed the granting of the modification petition based on the claimant’s ability to interview for two positions, even though the claimant was not actually offered any jobs. *Id.*

Here, Claimant first asserts the WCJ and Board erred because the WCJ’s conclusion that Claimant has an earning capacity of \$1,200.00 per week is not supported by competent evidence and pertinent authority. Claimant’s Br. at 14. Specifically, Claimant asserts the WCJ’s finding that Claimant is capable of performing medium-duty work, is not supported by competent evidence. *Id.* Claimant maintains that Dr. Spellman’s report is inconsistent with the conclusions of the FCE he relied upon. *Id.* According to Claimant, the FCE provides the evaluator’s opinion that Claimant could complete work “restricted to sedentary PDL within the restrictions outlined in” the report, but the Employer’s LMS of “medium duty” jobs exceed his physical capabilities as established by the FCE. *Id.* at 15.

Our review of Dr. Spellman’s testimony, in its entirety, reveals an unequivocal, or, in other words, an unquestionable opinion of Claimant’s ability to perform medium-duty work. Dr. Spellman opined that Claimant was able to work in a medium-duty capacity and agreed the Positions identified by Duncan were appropriate. In addition to a review of the FCE, Dr. Spellman based his opinion on his own physical examination of Claimant, as well as Claimant’s medical records including Claimant’s chiropractic records and MRIs. Dr. Spellman opined “to a reasonable degree of medical certainty” that Claimant was capable of performing medium-duty work. *See C.R.* at 283-84. While we acknowledge the FCE indicates Claimant “would be able to complete work restricted to sedentary [physical demand

level] within the restrictions outlined in this report,” Reproduced Record (R.R.), at 49a, the FCE also states under the Physical Demand Level section that Claimant “can currently perform work . . . that is characterized by the range of the Medium physical demand level.” *Id.* at 59a (original emphasis removed). Moreover, on the next page of the FCE entitled Physical Demand Characteristics of Work Definitions, which lists and describes Sedentary Work, Light Work, Medium Work, Heavy Work, and Very Heavy Work, the Medium Work section is highlighted. *Id.* at 61a. Dr. Spellman indicated he agreed with the recommendation in the FCE, but that did not render Dr. Spellman’s opinion incompetent. The WCJ found Dr. Spellman to be credible, and even if Claimant had presented medical evidence, which he did not, we do not review whether the record could support Claimant’s contrary assertions, but rather whether the evidence supports the findings the WCJ actually made. *See Hoffmaster*, 721 A.2d at 1155. Because Dr. Spellman’s testimony was competent and unequivocal, the WCJ did not err in relying on his testimony as substantial support for her finding that Claimant can perform medium-duty work.

Claimant also argues the positions identified by Duncan exceed his physical capabilities because those positions were “not even medium duty positions.” Claimant’s Br. at 16. Claimant bases this contention on his own testimony asserting he “has been an electrician for decades and established how demanding carrying tools, wire, and other equipment can be.” *Id.* Again, we recognize our role on appeal and to the extent Claimant seeks to have this Court reweigh the evidence, we cannot do so because the WCJ has the sole authority to assess credibility, resolve conflicting evidence, and determine the weight to give the evidence. *See Hoffmaster*, 721 A.2d at 1155-56. As addressed above, the WCJ found Claimant could perform medium-duty work. Additionally, Duncan, who the WCJ found credible, testified that she

contacted the employers to establish the work duties for each of the Positions. C.R. at 220. She also indicated the Positions were open and available and suitable for Claimant's physical capabilities, as outlined by Dr. Spellman. *Id.* at 24.

It does not escape the Court that Claimant was injured doing a commendable act of volunteer firefighting. It also does not escape the Court that Claimant's volunteer work was in addition to his full-time work as an electrician. Plainly, Claimant is not a person who shirked working, and the Court has no question that Claimant would prefer to be relieved of pain and not need benefits in the first place. That being said, the Court's authority is limited by its standard of review. The Court cannot determine the Board erred when it affirmed the WCJ. Because the WCJ's findings that the Positions were for medium-duty work within Claimant's capabilities were supported by substantial evidence, we discern no error.

