IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Roseann Mitchell, Petitioner	:	
v.	:	No. 2155 C.D. 2009
Workers' Compensation Appeal Board (Department of Public Welfare), Respondent	:	Submitted: April 16, 2010

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: May 20, 2010

Roseann Mitchell (Claimant) petitions for review of the October 6, 2009, order of the Workers' Compensation Appeal Board (Board) affirming the remand decision and order of the Workers' Compensation Judge (WCJ) denying Claimant's Petition to Review Compensation Benefits and Petition to Review Benefit Offset. We affirm.

By decision and order circulated June 24, 2003, the WCJ found that Claimant had suffered a work-related injury in the nature of a strain/sprain on September 9, 1998, while working as a state facility quality examiner/surveyor for the Commonwealth of Pennsylvania, Department of Public Welfare (Employer). An agreement for compensation was entered into by Claimant and Employer and

Claimant received total disability benefits at the rate of $512.25. Claimant returned to work with no loss of earnings on October 19, 1998, and her benefits were suspended.

The WCJ found further that Claimant suffered a new work-related injury on October 26, 1999, in the nature of annular tears at L5-S1, L4-5, L3-4, and L2-3. Claimant began receiving total disability benefits for this injury at the rate of $547.83 as of October 26, 1999. Neither Employer nor Claimant filed an appeal of the WCJ's June 24, 2003, decision.

Claimant retired from employment with Employer on July 2, 2001, and began receiving payments in the amount of $1,064.97 per month in pension benefits. This resulted in a pension benefit payment of $245.38 per week.

On or about July 30, 2002, Claimant, through her third party counsel, filed a medical malpractice action alleging medical malpractice occurred during surgery related to the October 26, 1999, work-related injury. Claimant settled the malpractice action for a total amount of $350,000.00.

The parties entered into a third party settlement agreement pursuant to Section 319 of the Workers' Compensation Act[1] (Act) on or about June 17, 2004,

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[1] Act of June 12, 1915, P.L. 736, as amended, 77 P.S. §671, provides:

> Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employe, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article by the employer; reasonable attorney's fees and other proper disbursements incurred in obtaining a recovery or in effecting a compromise settlement shall be prorated between the employer and employe, his personal representative, his estate or his dependents. The employer shall pay that proportion of the attorney's fees and other proper disbursements that the amount of compensation paid or payable at

(Continued....)

wherein Employer accepted $164,000 as a gross payment on its workers' compensation subrogation lien. The net amount of the recovery was $105,023, which was paid by Claimant's counsel in the third party action to Employer on June 17, 2004.

On November 3, 2004, Employer filed a Notice of Workers' Compensation Benefit Offset indicating that an offset was due based on the pension benefits Claimant was receiving and that the offset credit for the workers' compensation benefits paid to Claimant was in the amount of $43,362.13. The notice also indicated that beginning on November 24, 2004, the offset credit of $43,362.13 would be deducted from Claimant's bi-weekly workers' compensation benefit of $547.83 resulting in Claimant receiving no workers' compensation benefit payment until April 17, 2008, when the offset overpayment would be recouped. The notice indicated further that Claimant would then receive workers' compensation benefits in the reduced amount of $302.45 per payment based upon Claimant's continuing receipt of offsetable benefits.

> the time of recovery or settlement bears to the total recovery or settlement. Any recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employe, his personal representative, his estate or his dependents, and shall be treated as an advance payment by the employer on account of any future installments of compensation.
>
> Where an employe has received payments for the disability or medical expense resulting from an injury in the course of his employment paid by the employer or an insurance company on the basis that the injury and disability were not compensable under this act in the event of an agreement or award for that injury the employer or insurance company who made the payments shall be subrogated out of the agreement or award to the amount so paid, if the right to subrogation is agreed to by the parties or is established at the time of hearing before the referee or the board.

Through her workers' compensation counsel, Claimant filed a Petition to Review Compensation Benefits and to Review Compensation Benefit Offset on November 29, 2004. Therein, Claimant alleged that Employer was erroneously offsetting her workers' compensation benefits. Employer filed an answer denying the material allegations contained therein. Hearings before a WCJ ensued.

In support of the petitions, Claimant presented the testimony of Lisa Matrisian, subrogation lien coordinator for CompServices, Inc., Employer's third party administrator, and Richard Bimeal, adjuster for CompServices. Claimant also presented documentary evidence. In opposition to the petitions, Employer presented the testimony of Ms. Matrisian and Mr. Bimeal, as on cross, as well as documentary evidence.

