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Pennsylvania Workers' Compensation Bulletin

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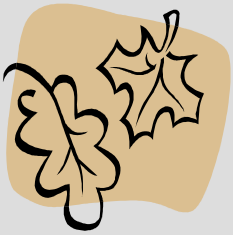

"FALL" Into Savings:
An Introduction to Offsets Available under Section 204(a) of the Workers' Compensation Act

Section 204(a) of the Pennsylvania Workers' Compensation Act seeks to lower the employers' cost of workers' compensation by reducing the payment of duplicate benefits to workers.

Section 204(a) of the Act permits employers to credit severance, pension, unemployment, and old-age social security benefits an employee receives against the amount of worker's compensation that the employer pays to that individual. However, Section 204(a) is not a *carte blanche* license to offset all worker's compensation benefits payments - there are clear rules and procedures limiting these offsets. This article will function as a brief primer to the qualifications for the Section 204(a) offset process.

What Offsets are Available?

There are four types of workers' compensation offsets available to employers. Severance benefits, unemployment compensation, old-age Social Security benefits and pension benefits. An employee's receipt of each of these may entitle an employer to a credit or offset.

Before looking more closely at each category, a recent Commonwealth Court case bears mention and is applicable to each of the four offset categories. In Philadelphia Gas Works v. WCAB (Amodei),[1] the Court held that employers may only calculate workers' compensation offsets based on the net amount of benefits that an employee receives, not the gross amount. This effectively overrules earlier Commonwealth Court cases holding that the gross benefit figure could be used as the offset credit.

Unemployment Compensation

An employer can credit the net amount of unemployment compensation benefits an employee receives against the workers' compensation benefits the employee receives. This offset is available against workers' compensation benefits payable under Sections 108 (various poisoning and chemical exposure) and 306 (general partial & total disability) of the Act. Awards under Sections 306(c) (permanent physical injuries such as loss of limb) or 307 (death of employee) of the Act cannot be subject to an offset.

An employer may only take offsets in the amount of the unemployment compensation benefits that an employee actually receives. If the employee is *eligible* for some unemployment compensation benefits but does not *receive* them, an employer is not permitted to take an offset against that amount.

Old-Age Social Security Benefits

An employer may credit 50% of the net amount an employee receives in post-injury old-age Social Security benefits against the workers' compensation benefits an employee receives. If the employee was receiving old-age Social Security benefits before the injury, an employer is not permitted to take the old-age Social Security offset.

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COMMONWEALTH COURT CASE REVIEWS

Lisanti Painting Company and Donegal Companies v. Workers' Compensation Appeal Board (Starinchak), No. 152 C.D. 2008, Filed May 5, 2009.

(Forfeiture—An employer is not entitled to a credit against future earnings where the claimant has been dilatory in his or her receipt of reasonable medical treatment.)

Claimant suffered a work injury on September 21, 2004. Employer recognized the injury as a comminuted fracture of the right distal phalanx, as well as a right shoulder impingement syndrome.

On October 27, 2006, employer petitioned to suspend benefits as of March 13, 2006 on the basis that claimant refused to undergo necessary right shoulder surgery which had been advocated by at least 3 surgeons. Employer maintained that claimant's refusal to undergo the surgery caused claimant to continue to have a lack of earning power and increased incapacity.

At the hearing before the Workers' Compensation Judge, claimant acknowledged that his treating physician, Dr. Donofrio, recommended in March of 2005 and again in November of 2005 that he undergo a right shoulder operation. He also admitted that employer's physician, Dr. Tucker, recommended the same procedure on September 25, 2006. Claimant eventually underwent the procedure on December 14, 2006.

The WCJ granted the suspension petition and suspended benefits for 39 1/7 weeks commencing with the circulation date of his decision. The WCJ awarded a suspension on a "prospective" basis inasmuch as the claimant had willfully refused reasonable medical treatment and was therefore unjustly enriched at the employer's expense.

Claimant appealed to the Workers' Compensation Appeal Board, which reversed noting that the doctrine of unjust enrichment applies only where a claimant receives additional compensation to which he has no arguable right under the Act. Here, claimant was entitled to continue to receive benefits until an order or agreement provided otherwise.

Employer then sought review by the Commonwealth Court, arguing that the WCAB erred because its decision deprived employer of its only means of obtaining the remedy provided by §306(f.1)(8) of the Act which provides:

> If the employe shall refuse reasonable medical services of health care providers, surgical, medical and hospital services, treatment, medicines and supplies, he shall forfeit all rights to compensation for any injury or increase in his incapacity shown to have resulted from such refusal.

Employer argued that, because claimant underwent the surgery *after* the petition was filed, it was entitled to a credit against claimant's future earnings. The Court disagreed.

Under §306(f.1)(8) of the Act, an employer who believes a claimant has refused reasonable medical treatment may petition for suspension of benefits until such time as the claimant agrees to undergo the treatment. The employer's remedy is not monetary; but rather, it is the ability to force the claimant to choose between the recommended medical treatment and forfeiting compensation because medical treatment was refused. There is nothing in the Act which leads to a conclusion that an employer is entitled to a credit against a claimant's future earnings.

The Court affirmed the WCAB's decision.

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Department of Labor & Industry, Bureau of Workers' Compensation v. Workers' Compensation Appeal Board (Ethan-Allen Eldridge Division and St. Paul Travelers Insurance Company), No. 1600 C.D. 2008, Filed May 6, 2009.

(Supersedeas Fund Reimbursement—Where the parties enter into a Compromise & Release Agreement which leaves open for resolution by a WCJ the question of whether employer was entitled to a suspension of benefits for a set period of time, and the suspension is subsequently granted, employer is entitled to reimbursement from the Fund.)

