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# Abex Corporation v. Brinkley Burden of Proof in Proceedings to Modify Workman's Compensation Agreements

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# Note

## ABEX CORPORATION v. BRINKLEY BURDEN OF PROOF IN PROCEEDINGS TO MODIFY WORKMAN'S COMPENSATION AGREEMENTS

### Introduction

In workman's compensation cases, the amount of disability compensation which the injured employee receives is based upon the degree of disability; the greater the disability the larger the compensation.[1] Thus, for an employer to reduce total disability payments to partial disability payments, it must be shown that the claimant is no longer totally disabled.[2] To prove such a reduction of disability the employer must show that: (1) the claimant is no longer totally physically disabled and is now capable of performing general light work; and (2) such work, commensurate with the claimant's qualifications and ability, is generally available.[3] However, there is disagreement among the courts as to the requisite proof of the availability of work needed to satisfy the second requirement.

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1. Ham v. Chrysler Corp., 231 A.2d 258 (Del. 1967); Kish v. Steele Coal Co., 185 Pa. Super. 257, 137 A.2d 855, 856 (1958); Hartnett Corp. v. Coleman, 226 A.2d 910 (Del. 1967).

2. Ham v. Chrysler Corp., 231 A.2d 258 (Del. 1967); Hartnett Corp. v. Coleman, 226 A.2d 910 (Del. 1967); Federal Bake Shops, Inc. v. Maczynski, 180 A.2d 616 (Del. Super. 1962). (If claimant can find a job commensurate with his qualifications and training, payments for total disability can end or be reduced to those for partial disability).

3. Ham v. Chrysler Corp., 231 A.2d 260 (Del. 1967); Hartnett Corp. v. Coleman, 226 A.2d 913 (Del. 1967); Kish v. Steele Coal Co., 185 Pa. Super. 257, 137 A.2d 856 (1958). *See, e.g.*, Unora v. Glen Alden Coal Co., 377 Pa. 7, 104 A.2d 104 (1954); Federal Bake Shops, Inc. v. Maczynski, 180 A.2d 616 (Del. Super. 1962); Kirk v. L. Bauer, Jr., Inc., 20 Pa. Super. 357, 228 A.2d 228 (1967).

This Note will examine the required specificity of proof as to the availability of jobs which must be proved by the employer in order to obtain a reduction of a total disability award. Specific attention will be given to the recent Delaware case of *Abex Corp. v. Brinkley*[4] and the effect of that decision on the determination of the following questions: (1) who shall have the burden of proof? (2) what is the amount and nature of the proof which the employer must present in order to meet his burden?

## I. Statement of the Problem

This Note is concerned with the problems of proof which arise from a suit by an employer to modify the workmen's compensation agreement between himself and a disabled claimant. When an employer sues to have a compensation agreement modified from one for total disability to one for partial disability, he must show that the claimant has partially recovered from his disabling injury.[5] A claimant's degree of disability is determined by a consideration of not only his physical recovery, but also his ability to find suitable light work.[6] His standing in the labor market, determined by his medical-economic position, is the criterion for determining the degree of his disability. A claimant's physical recovery may not be accompanied by an economic recovery—the ability to find suitable work. For example, in *Lightner v. Cohn*,[7] the court awarded total disability payments to a claimant who was only twenty-five per cent physically disabled because it found that he was unable to find suitable work as a result of his disability, even though his physical handicap was relatively small.

The problem of proof with which this Note is concerned is not the proving of a claimant's physical recovery, but rather with the proving of claimant's ability to find suitable light work. This problem is two-fold: (1) As between the employer and the claimant, who has the burden of proving the availability of light work, and (2) How specific must the proof of the availability of suitable jobs be?