By decision circulated March 31, 2006, the WCJ denied Claimant's petitions. Claimant appealed the WCJ's decision to the Board. Upon review, the Board vacated and remanded by decision and order dated November 28, 2006. The Board determined that the WCJ failed to make findings regarding whether any material mistakes of fact existed that would require the WCJ to modify the third party settlement agreement. The Board also determined that the WCJ failed to make any findings as to whether Employer contributed to the pension plan and, if so, what amount was contributed by Employer in order to determine whether Employer was entitled to a pension plan offset. Therefore, the Board remanded to the WCJ to provide additional findings and/or obtain additional evidence regarding the foregoing matters.

On remand, the WCJ accepted additional evidence from the parties. As additional support for the petitions, Claimant testified on her own behalf and submitted the deposition testimony of Dennis Ortwein, Esquire. Attorney Ortwein represented Claimant in the prosecution and settlement of her malpractice action.

In opposition to the petitions, Employer presented the deposition testimony of Susan Hostetter, Director of Benefit Administration for the State Employees' Retirement System (SERS), and Brent Mowery, an actuary and senior consultant for the Hay Group, as well as documentary evidence.

Based on the credible testimony of Attorney Ortwein and Ms. Matrisian, the WCJ found that there was no mistake of fact in the minds of either Attorney Ortwein or Ms. Matrisian at the time of the third party settlement agreement that would require the WCJ to modify the agreement. The WCJ found further, based on the credible and unrebutted testimony of Mr. Mowery and the credible testimony of Ms. Hostetter, which was supported by Mr. Mowery's testimony, that Employer properly calculated and took credit for the appropriate pension benefit offset. The WCJ found that Employer's contribution amounted to a monthly offset of $1,265.50. Therefore, the WCJ concluded that Employer sustained its burden of proving by substantial, competent and credible evidence and by actuarial evidence, the amount of money contributed by Employer to Claimant's pension plan.

Accordingly, by decision circulated December 17, 2008, the WCJ again denied Claimant's petitions. Claimant appealed to the Board, which affirmed. This appeal by Claimant followed.[2]

[2] This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of appeal board procedures, and whether necessary findings of fact are supported by substantial evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Mrs. Smith's Frozen Foods v. Workmen's Compensation Appeal Board (Clouser), 539 A.2d 11 (Pa. Cmwlth. 1988).

Herein, we are compelled to first address whether Claimant's brief complies with the Pennsylvania Rules of Appellate Procedure. By order of February 11, 2010, upon review of Claimant's brief filed with this Court in support of her petition for review, we found that Claimant's brief did not comply with the Rules because:

> 1. The brief lacked a copy of the opinion or adjudication of the trial court/administrative agency as required by Pa.R.A.P. 2111(a)(10);
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> 2. The statement of questions involved exceeded two pages. Pa.R.A.P. 2116(a); and
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> 3. The summary of argument exceeded two (2) pages. Pa.R.A.P. 2118.

Accordingly, this Court did not accept Claimant's brief and ordered her to file an amended brief that conformed to the Rules on or before February 25, 2010. Claimant's counsel filed an amended brief with this Court as ordered on February 25, 2010; however, the amended brief still does not comply with the Rules. Specifically, Claimant's amended brief fails to comply with: (1) Pa.R.A.P. 2111(a)(3), Statement of Both the Scope of Review and the Standard of Review; (2) Pa.R.A.P. 2117, Statement of the Case; and (3) Pa.R.A.P. 2119, Argument.

Claimant's counsel has not included a statement of this Court's standard of review in violation of Pa.R.A.P. 2111(a)(3). With respect to the Statement of the Case, Claimant's counsel has not included therein a statement of the form of action, followed by a brief procedural history of the case as required by Pa.R.A.P. 2117(a)(1).

Rule 2117(a)(4) requires that the Statement of the Case shall contain a closely condensed chronological statement of all necessary facts. Pa.R.A.P. 2117(a)(4). Claimant's Statement of the Case contains argument in violation of

Pa.R.A.P. 2117(b). Rule 2117(b) specifically provides that "[t]he statement of the case shall not contain any argument. It is the responsibility of the appellant to present in the statement of the case a balanced presentation of the history of the proceedings and the respective contentions of the parties." Pa.R.A.P. 2117(b).