On March 3, 2005, claimant sustained an injury to her left foot. A Notice of Compensation Payable was issued on March 15, 2005. On April 11, 2006, employer filed both a Suspension Petition and a Termination Petition. Both petitions included requests for supersedeas, which were denied by the Workers' Compensation Judge on May 25, 2006.

On January 12, 2007, employer and claimant executed a Compromise and Release Agreement which provided for a lump sum payment to claimant of $22,500 in exchange for claimant's waiver of all workers' compensation claims. The Agreement contained specific language indicating that employer's Suspension Petition for the period of March 10, 2006 through January 12, 2007 would remain open for a subsequent determination by the WCJ.

On January 16, 2007, the WCJ issued an order approving the Compromise and Release Agreement and dismissing employer's Termination Petition as moot. In his decision, the WCJ stated that employer's Suspension Petition was an open issue. Thereafter, in March of 2007, the WCJ circulated a decision granting employer's Suspension Petition as of April 11, 2006.

In April 2007, employer filed a Reimbursement Application with the Fund seeking reimbursement of the benefits paid from April 11, 2006 through January 12, 2007. The Bureau denied that employer was entitled to reimbursement, arguing that the continued litigation

of the Suspension Petition was an improper attempt to pass part of the cost of the employer's "agreed to liability" onto the Supersedeas Fund.

A hearing was held before a WCJ, who granted reimbursement to employer. The WCJ noted that there were specific provisions in the Compromise and Release Agreement which kept the issue raised in the Suspension Petition open.

The Bureau appealed to the Workers' Compensation Appeal Board. The WCAB affirmed, noting that the Agreement contained express language to keep the Suspension Petition open. While broad language may evidence an intent to settle all outstanding issues, the language here was specific.

The Bureau then petitioned the Commonwealth Court for review. The Court noted that, under §443 of the Act, the Legislature established certain criteria for payments from the Supersedeas Fund: 1) A supersedeas must have been requested; 2) The request for supersedeas must have been denied; 3) The request must have been made in a proceeding under §413 of the Act; 4) Payments were continued because of the denial of supersedeas; and, 5) In the final outcome of the proceedings, it is determined that such compensation was not, in fact, payable.

Where a Compromise and Release Agreement contains language which is broad enough to encompass all claims existing at the time the parties entered the Agreement, and there is no language in the Agreement reserving issues for subsequent determination, reimbursement may not be had from the Fund. Stroehmann Bakeries, Inc. v. WCAB (Plouse), 768 A.2d 1193 (Pa.Cmwlth. 2001).

In contrast, where, as here, the Compromise and Release Agreement at issue expressly leaves particular issues open for subsequent determination, reimbursement from the Fund may be possible. Coyne Textile v. WCAB (Voorhis), 840 A.2d 372 (Pa.Cmwlth. 2003).

Here, it is clear that the lump sum payment provided for in the Compromise and Release Agreement was intended to resolve all *future* liability issues. Employer never gave up its right to establish that it was not liable for wage loss benefits from March 10, 2006 through January 12, 2007. The WCJ's subsequent decision on the Suspension Petition determined that the benefits employer paid during that time frame were not, in fact, owed.

As such, reimbursement was appropriate. The decision of the WCAB was affirmed.

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Linda Sexton v. Workers' Compensation Appeal Board (Forest Park Health Center), No. 1225 C.D. 2008, Filed May 22, 2009.

(Utilization Review—The utilization review provisions of the Act provide the exclusive procedures for challenging the reasonableness and necessity of medical care; neither a WCJ nor the WCAB has jurisdiction to determine the reasonableness of medical treatment until a UR report is issued.)

Claimant suffered a work injury in April of 1999. As a result, he eventually came under the care of Dr. Kosenke, who began to treat claimant with myoblock injections for pain relief in December of 2004. Employer then filed a utilization review request seeking a determination as to whether the pain relief injections were reasonable and necessary.

The matter was assigned to a Utilization Review Organization (URO), which requested claimant's records from Dr. Kosenke. The URO then received the records, but not the required verification form signed by Dr. Kosenke. The URO returned the records and asked Dr. Kosenke to resubmit them with the signed verification form. Although Dr. Kosenke subsequently signed the form, the form and records were not returned to the URO in a timely fashion. As such, the URO issued a determination that the treatments were neither reasonable nor necessary.

Claimant filed a petition for review of the UR Determination with a Workers' Compensation Judge. The WCJ ordered that further utilization reviews be conducted for an assessment on the merits of whether the pain relief injections were reasonable and necessary.

Employer appealed to the Workers' Compensation Appeal Board, which vacated the WCJ's decision and remanded the case to the WCJ to determine if the URO followed proper procedure.

On remand, the WCJ concluded that although the Regulations require a verification form from the provider, the Regulations do not direct a URO to return timely received records for lack of verification. Because the URO returned the records to Dr. Kosenke solely for lack of a signed verification, the WCJ again ordered an assessment on the merits.

Employer again appealed to the WCAB maintaining that the WCJ erred because Dr. Kosenke's failure to submit the signed verification form with the records was a failure to comply with the utilization review provisions. The WCAB agreed and reversed the WCJ's decision.

Claimant then sought review by the Commonwealth Court. The Court noted that §306(f.1)(6) of the Act provides the exclusive procedure for challenging the reasonableness or necessity of medical treatment. That section further provides that neither a WCJ nor the WCAB has jurisdiction to determine the reasonableness of medical treatment unless and until a report is issued by a URO. Under 34 Pa. Code §§127.464(a) and (c), where a provider fails to produce the medical records as requested by a URO, no reviewer's report is written. Where that occurs, as here, the reasonableness of the bills submitted is final and cannot be appealed to the WCJ.

The Court also noted that the procedures that a URO is to follow in securing medical records are set

forth at 34 Pa. Code §127.464. Regarding verification of those records, 34 Pa. Code §127.459(c) makes it mandatory that a signed verification form be provided. The failure to do so is that same as providing no medical records. Without the form, a URO cannot ascertain the accuracy of the records.