The majority rule concerning the burden of proof is that in a

4. 252 A.2d 552 (Del. Super. 1969).
5. Cases cited note 3 *supra.*
6. *Id.*
7. 76 N.J. Super. 461, 184 A.2d 878 (1962). *See* Lee v. Minneapolis Street Ry., 230 Minn. 315, 41 N.W.2d 433 (Sup. Ct. 1950). *Cf.* Durney's Case, 222 Mass. 461, 111 N.E. 166 (1916); Jordan v. Decorative Co., 230 N.Y. 322, 130 N.E. 634 (1921) (claimant's inability to find work must be a result of the injury, and not the result of outside factors such as labor market fluctuations or economic cycles).

suit to modify a compensation agreement, the burden of proof is on the moving party to show a change in the claimant's condition.[8] Thus it is clear that, according to the majority rule, when an employer is alleging a claimant's partial recovery he must show that claimant has physically recovered and that suitable light work is available to him. The proof of claimant's physical condition is usually routine. The difficulty arises in determining how specific the proof of the availability of jobs must be. This point is critical because if the employer can prove that jobs are available the burden of proof then shifts to the claimant, who must prove that such jobs are not available. The moving party rule only requires proof of the *general* availability of jobs, thus allowing the employer to meet his burden rather easily.[9] The fairness of this result is questionable since the employer has forced the claimant into court. Whether the employer should be able to shift the burden of proof so easily to the uncomplaining claimant is the question to which the court addressed itself in *Abex*.

## II. ABEX CORP. V. BRINKLEY[10]

In *Abex Corp. v. Brinkley* the former employer of a claimant who had been receiving total disability payments under the Delaware Workmen's Compensation Law[11] appealed a finding of the Industrial Accident Board, in which the Board had denied the employer's petition to terminate total disability payments to the claimant. The employer had alleged in his petition to the Board that the claimant was sufficiently recovered to perform general light work, and that such work was available to the claimant in the area.[12]

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8. *E.g., Ex parte* G.C. Brown & Co., 211 Ala. 230, 100 So. 771 (1943); Brown v. Industrial Accident Commission of Cal., 44 Cal. App. 2d 6, 111 P.2d 931 (D.C. Cal., 3rd Dist., 1940); Cole v. City of Miami, 52 Ariz. 488, 83 P.2d 997 (1961); Fortson v. American Sur. Co., 92 Ga. App. 625, 89 S.E.2d 671 (1955); Boshers v. Payne, 58 Idaho 109, 70 P.2d 391 (1937); Consolidated Coal of Saint Louis v. Industrial Comm'n., 315 Ill. 428, 146 N.E. 442 (1953); Earhart v. Cyclone Fence Co., 102 Ind. App. 634, 4 N.E.2d 571 (1960); Jones W.U. Tel. Co., 165 Kan. 1, 192 P.2d 141 (1948); W.E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453 (1946); Connelly's Case, 122 Me. 289, 119 A. 664 (1923); Pretzer v. State Psychopathic Hospital, 286 Mich. 454, 282 N.W. 213 (1934); Bomersine v. Armour & Co., 255 Minn. 157, 30 N.W.2d 526 (1947); Ludwickson v. Central States Electric Co., 142 Neb. 308, 6 N.W.2d 65 (1942); Armstrong v. Lake Tarleton Hotel Corp., 103 N.H. 450, 174 A.2d 410 (1961); Jersey City Printing Co. v. Klochanski, 9 N.J. Super. 361, 74 A.2d 432 (1949); Rotino v. J.P. Scanlon, Inc., 125 N.J.L. 227, 15 A.2d 336 (Sup. Ct. 1940); Sinclair Refining Co. v. Duncan, 297 P.2d 663 (Okla. 1956) (rehearing denied); Holtz v. McGraw & Bindley, 161 Pa. Super. 371, 54 A.2d 905 (1950); Old Dominion Land Co. v. Messick, 149 Va. 330, 141 S.E. 132 (1928); Karlsen v. Department of Labor & Industries of Wash., 26 Wash. 2d 310, 173 P.2d 1001 (1946); Hipke v. Badger Paper Mills, 261 Wis. 226, 52 N.W.2d 401 (1952).

9. Cases cited note 8 *supra*.

10. 252 A.2d 552 (Del. Super. 1969).

11. DEL. CODE ANN. tit. 19, § 2324 (1953).

12. 252 A.2d at 553.