Moreover, while Claimant states in the Argument portion of her amended brief that the nine questions presented in the Statement of Questions Involved were each preserved at the hearing level, Claimant's counsel has failed to include in the Statement of the Case, a statement informing the Court of the specific place in the record where Claimant raised or preserved the nine issues before the WCJ. Rule 2117(c) specifically requires an appellant to specify the foregoing in detail in the Statement of the Case. Pa.R.A.P. 2117(c).

Finally, the Argument portion of Claimant's amended brief does not comply with Pa.R.A.P. 2119. Although Claimant has presented nine separate issues for this Court's review, Claimant's counsel has failed to divide the Argument section of the amended brief into as many parts as there are questions to be argued. Pa.R.A.P. 2119(a). Counsel has further failed to "have at the head of each part in distinctive type or in type distinctively displayed, the particular point treated therein followed by such discussion and citation of authorities as are deemed pertinent." Id. Claimant's counsel does not even argue the issues in the order presented in the Statement of Questions Involved and only specifically mentions by number three of the nine questions presented. Moreover, when Claimant's counsel does present an argument in support of this appeal, the argument is either minimal, convoluted or lacks citation to any statutory authority or controlling case law. Id. The Rules clearly require that each question or issue an appellant raises be supported by discussion and analysis of pertinent authority.

We note that while the Pennsylvania Rules of Appellate Procedure shall be liberally construed to secure the just, speedy and inexpensive determination of every matter to which they are applicable, see Pa. R.A.P. 105, this Court does not look favorably upon blatant violations of the Rules. Rule 2101 provides that this Court may quash or dismiss an appeal if the appellant's brief fails to substantially conform to the requirements of the Rules. Pa. R.A.P. 2101. While Claimant's brief contains numerous deficiencies, we conclude that we may conduct meaningful appellate review of three of the issues that Claimant has raised in the Statement of Questions Involved and argued in the Argument section of her counseled brief.

As such, we will not exercise our discretion and quash or dismiss Claimant's appeal based on the non-conformance with the Rules governing briefs; however, we caution counsel that the Court may not be as lenient in the future if counsel insists on continuing in not following the Rules. The Rules of Appellate Procedure are not guideposts but a mandate and appellate review is best served when the parties comply as directed. See Commonwealth v. Henry, 550 Pa. 346, 358 n.4, 706 A.2d 313, 318 n.4 (1997).

We now turn to the merits of Claimant's appeal. Initially, we note that Claimant has waived several of the nine issues set forth in the Statement of Questions Involved due to counsel's failure to argue the questions in the Argument portion of Claimant's amended brief. This Court has held, "[w]hen issues are not properly raised and developed in briefs, when the briefs are wholly inadequate to present specific issues for review, a court will not consider the merits thereof." Commonwealth v. Feineigle, 690 A.2d 748, 751 n.5 (Pa. Cmwlth. 1997). "Mere issue spotting without analysis or legal citation to support an assertion precludes our appellate review of [a] matter." Commonwealth v. Spontarelli, 791 A.2d 1254,

1259 n.11 (Pa. Cmwlth. 2002). Claimant has also waived any issue that was not preserved before the WCJ. See Pa.R.A.P. 1551 (No question shall be heard or considered by the Court which was not raised before the government unit.). Thus, we will only address the questions specifically preserved and properly argued in the Argument portion of Claimant's brief. All other issues have been waived.

Claimant appears to be arguing that it is unconstitutional for Employer, as the Commonwealth of Pennsylvania, and for CompServices to take pursuant to The State Employees' Retirement Code, 71 Pa.C.S. §§5101 – 5956, and Sections 319 and 204(a) of the Act, the same money received by Claimant as a loss of wages under the Act. Claimant argues that an offset for her pension benefits and the collection of a subrogation interest cannot be taken for the same time period. Claimant contends that such taking deprives her of due process. Claimant contends that since subrogation is based on equitable principles and therefore an equitable remedy, that remedy should fall to the pension offset provisions of the Act which have a basis in law and fact. In other words, Employer is only entitled to take a pension offset credit and not a subrogation interest for the same workers' compensation benefits being paid to Claimant.

Claimant argues further that CompServices is not entitled to subrogation because it has waived its rights by failing to notify Claimant's workers' compensation counsel of record to agree upon how to handle Claimant's subrogation obligation and/or by failing to file a proper petition with the Bureau of Workers' Compensation seeking subrogation. Claimant argues that before Employer could take a subrogation interest, it was required to prove : (1) a causal connection between the original work-related injury and the subsequent event for which a third party is liable; and (2) that as a result of the subsequent event the employer was compelled to pay compensation benefits greater than those required

by the initial injury. Finally, Claimant contends that CompServices made a material and ministerial mistake in calculating the subrogation rate and should be estopped from its claim of subrogation for lost wages and medical expenses from September 9, 1998, through October 24, 2000, because such subrogation right did not arise until October 24, 2000, the date the medical malpractice occurred.