The order of the WCAB was affirmed.

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Jefferson Young v. Workers' Compensation Appeal Board (LGB Mechanical), No. 2395 C.D. 2009, Filed June 4, 2009.

(Subrogation—The percentage of claimant's workers' compensation benefits paid to his counsel are part of the employer's accrued lien subject to subrogation under §319 of the Act.)

Claimant suffered a work injury on November 11, 1999. Employer denied that a compensable injury occurred, such that a Claim Petition was then filed. Following hearings, the Workers' Compensation Judge awarded ongoing total disability benefits to claimant. Two months before the WCJ's decision was issued, claimant fired his attorney. Given the contingency fee entered into by claimant and his counsel, the WCJ ordered employer to pay 20% of claimant's benefits owed through August 9, 2001 as counsel fees to claimant's attorney. After August 9, 2001, no counsel fees were due or owing.

In 2003, employer filed Modification and Suspension Petitions. During the litigation, the parties entered into a Compromise and Release Agreement, which provided for a total settlement of $90,000—$80,000 to the claimant and $10,000 to his then counsel. Additionally, the C&R provided that employer should pay claimant's litigation costs of $3,667.19.

Thereafter, claimant obtained a third party recovery. Employer filed a Review Petition seeking subrogation based on that recovery. Claimant agreed that employer was entitled to subrogation, but denied that the attorneys' fees paid to his former counsels should be considered as part of the accrued lien subject to employer's subrogation rights. The WCJ disagreed with claimant. He granted employer's petition and found the counsel fees in dispute to be part of employer's lien subject to subrogation.

The Workers' Compensation Appeal Board affirmed, stating that: "We believe that the costs for attorney's fees *and* litigation expenses incurred in the prior Workers' Compensation litigation should be included in that 'compensation' as they were incurred by Claimant as a result of the act or omission of the third party."

Claimant appealed to the Commonwealth Court. The Court noted that §319 of the Act provides that the employer is to be subrogated to the right of the employee against a third party *to the extent of the compensation payable* under this article by the employer…" The Act does not define compensation. Section 442 of the Act does provide that reasonable counsel fees of 20% of the *amount awarded* shall be approved by the WCJ. Money paid pursuant to a fee agreement is to be deducted from the claimant's workers' compensation benefits. Nichols v. WCAB (Ramsey Constr.), 713 A.2d 706 (Pa.Cmwlth. 1998).

Here, claimant was awarded $294 in weekly total disability benefits. Pursuant to a fee agreement, employer was obligated to deduct 20% from claimant's benefits and pay that amount to claimant's former counsel. The fact that a portion of claimant's compensation was paid to his counsel as fees does not detract from the fact that the money was due as payment for his work injury.

The Court agreed with the WCJ and the WCAB that the percentage of claimant's benefits paid to his legal counsel are part of the employer's accrued lien subject to subrogation under §319 of the Act.

Litigation costs payable under §440 of the Act, however, are not compensation, but are payments *in addition to* compensation. As such, litigation costs are not to be deemed a part of employer's accrued lien subject to subrogation.

The decision of the WCAB was, thus, reversed to the extent that it included claimant's litigation costs as part of employer's lien subject to subrogation. In all other respects, the WCAB's order was affirmed.

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Genetex Corporation and Gallagher Bassett Services v. Workers' Compensation Appeal Board (Morack), No. 214 C.D. 2009, Filed June 4, 2009.

(Notice—While a claimant need not give an exact diagnosis of his injury, he is required to provide a reasonable description of the injury in order to satisfy the notice requirements of the Act.)

Claimant worked as an inspector for about 27 years. In 2003, her job duties were increased and she began to experience swelling and pain in her hands. In addition, her fingers would get stuck in certain positions while working.

According to claimant, she informed her supervisor of her complaints, although she did not discuss the cause of her problems with her supervisor. Claimant did not seek medical care until January of 2005, at which time she was taken off work. She delivered the doctor's note taking her off work to the guard house. Pursuant to employer's policy, she then called in every day for the next 5 days stating that she would not be in because her doctor told her she was fatigued and could not use her hands.

Claimant applied for short-term disability benefits in February of 2005, noting that her condition was not work-related. Claimant then learned from Dr. Grady that her hand and wrist complaints were attributable to her employment. Claimant testified that she called employer's human resources benefits manager to alert her of this fact and left a voicemail indicating that

she had "work-related problems."

Employer maintained that it was unaware that claimant was claiming work-related hand problems until September of 2006 when a copy of claimant's Claim Petition was received.

The Workers' Compensation Judge credited claimant's testimony regarding the voicemail message. As such, the WCJ found that claimant provided employer with adequate notice of the injury and granted claimant's petition. The Workers' Compensation Appeal Board affirmed. The WCAB recognized that, based on the credited evidence of record, claimant initially did not know that her wrist and hand problems were work-related. Once she found out that her condition was work-related, she left a voicemail message to that effect with her employer. As such, adequate notice was given.

Employer then sought review by the Commonwealth Court arguing that there was insufficient evidence of record before the WCJ to establish timely notice. Claimant failed to establish *when* she left her voicemail message. As such, it could have been after the allotted time period provided for in the Act. Further, employer challenged the sufficiency of the injury description given to employer in the voicemail message.

The Court agreed, in part. The Act requires that the claimant give notice of his or her injury to the employer. The Act further requires that the notice "shall" inform the employer of the nature of the injury. While an exact diagnosis is not required, a reasonable description of the injury must be given within 120 days of the date of the injury.