Hence, the employer, who admitted that he had the burden of proof under the majority rule, proved only the general availability of jobs which claimant could physically perform. The employer's expert testified only that general light work which claimant was capable of performing was available in the area. However, claimant's entire condition—his age, training, skill, *and disability*—was not considered. Nor was it shown how prospective employers might react to the claimant in his present condition.[13] In fact, the employer's expert testified that he did not know how an employer might react to this particular claimant.[14]

The court held that such evidence was insufficient to prove that a reduction in disability payments was warranted.[15] The court thus recognized the hesitance of employers to hire the handicapped, even though the partially disabled person is physically capable of performing the particular job.[16]

In so holding, *Abex* extended an earlier Delaware case, *Ham v. Chrysler Corp.*,[17] in which the court held that, in determining claimant's disability, claimant's entire physical and economic condition must be considered.[18] That is, claimant's bargaining position in the labor market, considering his disability, must be the criterion for apportioning his disability payments.[19] The *Ham* decision held that evidence of existing work which the claimant is physically capable of performing is insufficient proof that the claimant could actually secure such work. The inability to secure work, the *Ham* court stated, is equally as damaging to a claimant as the inability to work.[20] However, the *Ham* court did not decide what standard of specificity should be required.

In *Abex*, the Delaware Superior Court followed *Ham* in stating that evidence of claimant's ability to perform work and the general availability of such work did not satisfy the employer's burden of proof.[21] The court then clarified the *Ham* decision by holding that the employer must present evidence of the availability of work

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13. *Id.* at 554.
14. *Id.*
15. 252 A.2d at 553.
16. *Id.*
17. 231 A.2d 258, 261 (Del. 1967).
18. *Id.* at 260. The court said:
> The proper balancing of the medical and wage loss factors is the essence of the problem . . . inability to secure work . . . is as an important factor as the inability to work.

*Id.* at 260.
19. *Id.* at 261.
20. *Id.*
21. 252 A.2d at 553.

*suited for the particular claimant* before disability payments could be terminated.[22] The court stated:

> A showing of physical ability to perform certain appropriate jobs and the general availability of such jobs is, in this court's opinion, an insufficient showing of the availability of said jobs to a *particular claimant* and that a showing of this latter factor is necessary to satisfy the burden of proving that total disability has ended.[23]

Thus, in Delaware it is no longer sufficient to simply show the general availability of work which a claimant is physically capable of performing and which is commensurate with his qualifications. Instead, it must be shown that suitable work within claimant's capabilities is available to the specific claimant; *i.e.*, that suitable employers would be willing to hire the claimant with his disability.[24]

It should be pointed out that the *Abex* court specifically stated that by its holding it was not requiring the employer to actually find other employers who would hire the claimant.[25] It is submitted, however, that requiring the employer to prove the existence of other employers who would be *willing* to hire claimant is practically the same as forcing the employer to find a new position for the claimant. A discussion of the equities in forcing an employer to relocate a claimant is not within the scope of this paper. But it should be noted that since *Abex* went as far as it did in enlarging the specificity of proof, if it had gone one step further, and required the employer to relocate a disabled former employee, the additional hardship on the employer, in the light of the actual *Abex* requirement, would have been small as compared to the benefit to the claimant.

## III. The Reason for the Abex Decision

In order to appreciate the importance of the *Abex* decision, the entire area of the degree and burden of proof required to show the availability or unavailability of suitable jobs for the claimant in workmen's compenation cases must be considered.

The majority of states follow the "moving party rule."[26] As previously discussed the elements of this rule are twofold. First, the rule states that in a proceeding to modify a compensation agreement from total disability to partial disability, the moving party has the burden of proof.[27] Second, the rule requires that if the employer is the moving party, in addition to claimant's physical recovery, he must prove also the *general* availability of such

22. *Id.*
23. *Id.*
24. *Id.* at 556.
25. *Id.* at 554.
26. Cases cited note 8 *supra.*
27. *Id.*

work in the area. Proof of both elements is the employer's *prima facie* case.[28] When these two elements have been proven, the burden then shifts to the claimant to prove that he has tried to secure such work but has failed because of his disability.[29] The rule in effect forces the claimant to reprove his original disability each time the employer proves physical recovery and the *general* availability of jobs which claimant could conceivably perform.