With regard to Claimant's due process claim, we point out that it is Employer and not CompServices who is entitled to subrogation and a pension offset in this matter. CompServices was acting on behalf of Employer as Employer's third party administrator. We also point out that Claimant does not cite to any controlling authority to support her argument that her due process rights have been violated by the statutory scheme governing workers' compensation benefits, subrogation and pension offset.

As noted herein, pursuant to Section 319 of the Act, 77 P.S. §671, an employer who has paid compensation to a claimant injured by a third party is subrogated to the right of the claimant against such third party and the employer has an absolute right to immediate payment of its subrogation lien from the claimant's recovery against the third party, after payment of fees and expenses. The purpose for this right of subrogation is threefold: to prevent double recovery for the same injury by the claimant, to ensure that the employer is not compelled to make compensation payments made necessary by the negligence of a third party, and to prevent a third party from escaping liability for his negligence. Dale Manufacturing Co. v. Bressi, 491 Pa. 493, 421 A.2d 653 (1980). An employer's subrogation rights are statutorily automatic and absolute and can be abrogated only by choice. Winfree v. Philadelphia Electric Co., 520 Pa. 392, 554 A.2d 485 (1989); Growth Horizons, Inc. v. Workers' Compensation Appeal Board (Hall), 767 A.2d 619 (Pa. Cmwlth. 2001).

An employer can waive or compromise its subrogation rights. Growth Horizons. However, a waiver or reduction of an employer's statutory right to subrogation must be reduced to writing and agreed to by the parties. See Rissmiller v. Workers' Compensation Appeal Board (Warminster Township), 768 A.2d 1212 (Pa. Cmwlth.), petition for allowance of appeal denied, 567 Pa. 769, 790 A.2d 1021 (2001); see also Rissi v. Workers' Compensation Appeal Board (Tony Depaul & Son), 808 A.2d 274 (Pa. Cmwlth. 2002), petition for allowance of appeal denied, 573 Pa. 687, 823 A.2d 146 (2003).

This Court has held that an agreement whereby an employer releases or waives its subrogation rights against the claimant's third party settlement recovery is valid under the Act and that the claimant in such a situation is entitled to the benefit of the bargain. See SKF USA, Inc. v. Workers' Compensation Appeal Board (Smalls), 714 A.2d 496 (Pa. Cmwlth. 1998), petition for allowance of appeal denied, 559 Pa. 684, 739 A.2d 546 (1999); Baus v. Workmen's Compensation Appeal Board (Nelson Co.), 585 A.2d 573 (Pa. Cmwlth. 1991). In Baus, we held that the employer could settle its claim for a past lien for a lesser amount out of the third party recovery by agreement and the claimant therein is entitled to the benefit of that bargain.

Accordingly, in this matter, the third party settlement agreement entered into between Employer and Claimant in the medical malpractice action in which Employer accepted a lesser amount out of the third party recovery is proper under the Act. As such, Claimant is entitled to the benefit of that bargain.

Moreover, Employer has not waived its right to subrogation as argued by Claimant. Since Employer and Claimant reached an agreement as to the amount Employer was due for subrogation, there was no need for Employer to file a petition for review with the Bureau of Workers' Compensation for approval of

the agreement. There is no dispute that Claimant was represented by counsel during the third party action and settlement negotiations. Thus, Claimant cannot now claim that her due process rights were violated in this regard. In addition, there is nothing in the Act that required Employer, Claimant, or the attorney representing Claimant in the third party action to first contact Claimant's workers' compensation counsel regarding the third party recovery or settlement agreement in order for counsel to agree to the rate of subrogation.

We further reject Claimant's contention that Employer and CompServices cannot take money from the "same pot" for the subrogation and pension offset. We note that Claimant agrees that Employer has a right to a pension offset in this matter pursuant to Section 204(a) of the Act, §77 P.S. §71(a).[3] Claimant does not dispute the amount of that offset. Instead, Claimant contends that a state actor, such as Employer, cannot take workers' compensation benefits from a claimant pursuant to the State Employees' Retirement Code, Section 319 of the Act, providing for subrogation, and Section 204(a) of the Act, providing for a pension offset, at the same time. Claimant argues that these statutes are in conflict; therefore, Employer should only be entitled to take a pension offset and not both a subrogation interest and a pension offset in this matter.