The Court noted that, given the testimony of record, the WCJ could reasonably infer that claimant left her voicemail message with the employer within the requisite time frame. However, there is insufficient evidence of record to permit an inference that claimant gave a reasonably precise description of her injury as required by §312 of the Act. The only testimony given was that claimant left a message that she had "work-related problems." Claimant did not present evidence concerning notice of the body parts affected or any rudimentary diagnosis.

The order of the WCAB was thus reversed.

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Department of Labor and Industry v. Workers' Compensation Appeal Board (Savani), No. 1263 C.D. 2008, Filed March 10, 2009, Reported June 10, 2009.

(Course and Scope of Employment—Where claimant leaves employer's premises to engage in activity that is more than a temporary departure from work to attend to personal needs, or more than an inconsequential or innocent departure from work, the course of employment is broken and claimant will not be found to be within the scope of employment if injured while engaged in such activity.)

On November 27, 2006 at approximately 9:10 AM, claimant fell while walking on the street in the industrial park where employer is located. The fall did not occur on employer's property. Claimant was on a paid break period at the time of the fall. She was not on a special mission for employer and employer had not requested her presence on the street. Claimant suffered a fractured arm which rendered her disabled through February 9, 2007. Thereafter, she returned to work without a wage loss.

Claimant filed a claim petition seeking payment of full disability benefits, medical bills and counsel fees. The parties stipulated to the facts and agreed that the only issue to be decided by the Workers' Compensation Judge was whether claimant was acting within the course and scope of her employment and/or in furtherance of employer's business or affairs at the time of injury.

The WCJ concluded that claimant was acting in the course and scope of her employment, noting that the "course of employment embraces intervals for leisure within the regular hours of the working day. Momentary and/or temporary departures from routine administering to employee's personal comforts does not break the continuity of course of employment." Because there was no evidence that claimant had "virtually abandoned" the course of her employment with the break, the WCJ awarded benefits.

Employer appealed to the Workers' Compensation Appeal Board, which affirmed the WCJ's decision.

Before the Commonwealth Court, employer argued that the WCJ erred in applying the "personal comfort doctrine" to this case. Claimant was not merely using the bathroom or getting a drink but instead had actually left employer's premises when she fell. Claimant was not attending to personal needs of the type typically recognized as falling under the personal comfort doctrine, such as the need for sustenance.

The Court agreed. The WCJ and the WCAB erred in granting the claim petition. Each case of this nature must be decided on its own facts. In explaining the personal comfort doctrine, the Court indicated that "neither small temporary departures from work to administer to personal comforts or convenience, nor inconsequential or innocent departures break the course of employment."

Here, however, claimant's injury did not occur during a small temporary departure from work to tend to her personal comforts or convenience, nor did it occur during an inconsequential or innocent departure from work. Instead, her injury occurred while walking on a street off employer's premises, an activity that was not in furtherance of employer's business or affairs.

The order of the WCAB was accordingly reversed.

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Allegheny Ludlum Corporation v. Workers' Compensation Appeal Board (Bascovsky), No. 1960 C.D. 2008, Filed June 17, 2009.

(Pension Benefit Offset—Where claimant has been employed at a plant owned by multiple employers, the employer who owns the plant at the time of claimant's retirement is entitled to an offset for the full amount of claimant's pension benefits provided no monies accrued from previous employers is being used to fund claimant's pension.)

Claimant petitioned for review of compensation benefit offset and requested a review of the benefit offset calculation due to claimant's receipt of retirement pension benefits.

At hearings before the Workers' Compensation Judge, claimant testified that he began to receive pension benefits on July 1, 2003 in the amount of $1,229.37 and that he also received on the same date a lump sum payment of $7,259.78. On July 25, 2003, employer issued a notice of offset stating that it would deduct an offset credit of $283.33 beginning August 13, 2003 and that benefits would be suspended for 37 weeks to recover an overpayment of $7,259.78.

Employer presented testimony which established that it purchased the plant at which claimant worked from Bethlehem Steel on November 20, 1998. Prior to Bethlehem Steel's operation of the plant, there were two predecessor companies, Lukens Steel and Washington Steel. As a part of the negotiations with Bethlehem Steel, employer recognized all past employment, whether it was Washington Steel, Lukens Steel or Bethlehem Steel as years of service to employer when a person retired from employer. Employer received no money related to pensions from Bethlehem or any of the predecessor companies. Employer was not using money that accrued from previous employers to pay claimant's pension benefits.

The WCJ credited the testimony of employer's witnesses and found that claimant's pension benefits were fully funded by employer and were not from a multi-employer pension plan. Thus, the WCJ found employer was entitled to the full offset. Additionally, the WCJ found that the lump sum payment claimant received was made from the pension trust and was, therefore, properly subject to the offset.

Claimant appealed to the Workers' Compensation Appeal Board, which reversed the WCJ's decision because employer's witnesses were not able to testify as to what, if any, contributions were made to the pension plan by employer.

Employer then sought review by the Commonwealth Court. The Court reviewed the applicable sections of the Act and the Regulations. Under 34 Pa. Code §123.2, a "defined contribution plan" is a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount of accumulated contributions and earnings in the participant's account. The plan at issue in this case was a defined contribution plan. As such, employer's contribution is calculated solely on the accumulated contributions and earnings in claimant's account. Here, the credited evidence established that claimant's pension was not based on contributions by any other employer. The plan was not funded by multi-employers; but rather, employer was solely funding claimant's pension plan. As such, employer met its burden to prove that it was entitled to an offset.

The decision of the WCAB was reversed.

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The Boeing Company v. Workers' Compensation Appeal Board (Horan), No. 1466 C.D. 2008, Filed June 24, 2009.

(Supersedeas Fund Reimbursement—Where overpayment is made to claimant due to WCJ's failure to recognize employer's entitlement to offsets/credits for unemployment compensation and severance benefits received by claimant, employer may be entitled to reimbursement from Supersedeas Fund if employer has requested supersedeas in connection with appeal from WCJ's decision.)