Finally, relying on *Phoenixville*, Claimant argues Employer failed to meet its burden of proving the Positions identified in the LMS remained open and available for a sufficient period. Whether a claimant had a "reasonable opportunity" to apply and did, in fact, apply for an identified position, and whether the job was already filled by the time a claimant had an opportunity to apply, are factual matters that the WCJ is fully qualified to determine. *Phoenixville*, 81 A.3d at 846. Here, Employer presented the testimony of Duncan, who testified that she contacted the employers regarding the available positions and sent the referral letters to Claimant regarding the positions. C.R. at 220. While Duncan did not testify regarding the continued availability of the jobs beyond that date, Claimant testified that he received the referral letters and applied to all six of the identified positions. C.R. at 179. Claimant received a response from Donald Miller Electric requesting his resume. *Id.* at 180. Like in *Smith*, Claimant's testimony supports the WCJ's finding that the

positions were open and available when he applied. *See Smith*, 177 A.3d at 404. As the Board noted, there was no indication in the record that Claimant was prevented from applying for any of the identified jobs or that Claimant was not offered a position because the jobs had already been filled before his applications. C.R. at 50. Accordingly, we discern no error by the Board when it affirmed the WCJ.

CONCLUSION

Employer met its burden of proving, through competent and substantial evidence, that Claimant was capable of performing medium-duty work, and it identified open and available jobs within Claimant's vocational and physical capabilities. Employer demonstrated an increase in Claimant's earning power under Section 306(b)(2) of the Act, and, therefore, the WCJ's grant of Employer's Suspension Petition was not in error. Accordingly, the Board's Order upholding the WCJ's Decision granting Employer's Suspension Petition is affirmed.

STACY WALLACE, Judge

Judge Dumas did not participate in the decision of this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Steven Waldman,	:
Petitioner	:
	:
v.	: No. 1706 C.D. 2024
	:
Limerick Fire Department (Workers'	:
Compensation Appeal Board),	:
Respondent	:

ORDER

AND NOW, this 21st day of October 2026, the November 25, 2024 order of the Workers' Compensation Appeal Board is **AFFIRMED**.

STACY WALLACE, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Steven Waldman,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1706 C.D. 2024
	:	Submitted: March 3, 2026
Limerick Fire Department (Workers'	:	
Compensation Appeal Board),	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE STACY WALLACE, Judge

OPINION NOT REPORTED

DISSENTING OPINION BY
PRESIDENT JUDGE COHN JUBELIRER

FILED: October 21, 2026

Upon review, I must, respectfully, disagree with the Majority's conclusion that the Workers' Compensation Appeal Board (Board) did not err in finding that the Limerick Fire Department (Employer) met its burden of proving that it identified jobs within Steven Waldman's (Claimant) vocational and physical capabilities that remained **open and available** until such time as he had a reasonable opportunity to apply. While the Majority and the Board appear satisfied that the jobs were open and available based on (1) the mere fact that Claimant was able to submit his applications online and (2) testimony from the vocational expert that she reached out to confirm availability of these jobs with prospective employers at some unspecified date, I do not agree that this evidence supports finding that the positions were actually open and potentially available so that Claimant had a reasonable opportunity

to apply to them. Rather, I would follow this Court’s approach in *Smith v. Workers’ Compensation Appeal Board (Supervalu Holdings PA, LLC)*, where we required **“additional circumstantial evidence”**—beyond the mere submission of a job application and vague testimony by a vocational expert that she contacted prospective employers at some unspecified time—to conclude that the jobs identified by an employer were open and available until such time as a claimant was afforded a reasonable opportunity to apply. 177 A.3d 394, 404 (Pa. Cmwlth. 2018) (*en banc*) (emphasis added).

“[A]n employer is required to establish the existence of substantial gainful employment that is compatible with the claimant’s residual productive skills, education, age, and work experience” *Phoenixville Hosp. v. Workers’ Comp. Appeal Bd. (Shoap)*, 81 A.3d 830, 844 (Pa. 2013). “[T]he proof required to reduce or suspend a claimant’s benefits must rest upon the existence of **meaningful** employment opportunities, and **not the simple identification of jobs found in want ads or employment listings.**” *Id.* at 842-43 (emphasis added). Our Supreme Court has described the meaning of the phrase “substantial gainful employment which exists” as follows:

The statutory concept of “substantial gainful employment which exists” would be meaningless with respect to a claimant’s actual medical and vocational circumstances unless the jobs identified by the employer’s expert witness, which are used as the employer’s proof of earning power under Section 306(b), **remain open until such time as the claimant is afforded a reasonable opportunity to apply for them.** Otherwise, the legislatively selected terms “earning power,” “*substantial gainful* employment” and “exists,” would become mockeries of their commonly understood meanings. *See* 1 Pa.C.S. § 1903(a) (“Words and phrases shall be construed according to . . . their common and approved usage”). Among other things, the Commonwealth Court’s holding could lead to the absurdity of an

employer identifying one “open” job and using it to establish earning power for a number of “eligible” claimants, when **clearly at most only one of these claimants could actually have the opportunity to achieve “substantial gainful employment” via this one opening.** *See* 1 Pa.C.S. § 1922(1) (providing that statutes should be interpreted in a manner that presumes that the General Assembly did not intend an absurd result).