[3] Section 204(a) provides, in relevant part:

> [T]he benefits from a pension plan to the extent funded by the employer directly liable for the payment of compensation which are received by an employe shall also be credited against the amount of the award made under sections 108 [relating to occupational diseases] and 306 [relating to total disability], except for benefits payable under section 306(c) [relating to specific loss benefits].

Again, Claimant does not cite to any authority as support for her argument. Additionally, Claimant's argument is completely without merit. Sections 319 and 204(a) of the Act and The State Employees' Retirement Code are clearly not in conflict.

As stated above, the purpose of subrogation is to prevent double recovery for the same injury by the claimant. Dale Manufacturing. Accordingly, in this matter, by taking the subrogation interest specifically agreed to by Employer and Claimant in the third party settlement agreement, Employer and Claimant were placed in the same position they would have been had Claimant not filed a third party claim. In other words, Claimant was prevented from receiving a double recovery by receiving a third party settlement from a negligent third party who caused the injury. By permitting Employer to receive a subrogation interest, Claimant was made whole but did not recover more than what was required to be made whole. As stated previously herein, subrogation is automatic. Winfree; Growth Horizons. Section 319 of the Act is written in mandatory terms, and by those terms, there are no express exceptions, equitable or otherwise. Thompson v. Workers' Compensation Appeal Board (USF&G Company and Craig Welding & Equipment Company), 566 Pa. 420, 781 A.2d 1146 (2001).

Under the Act, a pension offset is separate and distinct from an employer's right to subrogation. Section 204(a) of the Act serves the legislative intent of reducing the cost of workers' compensation by permitting an employer to avoid paying duplicate benefits for the same loss of earnings. The Pennsylvania State University v. Workers' Compensation Appeal Board (Hensal), 911 A.3d 225 (Pa. Cmwlth. 2006), petition for allowance of appeal denied, 593 Pa. 743, 929 A.2d 1163 (2007). To be able to take a pension offset credit, however, an

employer must prove the extent that it contributed to or funded the claimant's pension plan. Section 204(a) of the Act.

Herein, Employer proved the extent that it contributed to Claimant's pension plan by presenting credible actuarial evidence regarding the calculation of Claimant's pension pursuant to The State Employees' Retirement Code. Therefore, Employer was entitled to a pension offset of Claimant's workers' compensation benefits to the extent that Employer funded Claimant's pension.

As Sections 319 and 204(a) of the Act serve distinct and separate purposes, they are not in conflict with each other or The State Employees' Retirement Code. Employer was entitled to a pension offset credit regardless of whether Claimant prevailed on her third party claim and Employer was entitled to subrogation regardless of whether Claimant had chosen to retire. In addition, Employer was entitled to both a subrogation interest and pension offset for the same time period.

Finally, we address Claimant's argument that CompServices made a material and ministerial mistake in calculating the subrogation rate and therefore should be estopped from its claim of subrogation for lost wages and medical expenses from September 9, 1998, through October 24, 2000, because such subrogation right did not arise until October 24, 2000, the date the medical malpractice occurred. Claimant does not argue that there was fraud or misrepresentation associated with the third party settlement agreement.

It is undisputed that Employer compromised its subrogation interest by agreeing to settle for a lesser amount out of the third party recovery. While it may be correct that there was a mutual mistake as to the date of Claimant's work-related injury when the parties negotiated the amount of Employer's subrogation interest, the WCJ found, based on the credible testimony of Attorney Ortwein and

Ms. Matrisian, that there were no material mistakes of fact that would require the WCJ to modify the third party settlement agreement or the amount of Employer's subrogation interest. It is well settled that determinations as to witness credibility and evidentiary weight are not subject to appellate review. Hayden v. Workmen's Compensation Appeal Board (Wheeling Pittsburgh Steel Corp.), 479 A.2d 631 (Pa. Cmwlth. 1984).

Accordingly, the Board's order is affirmed.

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JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Roseann Mitchell, Petitioner	:	
v.	:	No. 2155 C.D. 2009
Workers' Compensation Appeal Board (Department of Public Welfare), Respondent	:	

O R D E R

AND NOW, this 20th day of May, 2010, the order of the Workers' Compensation Appeal Board entered in the above-captioned matter is affirmed.

JAMES R. KELLEY, Senior Judge