Claimant suffered a low back injury on February 4, 2004. He subsequently continued working in a light-duty capacity without a loss of earnings until December 23, 2004, when he was laid off. He filed a Claim Petition seeking acknowledgement of his injury and payment of ongoing total disability benefits as of December 24, 2004.

During the litigation, claimant testified that, after being laid off, he received $419 per week in unemployment compensation benefits and 19 weeks worth of severance pay. Employer argued that, in the event of an award, it should be entitled to an offset credit due to claimant's receipt of unemployment compensation and severance benefits.

The Worker's Compensation Judge granted the Claim Petition and directed employer to pay ongoing total disability benefits plus unreasonable contest counsel fees. The WCJ did not acknowledge employer's entitlement to any offsets/credits for the unemployment compensation and severance benefits received by claimant.

Employer appealed to the Workers' Compensation Appeal Board. In connection with its appeal, employer filed a request for supersedeas. The WCAB granted supersedeas as to the award of unreasonable contest counsel fees, but denied the request as to the payment of total disability benefits. As a result, employer paid claimant disability benefits totaling $25,526.47. After considering the merits of employer's appeal, the WCAB affirmed, but modified, the WCJ's decision and order. The WCAB concluded that, pursuant to §204(a) of the Act, employer was entitled to offsets/credits for the unemployment compensation and severance benefits received by claimant.

Employer then filed an Application for Supersedeas Fund Reimbursement. The Bureau challenged employer's request. As such, the matter was assigned to a WCJ. After a hearing, the WCJ concluded that employer was entitled to reimbursement from the Fund of $25,526.47.

The Bureau appealed, arguing that the WCJ erred in granting Supersedeas Fund reimbursement for offsets/credits awarded under §204 (a) of the Act. The WCAB agreed and reversed the WCJ's order.

Employer then sought review by the Commonwealth Court. Employer contended that it satisfied all of the requirements set forth in §443 of the Act governing the granting of reimbursement from the Supersedeas Fund.

In response, the Bureau argued that employer was not entitled to reimbursement because the offsets/credits that employer was seeking are derived from §204(a) of the Act, not §413. Additionally, the Bureau maintained that employer was not entitled to reimbursement because there was never a determination that benefits were not, in fact, payable.

The Court noted that the statutory provisions creating the Supersedeas Fund and allowing for reimbursement therefrom are found in §443 of the Act. When interpreting that section, the Court has explained in prior cases that reimbursement will be granted only where the following requirements are satisfied: 1) a supersedeas was requested; 2) the request for supersedeas was denied: 3) the request was made in a proceeding under §413 or §430 of the Act; 4) payments were continued because of the order denying supersedeas; and 5) in the final outcome of the proceedings, it was determined such compensation was not, in fact, payable.

Here, employer requested supersedeas from the WCAB and that request was denied. As a result of that denial, employer paid total disability benefits to claimant in accordance with the WCJ's decision (which did not allow for the offset).

When employer requested supersedeas, it did so under the provisions of §430 which allows an employer or insurer to request a supersedeas to suspend its obligation to pay benefits to a claimant pursuant to an order of a WCJ or the WCAB while that order is being appealed. It is, therefore, irrelevant that the offsets/credits sought by employer are derived from §204(a) and not §413.

Because employer's request for supersedeas was filed under §430, the Court then looked to the issue of whether benefits which were not, in fact, payable had been paid to claimant as a result of the denial of its supersedeas request. The WCAB had, in fact, issued a determination that claimant was not entitled to all of the benefits he received under the WCJ's original award due to employer's entitlement to offsets/credits for unemployment compensation and severance benefits received by claimant. The WCAB's determination effectively lowered the amount of benefit payments to which claimant was entitled. Employer's only remedy to recover that overpayment was through the Supersedeas Fund.

The Court agreed with employer that all of the requirements for obtaining reimbursement set forth in §443 of the Act were satisfied. The WCAB erred in reversing the WCJ's decision granting employer reimbursement from the Supersedeas Fund. Thus, the WCAB's order was reversed.

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Antonio Braz v. Workers' Compensation Appeal Board (Nicolet, Inc.), No. 2226 C.D. 2009, Filed March 31, 2009, Reported July 6, 2009.

(Suspension—Where claimant has moved to Portugal and lived there for more than a decade he has effectively removed himself from the workforce, thereby entitling employer to a suspension of benefits.)

In January of 1986, claimant suffered a fractured wrist while working as a machine operator. At that time, claimant resided in Souderton, Pennsylvania. At some point thereafter, claimant moved to Portugal.

After claimant lived in Portugal for more than a decade, employer petitioned to suspend benefits on the basis that claimant was unavailable for employment because he resided in Portugal. Employer did not present any medical evidence in support of its petition.

The Workers' Compensation Judge denied the suspension petition because employer failed to present any evidence of a change in claimant's medical condition.

The Workers' Compensation Appeal Board reversed, noting that even if employer had been able to establish a change in claimant's condition, it would have been futile to find jobs for claimant in Pennsylvania as he had moved to Portugal. The WCAB found claimant's move to Portugal constituted a removal from the work force and the WCJ erred in denying employer's suspension petition.

The Commonwealth Court agreed. In Kachinski v. WCAB (Vepco Construction Co.), 516 Pa. 240, 532 A.2d 374 (1987), the Supreme Court held that, in order to satisfy its burden to modify or suspend compensation benefits, an employer must produce: (1) medical evidence of change in the employee's condition; (2) evidence of a job referral to a then open job which fits the occupational category for which the claimant has been given medical clearance; (3) claimant must then demonstrate that he has followed through on the job referral in good faith; and, (4) if the referral fails to result in a job the claimant's benefits should continue.