The court in *Abex* followed the moving party rule in so far as that rule places the burden of proof on the moving party. However, *Abex* felt that the requirement of a showing of only the general availability of jobs was unfair since the employer, as the moving party, should not be able to meet his burden of proof by a showing of facts which may not be relevant to the particular claimant. The court stated that a disabled person does not stand on the same footing as a non-disabled person.[30] Since employers may feel unable to rely on a partially disabled person's health, they may refuse him a job which he may be physically able to perform.[31] Hence, the employer's proof that light work is generally available does not mean that a partially disabled claimant will be able to secure such work. To allow an employer to prove his case by such an unrealistic showing is unfair to a claimant who, despite a court's finding of partial recovery (accompanied by a reduction of disability payments), finds it impossible to secure employment. To remedy this inequity, the *Abex* court reasoned that the employer should be required to make a realistic showing that a particular claimant, with his peculiar disability, can actually secure employment. Thus, the *Abex* decision now requires the employer to show the willingness of employers to hire the particular claimant in order to meet his burden of proof.

The impact of this requirement of greater specificity of the employer's proof on the matter of the *burden* of proof in compensation cases is important and should be noted. While obstensibly the court is only increasing the specificity of the proof, a secondary effect of the holding is to control the shifting of the burden of proof. The required degree of the specificity of the proof determines how easily the employer can meet his burden of proof. This in turn is determinative of when, if ever, the burden of proof (to show the unavailability of jobs) will shift to the claimant. By requiring a

28. Connelly's Case, 122 Me. 289, 119 A.2d 664 (1923); Holtz v. McGraw & Bindley, 161 Pa. Super. 371, 54 A.2d 905 (1950). *See also* note 19 and accompanying text *supra*.
29. Cases cited note 8 *supra*.
30. 252 A.2d at 553.
31. *Id.*

greater degree of specificity than the pre-*Abex* moving party rule, the *Abex* court has forced the burden of proof to remain on the employer.

Thus, the *Abex* decision maintains the spirit and effect of the moving party rule: to place the burden of proof where it belongs—on the moving party—and to keep it there until the *prima facie* case is realistically proved.

The *Abex* ruling also eliminated another undesirable consequence of the "general availability" requirement of the moving party rule. Under the old pre-*Abex* rule, once the employer had met his burden of proof, the claimant, in order to resist termination of his compensation payments, had to prove that there actually were no jobs available to him because of his disability. This was a difficult, if not impossible, burden for the claimant to meet. Theoretically, it would require a canvassing of virtually the entire labor market to determine the willingness (or hesitance) of employers to hire claimant. Moreover, it is usually more difficult to prove the non-existence of something rather than its existence.[32] *Abex* corrected this inequity by requiring specific proof of the availability of jobs for claimant. If the employer meets this burden of proof, and the claimant cannot rebut it, the court will permit termination of payments for total disability since it will have been realistically proven that claimant *has* recovered and thus there is no further need for compensation payments.

A great deal of the *Abex* decision was devoted to the degree and the burden of proof required in similar cases in Pennsylvania, where a different approach to the problem had been used. In Pennsylvania, prior to 1967,[33] once the employer proved that the claimant was capable of performing general light work, a presumption arose that such work was available.[34] The burden then shifted to claimant to prove the unavailability of suitable jobs in order to resist modification of his compensation agreement.[35] Under this Pennsylvania rule, the employer's burden of proof was lessened while the claimant's was made more difficult. The rule thus favored the employer. This result was inherently unfair to an uncomplaining claimant and was an illogical allocation of the burden of proof. However, since the *Abex* court was discussing the burden and specificity of proof in workmen's compensation cases, it felt constrained to discuss the series of Pennsylvania cases which were so antithetical to the *Abex* view.

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32. *Id.* at 556.

33. Pennsylvania now apparently follows the majority moving party rule. *See* Petrone v. Moffat Coal Co., 427 Pa. 5, 233 A.2d 891 (1967).

34. Sorby v. Three Rivers Motors, 178 Pa. Super. 187, 114 A.2d 347 (1955) (and cases cited therein); Earley v. Philadelphia & Reading Coal & Iron Co., 144 Pa. Super. 301, 19 A.2d 615 (1941).