Id. at 845 (first emphasis added). In sum, “[t]he jobs identified by the employer’s expert witness that the claimant is ‘capable of performing’ must thus be those jobs that are **actually open and potentially available, not simply jobs that are already filled with existing employees.**” *Id.* at 843 (emphasis added). “Whether a claimant had a ‘reasonable opportunity’ to apply and did, in fact, apply for an identified position (and whether the job was already filled by the relevant time) are factual matters that the [Workers’ Compensation Judge (WCJ)] is fully qualified to determine.” *Id.* at 846.

In *Smith*, this Court considered what evidence amounts to “substantial evidence” in support of a finding that a position remains open and available to afford a claimant a reasonable opportunity to apply, as required under *Phoenixville*. 177 A.3d at 404-05. The claimant in *Smith* applied to five jobs identified by the employer as compatible with his vocational and medical restrictions. *Id.* at 401. The vocational expert in *Smith* testified that these five jobs were open and available **at the time she conducted her labor market survey**, based on contacts she made to the prospective employers; she could not, however, testify to whether the jobs remained opened and available **“when Claimant made his applications.”** *Id.* at 399-400, 402 (emphasis added). The WCJ found that the claimant **“immediately applied** for the positions” identified by the vocational expert, after which he received two interviews but no offers. *Id.* at 398, 404 (emphasis added). For one of

the five positions (separate from the two jobs that conducted interviews), Claimant contacted the job, spoke to Human Resources (HR), and submitted a resume upon request. *Id.* at 398. This Court concluded that “merely mailing an application **or making an online application** to a prospective employer” **does not constitute substantial evidence that a position remained open and available** at the time of a claimant’s application, as “[s]uch evidence, by itself, is so ambiguous and so suggestive of different inferences as to amount to **speculation** on this point.” *Id.* at 404 (emphasis added). Rather than the mere submission of an application, *Smith* proposed that the test for whether a job is actually open and potentially available depends on whether “there is **additional circumstantial evidence** about a job application.” *Id.* (emphasis added). *Smith* offers the following examples of additional circumstantial evidence which “**may**” support a finding that a position remains open and available at the time of application:

[1] testimony of an in-person application during which information is exchanged, [2] evidence of follow-up communications between a claimant and a prospective employer which prompt acts or inaction by a claimant, or [3] evidence relating to an interview

Id. Applying this reasoning, this Court in *Smith* determined that the claimant having interviewed for two positions constituted “substantial evidence” that these two positions remained open and available for claimant to apply. *Id.* at 404. For all other positions, including the separate position that requested a resume following the claimant’s contact with HR, this Court found that there was an “absence of additional circumstantial evidence beyond mere applications” and, therefore, concluded that there was not substantial evidence to support finding that these remaining jobs were open and available to afford the claimant a reasonable opportunity to apply. *Id.*

Here, **Claimant applied online for six jobs** identified by Employer but, like the claimant in *Smith*, **received no offers**. Claimant received no interviews and heard **nothing** back from any of the six jobs except for one, which asked that he forward his resume. Employer’s vocational expert testified that she contacted the prospective employers to confirm availability and job duties of the six positions. In my view, this outreach by the vocational expert is not the sort of “additional circumstantial evidence” described in *Smith*. To the contrary, this testimony is, at most, substantial evidence that the six positions may have been open and available **at some point in time**—not substantial evidence that they remained open and available at the time Claimant made his applications. Given this record, I do not agree that substantial evidence supports finding that any of the six jobs were open and available at the time Claimant applied under the “additional circumstantial evidence” analysis in *Smith*.