However, the Supreme Court has recognized that the first prong of Kachinski does not apply if the modification or suspension petition is not based on the assertion that the claimant has recovered some or all of his ability. For example, an

individual who moves to New Zealand has voluntarily removed himself from the workforce. (Blong v. WCAB (Fluid Containment), 890 A.2d 1150 (Pa.Cmwlth. 2006). Also, a claimant who joins the Peace Corp and moves to Africa has voluntarily removed himself from the workforce. Smith v. WCAB (Dunhill Temporary Systems), 723 A.2d 1285 (Pa.Cmwlth. 1999). In such cases, it is not necessary for an employer to show the Kachinski requirements of change of condition and job availability. The critical factor is removal from the workplace with as much certainty as one who becomes incarcerated or one who decided to retire.

The WCAB's decision was affirmed.

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Doug Rebeor v. Workers' Compensation Appeal Board (Eckerd), No. 2328 C.D. 2008, Filed July 9, 2009.

(Labor Market Survey—Where claimant notifies employer that he intends to move out of state, employer's labor market survey need not be conducted in the claimant's new home state to be effective, but may be conducted in the claimant's usual employment area at the time of injury.)

In July of 2006, employer served claimant with a "Notice of Ability to Return to Work," informing claimant that employer's medical expert, Dr. Seel, had released him to modified duty work. In December of 2006, employer filed a Modification Petition alleging that work was generally available to claimant.

At hearings before the Workers' Compensation Judge, employer presented testimony from Dr. Seel who opined that claimant was capable of medium-duty work. Dr. Seel reviewed a vocational report prepared by Kathleen Roche, which identified a number of available positions as being within claimant's labor market. Dr. Seel approved three of the positions as being within claimant's capabilities as determined by claimant's treating physician.

Employer also presented testimony from Ms. Roche, who is approved by the Bureau to perform labor market surveys and earning power assessments. Based upon her interview of claimant, she performed a transferable skills analysis and a labor market survey. She concluded claimant had an earning power of $240.00-$280.00 per week. Ms. Roche acknowledged that claimant had informed her that he was planning to move to South Carolina, but she did not determine if any work would be available to claimant in South Carolina.

Claimant testified that he moved to South Carolina in September of 2006. He also testified that he believed himself to be capable of only light-duty work. He presented no expert testimony to refute the testimony of Dr. Seel or Ms. Roche. Claimant argued that the work identified by Ms. Roche was not available to him because she conducted her search in Lawrence County where the injury occurred rather than in South Carolina where he currently resided.

The WCJ concluded that, as of October 18, 2006, work was generally available to claimant in his labor market and within his physical restrictions. The WCJ concluded that employer is not required to find work generally available to claimant in his current area of residence but is only required to establish that work was generally available to claimant in his pre-injury economy.

The Workers' Compensation Appeal Board affirmed the WCJ's decision and order, noting that §306(b)(2) of the Act requires employer prove only that work is available in claimant's "usual employment area," which is the area where the claimant lives within the Commonwealth or, alternatively, in the area where the injury occurred.

On appeal to the Commonwealth Court, claimant argued that employer acted in bad faith by utilizing a vocational rehabilitation evaluation based in Lawrence County because employer knew of claimant's impending move to South Carolina. The Court disagreed.

Section 306(b)(2) of the Act provides that a claimant's benefits may be modified from total to partial if employer establishes that claimant has an earning power *"...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."*

Here, at the time of injury, claimant lived in this Commonwealth. He was also a resident of the Commonwealth at the time that the labor market survey was conducted. He did not move to South Carolina until September of 2006. Even assuming that he did not live in the Commonwealth at the time of the vocational assessment and labor market survey, the injury occurred in Pennsylvania, not South Carolina. As such, South Carolina cannot be claimant's "usual employment area."

The Court noted that employers are not *prohibited* from conducting a labor market survey outside of the Commonwealth when a claimant no longer lives within the Commonwealth; however, employers are not *required* to do so.

The order of the WCAB was affirmed.

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Good Tire Service v. Workers' Compensation Appeal Board (Wolfe), No. 729 C.D. 2008, Filed July 15, 2009.

(Subrogation—Employer's pro-rata share of attorney's fees from a third party settlement arising out of a work injury should be based upon actual counsel fee paid.)

Claimant suffered a work-related injury in the form of a broken leg as a result of an automobile accident. As a result, claimant received benefits under a Notice of Compensation Payable.

Claimant subsequently filed a third-party lawsuit arising out of the automobile accident. Claimant settled the lawsuit for a total of $75,000, having incurred litigation costs of $727.25. As of the date of the settlement, employer had paid wage loss and medical benefits totaling $48,259.32.

Claimant and his counsel had a contingent fee agreement for 40% of any amount recovered in the third-party action. Given the settlement of that claim, claimant's counsel deposited the 40% fee, or $30,0000, but then remitted $9,205.92 of that fee to claimant when the settlement proceeds were distributed. Claimant and his counsel took the position that the 40% fee applied to the calculation of employer's pro-rata recovery of its compensation lien, regardless of claimant's counsel's voluntary decision to refund a portion of the fee to claimant. Accordingly, $28,478.67 was paid to employer from the $75,000 recovery.

Employer did not accept that amount as payment in full. Instead, employer calculated the recovery of its accrued lien and future grace period using an attorney fee of $20,974.08 ($30,000 minus $9,205.95). Employer filed a petition to review benefit offset, alleging that the subrogation claim had not been paid in full.

The Workers' Compensation Judge granted employer's petition, concluding that the refunded attorney fee is not a reasonable attorney fee incurred in obtaining recovery from a third party. Accordingly, the WCJ directed claimant's counsel to reimburse employer a total of $34,485.67.

Claimant appealed and the Workers' Compensation Appeal Board reversed, characterizing the refunded fee as a "gratuity."