35. Sorby v. Three Rivers Motors, 178 Pa. Super. 187, 114 A.2d 347 (1955).

## IV. The Employer's Burden under the Pennsylvania Presumption Rule

The Pennsylvania rule was first pronounced by the Superior Court in *Consona v. R.E. Coulborn & Co.*[36] In *Consona* the court held: "If a workman is proved able to do light work in general, it *may* be presumed that such work is available."[37] Ten years later, however, the same court in *Earley v. Philadelphia and Reading Coal and Iron Co.*,[38] construed *Consona's* ambiguous use of the term "presumed" to mean that, once the employer has shown that the claimant is capable of doing general light work, a *legal* presumption arises that such work is available. The effect of this legal presumption was to shift the burden of proof to the claimant to prove that suitable jobs were unavailable once the employer had established that claimant was physically capable of performing such jobs. *Earley's* use of the legal presumption shifting the burden of proof to the claimant was followed in subsequent Pennsylvania cases.[39]

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36. 104 Pa. Super. 170, 158 A. 300 (1931).

37. *Id.* at 172, 158 A. at 300. Again, later in the case, the court stated that "it may be presumed that work of that nature is available." Based on the use of the word "may" the court probably did not intend the term "presumed" to be interpreted in the evidentiary sense as a "presumption of fact," but rather in its lay sense of being roughly analogous to "assumed." The meaning of the term "presumed" in *Consona* is at best ambiguous.

38. 144 Pa. Super. 301, 19 A.2d 615 (1941). The case did differentiate between two types of claimants: (1) those capable of doing general light work, and (2) those claimants who are so disabled that they are only capable of performing specially created "odd jobs" type of work. As to the latter class, the presumption did not apply and the burden of proving the availability of jobs was on the employer. But as to the former class, those capable of performing general light work, the case held that the presumption certainly applies. This distinction between types of claimants is recognized in most other jurisdictions. *See, e.g.*, Shroyer v. Industrial Comm'n, 98 Ariz. 388, 405 P.2d 875 (1965); State Subsequent Injuries Fund v. Industrial Accident Comm'n., 196 Cal. App. 10, 16 Cal. Rptr. 323 (1961); Clark v. Western Knapp Eng'r. Co., 190 So.2d 334 (Fla. 1966); Pelebat v. Portland Box Co., 155 Me. 226, 153 A.2d 615 (1959); Lightner v. Cohn, 76 N.J. Super. 461, 184 A.2d 878 (1962); Jordan v. Decorative Co., 230 N.Y. 552, 130 N.E. 634 (1921).

39. Sorby v. Three Rivers Motors, 178 Pa. Super. 187, 114 A.2d 347 (1955) (and cases cited therein). In *Sorby*, the employer was petitioning to have claimants' payments for total disability reduced to those for partial disability. Claimant was shown to be capable of doing general light work. Thus, the court held that the presumption that light work was available was applicable and the burden was on the claimant to show that she could not secure such work. Failing in this, the court held that claimant's disability was partial and payments were reduced accordingly.

A. *Attacks on the Pennsylvania Rule*

The *Abex* court decided not to adopt the Pennsylvania presumption rule in Delaware. Part of the court's rationale for not doing so came from subsequent Pennsylvania cases which modified and finally rejected the presumption rule.[40]

In *Unora v. Glen Alden Coal Co.*,[41] the Pennsylvania Supreme Court recognized that the presumption rule was arbitrary and illogical and attempted to correct it. The court held that a realistic opportunity for claimant to engage in gainful employment must be shown to exist.[42] The *Unora* holding seems to overrule the presumption rule, and the burden of proving the availability of jobs was apparently shifted to the employer. However, the case is unclear and cannot be considered to be a definitive statement of the Pennsylvania law at that time. Furthermore, in *Unora*, a distinction must be noted. Claimant in *Unora* was not capable of doing general light work, but was in the category of one who is only capable of performing specialized "odd jobs." But, since the presumption rule had never been applied to that type of claimant, the case actually changed nothing in rejecting the presumption rule in the *Unora* fact situation. The case appears to be largely a factual determination based on the fact that claimant was only capable of special work for which a reasonably stable market did not exist. In holding that the employer must show the availability of work the court did not really reject the presumption rule but actually only restated *Earley v. Philadelphia and Reading Coal and Iron Co.*,[43] which held that an employer must show the availablity of jobs for claimants who are only capable of doing specialized "odd jobs" type of work which is difficult to find.