While the Majority finds significant that “there was no indication in the record that Claimant was prevented from applying,” (Majority Op. at 13-14), we are bound by *Smith* that the mere submission of an **online** application to a prospective employer is not substantial evidence of a job being open and available at the time a claimant applies. *Id.* at 404. Particularly given that Claimant’s job application was submitted online, there are any number of reasons why an online job listing may remain posted, even if it is not actually open and potentially available—to collect resumes for future hiring purposes, to evaluate the job pool, to give the appearance of efforts to hire an external candidate, to signal growth (whether to existing employees or outside observers),¹ or perhaps less cynically, because the position was swiftly filled and an

¹ This is not to say that the prospective employers in this case had a pretext for posting the six jobs at issue here, but rather, to illustrate why the mere fact that an online application was (Footnote continued on next page...)

employer has forgotten or not had the time to take the listing down. The latter possibility is not difficult to envision in the context of online applications, where modern recruitment technologies afford employers broader reach across a global talent pool and significant reduction in “time-to-hire,” and where candidates can apply with the click of a button, interview virtually, and accept emailed offers via e-signature in as little as a matter of days—sometimes before an employer has had a chance to take down a listing **or before another candidate may have had a chance to apply.**²

As to the sole position for which a prospective employer asked Claimant for a resume (the Donald Miller Electric job), I am not convinced that this communication qualifies as “additional circumstantial evidence” as contemplated in *Smith*. *Smith* itself **rejects** that an employer’s request for a resume counts as “additional circumstantial evidence” that a position is open and available at the time a claimant applies, notwithstanding that it enumerates “follow-up communications between a claimant and a prospective employer which prompt acts or inaction by a claimant” as an example of such evidence. *Id.* at 404. As set forth above, the claimant in *Smith* applied for five jobs, receiving interviews for two and submitting a resume upon request to a third after he contacted the job and spoke to HR. *Id.* at 398. He did not hear back further or receive an interview or offer from the job that

successfully submitted without an immediate rejection notification should not be seen as substantial evidence of openness and availability of job.

² The “digital transformation” in recruitment, including the advent of online job portals, “AI-driven tools” that can parse resumes, and “applicant tracking system” software that can automate recruitment-related tasks (such as scheduling interviews, communicating with candidates, etc.) have streamlined the recruitment process and reduced “time-to-hire,” in some cases as much as by 35%. See Prashasth Bhushan & Prof. Sudhir Kumar Shukla, *The Digital Transformation in Recruitment: Exploring the Effect and Challenges of Online Recruitment*, 4 MGMT. J. ADVANCED RSCH. 22 (2024).

requested the resume. *Id.* Despite this extra communication with the prospective employer concerning a resume request, this Court in *Smith* did not find the resume request significant and concluded that, “we are constrained to hold that **only these two positions** [the two positions for which the claimant received interviews] remained open and available under *Phoenixville*.” *Id.* at 404 (emphasis added).

While a request for a resume may be evidence of some **general interest** in a candidate, mere outreach for a resume does not necessarily speak to whether a position is actually open and potentially available when a claimant applies. Again, just as an employer may keep a job listing posted beyond when the position is filled (or even in the absence of a genuine candidate search in the first place), it is entirely plausible that a resume might be requested by an employer for any number of reasons other than a job being open and available, such as to keep a qualified candidate’s resume on file for future vacancies if the position has, regrettably, already been filled. Under these circumstances, a resume request is not evidence that a job is actually open and potentially available, but rather, evidence of the opposite.³

If neither the mere fact of Claimant having applied nor the resume request are “additional circumstantial evidence” or constitute substantial evidence necessary to

³ Even if I were to agree that the follow-up resume request from the Donald Miller Electric job satisfied the additional circumstantial evidence analysis in *Smith*, and that this one job remained open and available for a reasonable period for Claimant to apply, I would conclude that Claimant’s disability benefits should not be suspended. The record reflects that the weekly earnings for this position would range between \$700 to \$1,100, based on an hourly wage of \$17.50 to \$27.50 scaled to a forty-hour work week. (C.R. at 163.) Averaging out this range results in an average weekly wage of \$900 per week for this position, which is below Claimant’s pre-injury average weekly wage of \$1,081. (*Id.* at 22). Where a claimant’s pre-injury average weekly wage **exceeds** the estimated post-injury average weekly wage derived from the open and available positions identified by an employer, an employer cannot establish that a claimant has earning power sufficient to warrant total suspension of disability benefits. Accordingly, even if we credit one of the six prospective jobs as open and available based on the resume request—which I would not do based on *Smith*—we would reverse the Board.