Employer then sought review by the Commonwealth Court arguing that the WCAB's determination that the subrogation lien should be reduced by the full 40% when the full 40% was not retained by counsel contradicts the well established principle that the statutory right to subrogation is absolute and cannot be altered. The Court agreed. Employer is obligated to pay under the Act a pro-rata share of the fee paid to generate the fund subject to subrogation, not some hypothetical fee which might have been paid.

Accordingly, the order of the WCJ was reinstated.

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Cassandra Oliver v. City of Pittsburgh, No. 1441 C.D. 2008, Filed July 17, 2009.

(Heart & Lung—Subrogation—Employer is entitled to subrogation against employee's third party recovery to the extent Heart & Lung benefits were paid.)

Claimant was injured in a motor vehicle accident while performing her duties as a City police officer. As a result, the City paid Heart & Lung Act benefits in the amount of $848. In addition, claimant pursued a civil claim against the third party tortfeasor, which eventually settled for $2,300.

`The City notified claimant of its subrogation interest against the third party settlement proceeds. As a result, claimant filed a declaratory judgment action seeing a declaration that, under §1720 of the Motor Vehicle Financial Responsibility Law, the City could not seek reimbursement from her third party recovery for benefits it paid pursuant to the Heart & Lung Act.

The Court of Common Pleas compared the Heart & Lung Act to the Workers' Compensation Act and determined that the City was not entitled to subrogation.

The Commonwealth Court disagreed. The Court noted that, prior to 1993 and the passage of Act 44, the MVFRL provided an exception to an employer's absolute right to subrogate against an employee's third party recovery under the Workers' Compensation Act. However, Act 44 repealed that section and a workers' compensation carrier now has a right to subrogate against any benefits the claimant receives in connection with the third party action. Consequently, the General Assembly preserved a scheme which allowed claimants to be made whole but prevented their double recoveries, while shifting the burden from innocent employers and their carriers to responsible tortfeasors.

Because Heart & Lung benefits effectively replace workers' compensation benefits for those employees covered by its provisions, the employer has the right to subrogate against its officer's third party recovery to the extent of Heart & Lung benefits paid.

The decision of the Court of Common Pleas was reversed.

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ESAB Welding & Cutting Products v. Workers' Compensation Appeal Board (Wallen), No. 60 C.D. 2009, Filed May 22, 2009, Reported August 10, 2009.

(Credits—Employer is not entitled to credit for holiday and vacation payments made to claimant where claimant would have been entitled to said benefits even if he had not been injured.)

Claimant suffered a work-related back injury in 2003. In March of 2007, employer filed a review petition claiming it was entitled to credit for holiday and vacation payments made to claimant while he was receiving workers' compensation benefits.

The Workers' Compensation Judge denied employer's petition because employer had made the vacation and holiday payments to claimant pursuant to a collective bargaining agreement (CBA). The CBA provided that, in addition to workers' compensation benefits that an injured worker receives, employer pays the difference between holiday pay and the workers' compensation benefit and, at the end of the year, employer pays the employee for vacation pay earned in that particular year.

The Workers' Compensation Appeal Board affirmed the WCJ's decision and employer appealed.

The Commonwealth Court noted that claimant did not receive the holiday and vacation pay solely because he was receiving workers' compensation benefits, but because he would have been entitled to them even if he had not been injured. Employer negotiated the terms of the CBA with the union and agreed to pay these benefits to injured workers. To allow employer a credit now would render the CBA meaningless.

When holiday or vacation pay is an entitlement that arises from the performance of services for the employer during some stated preceding period, no credit is allowed. Here, holiday pay and vacation pay under the CBA were based on years of service and whether the injured employee was considered "on the payroll." Here, claimant was still considered an employee despite his receipt of workers' compensation benefits. Thus, employer is not entitled to a credit for the benefits paid under the CBA, and the WCAB did not err in affirming the WCJ's decision.

Employer also argued that claimant had voluntarily removed himself from the workforce. Again, the Court disagreed. During the time of his disability, claimant was receiving holiday and vacation pay and was still accruing seniority. Additionally, claimant remained willing to return to work if work within his physical capabilities was available. Since modified duty was not offered, and since claimant was still considered by employer to be an active employee, claimant cannot be said to have voluntarily removed himself from the workforce.

The WCAB's order was affirmed.

Supreme Court Case Reviews

Cinram Manufacturing, Inc. and PMA Group v. Workers' Compensation Appeal Board (Hill), No. 37 MAP 2008, Decided July 21, 2009. **(Termination—Review—During a termination proceeding, a workers' compensation judge may correct a notice of compensation payable to include injuries not specifically contemplated by the original notice.)**

Claimant suffered a work injury in the form of an aggravation of a pre-existing medical condition. Employer issued a Notice of Compensation Payable (NCP) identifying the injury as a "lumbar strain/sprain." Several months later, employer filed a petition to terminate claimant's benefits alleging that claimant had fully recovered.

Conflicting evidence was presented to the Workers' Compensation Judge. Claimant's evidence supported a finding of an aggravation of a pre-existing disc herniation resulting in nerve impingement. The WCJ credited claimant's evidence, denied termination, and amended the NCP to conform to claimant's medical evidence.

Employer appealed arguing that the WCJ lacked authority to amend the NCP inasmuch as claimant never filed a review petition. Employer pointed out that, under the case of Jeanes Hospital v. WCAB (Hass), 582 Pa. 405, 872 A.2d 159 (2005), where an NCP does not correctly reflect the injury, a claimant must file a review petition, which is then treated like a claim petition. The WCAB was not persuaded and affirmed the WCJ's decision. The WCAB noted that, under §413(a) of the Act, the WCJ is authorized to modify an NCP at any time upon proof of an inaccuracy.

Employer sought further review by the Commonwealth Court, which affirmed the WCAB's decision based on the plain language of §413(a) of the Act.