Another criticism of the presumption rule was stated by the Pennsylvania Superior Court in *Kirk v. L. Bauer, Jr., Inc.*[44] Here the court suggested that the presumption rule should be modified into either an "inference" or a "rule of proof production."[45] As an

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40. Petrone v. Moffat Coal Co., 427 Pa. 5, 233 A.2d 894 (1967); Kirk v. L. Bauer, Jr., Inc., 20 Pa. Super. 357, 228 A.2d 228 (1967).

41. 377 Pa. 7, 104 A.2d 104 (1954).

42. *Id.* (The holding here is to be distinguished from that of the main case. Here the required specificity of the proof is somewhat less specific than in *Abex*).

43. 144 Pa. Super. 301, 19 A.2d 615 (1941). *See also* Transport Indemnity Co. v. Industrial Accident Comm'n, 157 Cal. App. 2d 542, 321 P.2d 21 (D.C., 1st Dist., 1958); Cohen v. Doubleday & Co., 191 Pa. Super. 106, 155 A.2d 381 (1959); Cunningham v. Alex Guerrina & Sons, 188 Pa. Super. 106, 146 A.2d 319 (1958); *In re* Iles, 56 Wyo. 443, 110 P.2d 826 (1965).

44. 209 Pa. Super. 357, 228 A.2d 228 (1967). The court did say:

> If the effect of the presumption, in this case, were really to impose an almost insurmountable burden on the claimant to prove that he could not find employment, then we should be tempted to discard it as unjust as well as unrealistic.

*Id.* at 362, 228 A.2d at 231.

45. *Id.* at 361, 228 A.2d at 231.

inference, the rule would be construed as a "permissible consideration of the possibility that light work is available."[46] The problem with this approach, however, is that the difference between presumption and inference is largely semantic. The end result of both is basically the same; the burden of proof shifts to the claimant. As an inference the burden is on the claimant to rebut the inference that jobs are available. The burden is identical under the presumption rule.

As a rule of proof production, according to *Kirk*, the burden of proof would be determined by the comparative accessibility of each party to the evidence.[47] This seems more equitable than either the presumption or the inference rule since the burden of proof would vary according to the particular fact situation of each case. However, there is no indication that this rule has ever been applied by any court.

B. *The Change in the Pennsylvania Law*

The last case which the *Abex* court considered in its discussion of the Pennsylvania Rule was *Petrone v. Moffat Coal Co.*[48] In *Petrone*, claimant, a coal miner suffering from anthracosilicosis and unable to return to the mines, appealed a lower court ruling that because he was able to do light work he was not totally disabled. The only evidence presented by the employer as to the availability of jobs was testimony by a doctor who stated that he believed claimant was capable of operating a power lawn mower or an elevator. No expert testified that such jobs were available in the area. Furthermore, there was no testimony that, even if these jobs existed, employers would hire disabled persons such as claimant. On appeal, the Pennsylvania Supreme Court reversed and remanded, holding that the presumption of the availability of suitable work was invalid and that since the availability of suitable jobs had not been shown, the employer had not met his burden of proof.[49]

While *Petrone* did unequivocably reject the presumption rule, the court also hinted at the *Abex* issue; that is, the specificity with which the employer must show the availability of jobs for the claimant.[50] The court suggested that more specific proof than a mere showing of the *existence* of suitable jobs is needed to satisfy the

46. *Id.*
47. Kirk v. L. Bauer, Jr., Inc., 20 Pa. Super. 357, 228 A.2d 228 (1967).
48. 427 Pa. 5, 233 A.2d 891 (1967).
49. *Id.* at 8, 233 A.2d at 894 (that rationale here seems to be, however, that the very *existence* of jobs was not shown).
50. *Id.*

employer's burden of proof. However, the decision in *Petrone*, unlike *Abex*, was based on a different ground; the fact that the availability of jobs, per se, was not shown. The employer, relying on the presumption rule, offered *no evidence* on the availability of jobs. Thus, since the court rejected the presumption rule, the case was remanded in order to give the employer an opportunity to present evidence as to the availability of jobs.[51] The basis for the decision, therefore, was not that the employer failed to be specific as to the availability of work for the claimant, but that he failed to offer any proof as to the very existence of such work.