affirm, the question then becomes whether Employer’s vocational expert testimony regarding her outreach to prospective employers is enough to carry the day. Upon careful review, I do not believe that this testimony constitutes substantial evidence that the positions were actually open and potentially available until such time as Claimant had a reasonable opportunity to apply. Our Supreme Court stated in *Phoenixville Hospital* that substantial gainful employment “must encompass more than the mere existence of jobs compatible with a claimant’s restrictions **that happen to be open at the time they are discovered by the employer’s expert witness . . .**” *Id.* at 845 (emphasis added). In this case, although the vocational expert’s testimony offers a snapshot of these jobs as open and available for some moment in time, her testimony points to no specific dates or times of her contacts with the prospective employers and, therefore, sheds no light on the openness or availability of the jobs **beyond** the date(s) of her contacts. Specifically, the vocational expert testified as follows concerning her contacts with prospective employers:

Q. In connection with each of the six positions, did you have contact with the employer to establish what the work duties were, the hours and pay?

A. Yes, I did establish the work hours, the duties, the pay, review physical restrictions with each employee representative, Human Resources’ contact by telephone prior to referring the position to [Claimant].

(C.R. at 220.) While this testimony speaks to the **occurrence** of her outreach, it does not inform us **when** the outreach occurred. When asked a follow-up question on dates of her contacts with prospective employers, the vocational expert testified to having no documentation of these dates:

Q. And what I'm confirming is that there's no letter, **no document that provides the date when you contacted – allegedly contacted these employers** after you notified [Claimant] of the potential job lead. Correct?

A. **Well, correct**, in the sense that nothing was provided to [Claimant]'s Counsel about the outcome of his application status.

(*Id.* at 229 (emphasis added).) The vocational expert offered similar testimony that the documentation did not contain dates of her outreach to prospective employers when confronted with job lead letters for specific positions. (*Id.* at 242.) The closest Claimant comes to providing a timeline for her contacts to prospective employers is when she testifies that she spoke to prospective employers “[p]**rior to referring the position** to [Claimant]” and “**prior to sending the [lead] letter** to [Claimant],” but even so, this testimony falls short of establishing any date of said contacts (or establishing that any prospective employers had shared a specific window for how long the positions would remain available beyond her outreach). (*Id.* at 247-48, 254 (emphasis added).) Based on the foregoing, the vocational expert's testimony, at best, establishes only the existence of compatible jobs that “happen[ed] to be open at **the time they [were] discovered**” by her—not that they remained open and available until Claimant had an opportunity to apply. *Phoenixville Hosp*, 81 A.3d at 845 (emphasis added).

The Majority appears to excuse the lack of testimony from the vocational expert concerning “continued availability of the jobs beyond the date [of her contact with employers]” (Majority Op. at 13.) While it may be tempting to infer that a job remains open and available as long as the window between the date of a vocational expert's last outreach confirming job availability with a prospective employer is near to when a claimant receives a job lead letter, in this case, neither

the WCJ nor the Board made **any finding** concerning **the date** of the vocational expert's outreach to prospective employers or the timing of said outreach in relation to her vocational evaluation with Claimant, the dates of the job lead letters, and the dates of Claimant's applications. Likewise, the Board made **no findings regarding the dates** Claimant applied to the prospective positions. In the absence of any such factual findings, it is not the role of this Court to make its own findings in place of the Board.⁴ See *Cambria Cnty. Transit Auth. ("CamTran") v. Unemployment Comp. Bd. of Rev.*, 201 A.3d 941, 947 (Pa. Cmwlth. 2019) (quoting *Chartiers Cmty. Mental Health & Retardation Ctr. v. Unemployment Comp. Bd. of Rev.*, 134 A.3d 1165, 1172-73 (Pa. Cmwlth. 2016)) ("[T]his Court's review of a decision by the Board