The Supreme Court then allowed employer's appeal to address the validity of Jeanes Hospital's directive as applied to corrective amendments.

Employer argued that if a WCJ is permitted to amend an NCP to add injuries in the course of any proceeding, then a claimant will remain perpetually eligible to receive compensation by serially and belatedly alleging new injuries.

Claimant responded that, in this case, he was not seeking to add "new" injuries but rather that the "lumbar strain/sprain" described in the NCP is sufficiently similar to "disc herniation and nerve impingement" in the lower back area to justify a departure from the requirement in Jeanes Hospital that a new petition be filed by the claimant.

The Court explained that the decision in Jeanes Hospital did not focus on the distinction between "corrective amendments" and "amendments addressing consequential conditions," i.e., subsequently arising medical or psychiatric conditions related to the original injury.

Under §771 of Title 77 of the Pennsylvania Statutes, *corrective amendments* may be made in the course of the proceedings under any petition pending before the WCJ.

In contrast, amendments addressing *consequential conditions* are governed by §772 of Title 77, which authorizes amendments upon petition filed by either party. Thus, amendments based upon consequential conditions are to be made only upon consideration of a specific review petition.

In Jeanes Hospital, the claimant sought to have fibromyalgia and depression added to the description of the work injury. These are *consequential conditions* as opposed to injuries existing at the time of the NCP's issuance. As such, a review petition was necessary. The decision in Jeanes Hospital, however, does not stand for the proposition that a review petition must be filed as a necessary prerequisite to a *corrective amendment.*

Because the claimant here sought only to have a corrective amendment made to the NCP, he was not required to file a review petition. The WCJ was authorized under §413 to correct the NCP.

The order of the Commonwealth Court was affirmed.

(Continued from page 1)

An employer, however, is entitled to use the old-age Social Security benefits an employee receives as an offset if that employee's post-injury Social Security benefits status changes from disability to old-age. For example, in the case of Ropoch v. WCAB (Comm. of PA/DPW),[2] an injured worker received Social Security *disability* benefits until age 65, when his disability benefits terminated and became *old-age* benefits. The employer then used the old-age Social Security benefits as an offset against its workers' compensation payments. The employee protested, arguing that the conversion of the Social Security benefits was an administrative decision out of his control. The Court held that the plain language of the statute permitted the old-age Social Security offset in this case.

Severance Benefits

All employers, regardless of whether they are self-insured or privately insured, are entitled to take the same severance payment offsets.[3] An employer is entitled to a credit for the net amount of severance benefits an employee receives to the extent those benefits are funded by the employer. The offset may be taken against workers' compensation benefits received under Sections 108 and 306 of the Act, but not against benefits received under Section 306(c).

Further, to receive an offset credit for severance payments made to an employee, those payments must compensate the employee for his/her work-related injury. If an employee received severance benefits to compensate for a lay-off and not as compensation for a work-related injury, the employer cannot use that benefit as an offset against its workers' compensation payments.[4]

Pension Benefits

To the extent that the pension is funded by the employer, the employer is entitled to take an offset for the net pension benefits against the workers' compensation benefits that an employee receives under Sections 108 and 306 of the Act. Again, benefits payable under Section 306(c) may not be subject to an offset credit. If the employee receives pension benefits from multiple sources, or if an employer and other businesses collectively pay into a common pension fund, the employer is only entitled to an offset to the extent that the employer contributed to the claimant's pension. The testimony of an actuary may be necessary to establish the extent of the employer's contributions to the fund.

There are two primary types of pension plans, defined contribution plans and defined benefit plans. Since defined contribution plans feature individual accounts for each employee, the calculation of an employer's contribution is relatively straightforward. However, to take an offset from a defined benefit plan, an actuary is needed to calculate the employer's contribution. Despite the differences in these plans, offsets can be taken in both cases. Additionally, an employer can offset investment income that the pension fund receives as a result of the employer's contributions. The employer may not take credit for investment income earned by the fund which is attributed to the employee's contributions to the plan.

An employer may only take an offset against the net pension benefits that an employee actually receives. Even if an employee is eligible for more pension benefits, that amount cannot be offset against the workers' compensation payments. Finally, in the tragic event that an employee is killed as a result of a work injury and the spouse receives survivor pension benefits, an employer is not entitled to a credit for those benefits.[5]

So, I think I can take an offset, how do I do it?

Taking an offset is a two-part process. The first part of the process requires the employee, upon the insurer's request, to complete Form LIBC-756 and return it to the insurer. Form LIBC-756 requires an employee to list the sources and amounts of unemployment compensation, (old age) social security benefits, severance benefits, and pension benefits that they receive. The employee must submit that form within 30 days of receipt of a new benefit, within 30 days of a change in benefit level, and if there are no changes, at least once every six months.

After the insurer receives the completed Form LIBC-756 from the employee, it can calculate any applicable offsets from the aforementioned four categories. An insurer is not entitled to take an offset without notice to the employee. By statute, the insurer must provide the employee, the Department and employee's counsel (if known) with Form LIBC-761 at least twenty days before taking an offset and at least twenty days before the offset level changes. This informs the employee about the amount of offset, type of offset, how the offset was calculated, when the offset starts, and if/how much the insurer is seeking to recoup. The employee may then challenge the offset by filing a Review Petition.

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1 964 A.3d 962 (Pa. Cmwlth. 2009).
2 941 A.2d 726 (Pa. Cmwlth. 2008).
3 Kramer v. WCAB (Rite Aid), 883 A.2d 518 (Pa. 2005).
4 EMI Co. v. WCAB (Rathman), 738 A.2d 22 (Pa.Cmwlth. 1999).
5 Allegheny Ludlum Corp. v. WCAB (Carney), 928 A.2d 1138 (Pa.Cmwlth. 2007).

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