Thus, while *Petrone* suggested that some degree of specificity was needed in showing the availability of jobs, its holding merely rejected the presumption rule and shifted the burden of proof of the general availability of jobs from the claimant to the employer. *Petrone* determined the initial burden of proof rather than the nature and quality of that proof, and, as such, did not reach the *Abex* question. The *Abex* issue of the specificity of proof (important in determining if the burden of proof will shift to the claimant) was not decided.

## V. The Abex Rejection of the Pennsylvania Rule

The question before the *Abex* court was not who had the burden of proof, but rather how specific that proof must be so as to keep the burden of proof on the employer.[52] Thus, while *Abex* strongly rejected the presumption rule, it is submitted that the court in deciding the specificity question should not have been concerned with the presumption rule. At the time of the *Abex* decision it was settled law in Delaware that the *burden* of proof as to the availability of jobs is on the party who is petitioning for modification of the compensation agreement (*i.e.*, the moving party).[53] The employer in *Abex*, as the moving party, did not challenge the Dela-

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51. *Id* at 9, 233 A.2d at 895.

52. 252 A.2d at 556. In only one of the Pennsylvania cases was the specificity of the proof even mentioned, and then only as dictum. Petrone v. Moffat Coal Co., 427 Pa. 5, 233 A.2d 891 (1967).

53. *Cf.* Braun & Co. v. Mason, 168 A.2d 105 (Del. Super. 1960). The court held:

> In our opinion the effect of 19 Del. C. § 2344 and 19 Del. C. § 2347 is to place upon the party seeking to modify an award by subsequent review the burden of establishing by a preponderance of the evidence that the former award should be modified.

*Id.* at 107. This interpretation is questionable, however, in light of the quoted statutes which do not specifically mention the burden of proof. The statutes quoted read:

> § 2344—If the employer and the injured employee . . . reach an agreement in regard to compensation . . . it shall be final and binding unless modified as provided in section 2347 of this title.
> § 2347—On the application of any party . . . on the ground that the incapacity has subsequently terminated, increased, diminished or recurred . . . the board may . . . review any agreement or award. . . .

Del. Code Ann. tit. 19, §§ 2344, 2347 (1953).

ware law on the burden of proof, but rather admitted that he had the burden of proof.[54] The only issue before the *Abex* court was the degree of proof required as to the availability of jobs for a disabled claimant. Adoption of the presumption rule would have been a step backwards. Delaware had already gone further with the use of the majority moving party rule.[55]

Furthermore, the *Abex* court's discussion of the use of the presumption rule in Pennsylvania is somewhat misleading. *Abex* states that in all of the Pennsylvania cases where the presumption rule was used, the claimant was the moving party. The *Abex* court, therefore, reasoned that the Pennsylvania courts were justified in using the presumption rule since claimant, as the moving party, should have the burden of proof. The Delaware court states that these Pennsylvania cases are distinguishable from *Abex* since in *Abex* the employer was the moving party and would be unjustly relieved of his burden of proof if he were allowed simply to show the general availability of jobs, thereby in effect shifting the burden of proof to the claimant to show the unavailability of jobs. This reasoning is the court's basis in *Abex* for increasing the employer's burden of proof by requiring a greater specificity in that proof.[56]

It is submitted that the court in *Abex* was wrong in its interpretation of the Pennsylvania cases. The presumption rule was apparently applied in Pennsylvania regardless of who was the moving party; it was utilized as soon as the employer had shown the claimant to be capable of doing general light work. The fact that claimants were the moving parties in the presumption cases reviewed by *Abex* had no effect on the application of the presumption rule.