⁴ Even if we were to look to the record and make our own determinations on timing in the absence of explicit findings by the Board, I believe we can only speculate about timing based on this record. As noted in the Majority, the vocational expert received an assignment to conduct labor market survey activity for Claimant on **November 8, 2022**, conducted a vocational evaluation with him on **December 6, 2022**. (Majority Op. at 3.) The vocational expert also issued a vocational evaluation report on **December 14, 2022**. (Reproduced Record (R.R.) at 90a.) The job lead letters for the six positions, meanwhile, are dated **December 15, December 22, and December 27, 2022, and January 3 and January 9, 2023**. (C.R. at 149-65.) The testimony of the vocational expert is inconclusive of the date of outreach and internally inconsistent. At most, it appears she contacted the employers sometime **between when she received the assignment, on November 8, 2022, and the dates of each job lead letter**—but whether this means one day, one week, one month, two months, or longer transpired between the dates of the vocational expert's contacts with each prospective employer and the dates Claimant actually received the job lead letters and had an opportunity to apply, we can only speculate. This discussion does not even account for the time elapsed between when the vocational expert mailed the job lead letters and Claimant's receipt of the same, or the time for Claimant to review the listings, assemble his application materials, and apply. While the Board makes no findings regarding the dates of Claimant's receipt of the job lead letters, the record also contains **certified mail receipts** corresponding to the job lead letters marked with "receipt dates" stamps ranging from **January 23, 2023 (for the job lead letter dated December 15, 2022)**, to **February 8, 2023 (for the job lead letter dated January 9, 2023)**. Where the gap from the vocational expert's confirmation of availability to the date when Claimant had an opportunity to apply can be as long as almost three months, I cannot conclude that there is substantial evidence that the jobs remained open and available to afford Claimant a reasonable opportunity to apply.

does not permit it to reweigh the evidence or substitute its own findings for those made by the Board.”).

Moreover, *Smith* seems to reject that such temporal proximity is relevant to our examination of whether the six jobs were actually open and potentially available at the time Claimant applied. In *Smith*, as in this case, the vocational counselor contacted prospective employers and confirmed that the positions were open and available **as of the date of her contact only**—not beyond this date. *Id.* at 399-400, 402. This Court noted that “the WCJ found [c]laimant **immediately applied** for the positions,” but even where we found that there was no gap, or at least a very minimal gap, between the vocational expert’s identification of jobs and claimant’s application, we still held in *Smith* that **there should be some additional circumstantial evidence** to conclude a job is open and available. *Id.* at 404 (emphasis added). Simply put, that there was seemingly an insignificant amount of time that passed before Claimant applied was not enough. Where online applications allow for applicants to apply at breakneck speeds compared to days of old where mail-in applications and in-person interviews dominated, I am in agreement with *Smith*’s approach, that we should look to evidence other than the timing of days or weeks from a vocational expert’s last outreach to gauge openness and availability, where even a matter of several days or weeks can be a lifetime in the context of a candidate applying to online job listings.

In sum, it is reasonable that employers should have to present “additional circumstantial evidence,” beyond the mere fact of a claimant having submitted an online application after a vocational expert makes an initial outreach, before we modify or suspend a claimant’s disability benefits. Under *Smith*, testimony that a claimant applied in-person and exchanged some information with an employer, or a

simple email from an employer confirming receipt of an online application and stating that they will get back to a claimant with next steps in the application process may well be sufficient to suffice as additional circumstantial evidence tending to indicate the job was open and available when a claimant applied. Especially in the context of online job application portals such as *Indeed.com* and *LinkedIn*, where dozens or even hundreds of applicants might apply for a single job with just the click of a button, where applicants can apply beyond their geographic bounds, and where “ghost job” listings (positions that are advertised as available but in reality either are not hiring or do not exist)⁵ abound, the reality is that job searching in the modern world can sometimes feel like casting a net into empty waters. Thus, to the extent that our Supreme Court in *Phoenixville Hospital* cautioned against a reading of Section 306(b) that would lead to “the absurdity of an employer identifying one ‘open’ job and using it to establish earning power for a number of ‘eligible’ claimants, when clearly at most only one of these claimants could actually have the opportunity,” 81 A.3d at 844, I believe that *Smith* offers an approach that avoids this result while taking into account some of the challenges of job-searching in the modern world.

For the foregoing reasons, I believe that Employer has not met its burden of proving, through legally competent evidence, that it identified an open and available job within Claimant’s vocational and physical capabilities, and further, Employer has not demonstrated an increase in Claimant’s earning power. Accordingly, I

⁵ “A tight employment market, economic uncertainty, and the rising (and often clumsy) use of artificial intelligence” in the post-COVID-19 economy have led to a rise in ghost jobs—“online job listings by real companies advertising positions that **do not actually exist or for which there is no present intention to hire.**” See Daniel J. Grimm, *Ghost Jobs*, 125 COLUM. L. REV. F. 183, 183-84 (2025) (emphasis added). “Some ghost jobs are limited to passive résumé collection, while others truly commit to the ruse by staging fake screening calls and interviews.” *Id.*

respectfully dissent from the Majority's affirmation of the Board's November 25, 2024 Order, affirming the WCJ's Decision to suspend Claimant's disability benefits, and would reverse the WCJ's Decision.

RENÉE COHN JUBELIRER, President Judge