Moreover, in *Petrone*,[57] claimant was again the moving party. Thus, according to the *Abex* reasoning, the *Petrone* court would have been justified in applying the presumption rule since the burden should have been on claimant, as the moving party. However, the *Petrone* court, even though claimant was the moving party, refused to apply the presumption stating that it was illogical and not based on sufficient facts. *Petrone* arrived at this decision without regard to the fact that claimant was the moving party. Thus, the reasoning in *Abex* for not adopting the presumption rule because in its case, unlike the Pennsylvania presumption rule cases, the employer was the moving party, is not substantiated by the

54. 252 A.2d at 553.
55. Ham v. Chrysler Corp., 231 A.2d 258 (Del. 1967); Hartnett Corp. v. Coleman, 226 A.2d 910 (Del. 1967).
56. 252 A.2d at 555.
57. Petrone v. Moffat Coal Co., 427 Pa. 5, 233 A.2d 891 (1967).

Pennsylvania cases.

However, other criticisms stated by the *Abex* court of the presumption rule are more cogent and are adequate justification for that court's rejection of the rule. For example, *Abex* states that for a legal presumption to be valid, it must be based on fact and be a reasonable and natural deduction from that fact.[58] It is hardly logical to believe that jobs exist simply because one is capable of performing them. Such a belief is a *non sequitur*. Another valid reason, stated by *Abex*, for rejecting the presumption rule was that a disabled claimant rarely stands on an equal base with a non-disabled person.[59] Employers would rarely choose a disabled job applicant over a non-disabled one. They would naturally be concerned about a disabled man's ability to work efficiently and steadily, and whether his good health would continue. A final reason stated by *Abex* is the matter of expedience. It would normally be easier for an employer, who is more knowledgeable as to the labor conditions than a claimant, to determine the availability of jobs in the area.[60] Regardless of *Abex*' reasons for rejecting the rule, however, it would seem, in light of the Pennsylvania court's rejection of the rule, that the *Abex* court arrived at a logical and rational conclusion in declining to adopt the presumption rule.

## Conclusion

### *The State of the Law after the Abex Decision*

The *Abex* holding leaves unchanged the Delaware law with regard to the question of who has the burden of proof as to the availability of jobs. The burden is still on the moving party.[61] This is in accord with the majority of states.[62] The major impact of the *Abex* holding, however, is in the degree of specificity of the proof required by the court as to the availability of suitable work for claimant. The employer's burden of proof now must be a realistic showing of the availability of jobs for a *particular claimant*.[63] In *Abex*, the employer argued that this was too great a burden and that in effect, under this rule, he would be required to lead the claimant to a new job. The court disagreed, stating that the em-

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58. 252 A.2d at 555. *See, e.g.*, Petrone v. Moffat Coal Co., 427 Pa. 5, 233 A.2d 891 (1967).

59. 252 A.2d at 553.

60. Petrone v. Moffat Coal Co., 427 Pa. 5, 233 A.2d 891 (1967).

61. 252 A.2d at 554.

62. The moving party rule is the majority rule. Cases cited note 19 *supra*.

63. 252 A.2d at 552. The court states:

> A showing of physical ability to perform certain appropriate jobs and general availability of such jobs is, in the court's opinion, an insufficient showing of the availability of said jobs to a particular claimant and that a showing of this latter factor is necessary to satisfy the burden of proving that total disability has ended.

*Id.* at 553.

ployer did not have to show the existence of a particular job at a particular time. Rather, all the employer had to show was something more than the mere availability of general light work. He had to prove the "general willingness" of employers to hire a man with the claimant's particular qualifications *and* disability.[64]

It is submitted that in so holding, the *Abex* court unnecessarily weakened its holding and created unfortunate confusion. For, although the employer now must show a willingness of employers to hire the particular claimant, he is not required to relocate the claimant in a new job. The distinction between the two seems small and vague and does not present an adequate and unambiguous guideline with which other courts can evaluate the adequacy of an employer's proof.

The court should have held that in cases such as this, where the employer is the moving party, he should find the work for claimant which he alleges to be available. Proving that employers exist who would be willing to hire the claimant is tantamount to relocating him anyway. Requiring the relocation of the claimant would have been only a slight extension of the *Abex* holding, would have caused little additional hardship on the employer, effectively replaced the compensation which the employer alleges is no longer needed by claimant, and clarified completely the degree of specificity required. Thus, although *Abex* was a step towards establishing a more realistic standard with which to judge alleged recovery in compensation cases, some further extension would seem to be warranted.

JOHN A. SNOWDON, JR.

64. 252 A.2d at 554.