

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Geraldine Flynn, :
Petitioner :
 :
v. :
 :
Workers' Compensation Appeal :
Board (Department of Military and :
Veterans Affairs), : No. 2169 C.D. 2010
Respondent : Submitted: February 18, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: May 25, 2011

Geraldine Flynn (Claimant) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed the Workers' Compensation Judge's (WCJ) decision to grant Claimant's Petition to Review Compensation Benefit Offset (Review Offset Petition) and authorized the Department of Military and Veteran Affairs (Employer) to take a prospective offset from compensation benefits.

Claimant sustained a work-related injury¹ in the course and scope of her employment with the Employer on September 16, 1998. Pursuant to a notice of compensation payable (NCP), Claimant received compensation benefits in the weekly amount of \$284.51. On September 18, 2007, Employer filed a Notice of Workers' Compensation Offset and asserted entitlement to an offset credit in the

¹ Claimant's work-related injury was in the nature of a right foot injury.

amount of \$13,085.70² starting October 13, 2007, continuing through November 15, 2008. During that time Claimant would receive and Employer would pay zero dollars in workers' compensation benefits. After that, Claimant would receive compensation benefits in the reduced amount of \$228.86 per week, retroactive to April 11, 2003.

On November 7, 2007, Claimant sought review of the compensation benefit offset. Petition to Review Compensation Benefit Offset, November 7, 2007, at 1; Reproduced Record (R.R.) at 4a. Employer contested Claimant's petition.

Claimant testified that she was injured when "two residents were arguing and fighting and me and another nurse tried to separate them and a third guy came and ran over my leg with his wheelchair while he was still in it . . . I subsequently had to have three separate surgeries." Hearing Transcript, December 27, 2007, (H.T. 12/27/07) at 16; R.R. at 55a. Claimant stated that Dominick Morocco (Morocco), head of Human Resources, called her into his office and notified her that "we've checked with your doctor [and he] will not let you go full duty and according to our records you can only work ninety days on light-duty." H.T. 12/27/07 at 19; R.R. at 58a. Morocco referred Claimant to Gerald E. Sotak (Sotak) in order to discuss whether she qualified for partial retirement. H.T.

² "The monthly offset amount is \$241.55. Dividing this figure by 4.43, the weekly offset amount is \$55.65. Thus, as of your retirement date, 4/11/03, you were overpaid by the amount of \$55.65 per week. Total lump sum overpayment through 10/12/07 is \$13,085.70." Notice of Workers' Compensation Benefit Offset at 2; Certified Record (C.R.), Claimant's Exhibit Number 4.

12/27/07 at 20; R.R. at 59a. Sotak informed Claimant that she qualified for a partial retirement based upon her seven and a half years of employment with Employer. H.T. at 20; R.R. at 59a. Claimant queried whether her retirement would affect her workers' compensation benefits. Sotak replied that "[n]o it's not going to have any affect on it . . . [y]our [w]orkers' [c]omp will stay the same and you will get this additional check for . . . \$279.00 a month." H.T. 12/27/07 at 21; R.R. at 60a.

Sotak testified on behalf of Employer that he did remember Claimant's name and "[t]hat's about it, really." Hearing Transcript, January 28, 2008, (H.T. 1/28/08) at 6; R.R. at 103a. In regards to Claimant's assertions that her pension benefits would not affect her workers' compensation benefits, Sotak responded:

The only thing I can say, since I don't recall specifically a conversation with her, but generally speaking, when that - - and that is the kind of question that has come up frequently - - when I met with members who had exactly that question, Workers' Comp and will pension affect their Workers' Comp, our standard pat answer was that's not our area of expertise. If you have any questions concerning your Workers' Compensation, you need to speak directly to Workers' Compensation. So that's the only way I can answer that.

H.T. 1/28/08 at 7-8; R.R. at 104a-05a.

I. The WCJ's First Decision Circulated On July 1, 2008.

9. After reviewing the evidence presented by both parties, this WCJ finds the testimony of the claimant to be convincing, credible and persuasive based upon her testimony before this WCJ she was advised by Mr. Sotak

that the receipt of workers' compensation benefits would have no effect upon her retirement benefits and that she acted in reliance upon the statements made by Mr. Sotak, electing to retire believing that her compensation benefits could not be effected by the receipt of the partial benefits. (emphasis added).

10. The WCJ was neither impressed nor persuaded by the credibility of Mr. Sotak as he could not recall any conversation he had with this specific claimant, nor could he refer to any notes in her retirement file that he met with her confirming he referred her to someone with regard to any questions regarding her workers' compensation benefits and the effect retirement would have on those benefits. On the contrary, this WCJ finds that Mr. Sotak's testimony is not credible and will be specifically rejected. This WCJ finds the testimony of the claimant to be more convincing and persuasive. (emphasis added).

11. This WCJ finds it is the obligation of the defendant [Employer] to notify the employee [Claimant] of reporting requirements under Section 204 of the Workers' Compensation Act The facts in this case support it was not until March 2007, some four years after the claimant first received pension benefits; that the employer sent to the claimant the LIBC-756 form for claimant to report receiving pension benefits in 2003. (emphasis added).

12. The claimant initially cited the case of Gadonas, Petitioner v. WCAB (Boeing Defense & Space Group), 911 A.2d 95 (Pa. Cmwlth. 2007) which controls for the proposition a defendant fraudulently or deceptively lulled a workers' compensation claimant into a false sense of security regarding the filing of a claim. This WCJ finds that the case is applicable to the extent that there is no deliberate intent on the part of Mr. Sotak to mislead the claimant, this WCJ finds that the claimant justifiably relied upon the opinion of Mr. Sotak that workers' compensation benefits would not be effected by receiving pension benefits and that there was, at the very least, a misrepresentation or conduct that the employer should

not be permitted to benefit from claimant's relying upon Mr. Sotak, who was the retirement counselor. (emphasis added).

....

15. This WCJ finds that the only credit that can take place in this matter did not occur until on and after March 23, 2007, and that all monies received before this date by claimant and her pension are not subject to a credit and benefits for workers' compensation should be reinstated.

16. This WCJ finds that any credits taken by the employer unilaterally reflecting any pension benefits received by the claimant up through March 23, 2007, should be reinstated to the claimant and, in addition interest at the rate of ten percent per annum.

17. This WCJ further finds that the employer is entitled to a credit in the amount of \$228.86 per month for her to continue to receive pension benefits against any workers' compensation benefits as of March 23, 2007.

WCJ's Decision, July 1, 2008, (First Decision), Findings of Fact (F.F.) Nos. 9-12 and 15-17 at 3-4. The WCJ granted Claimant's Review Offset Petition.

Both Claimant and Employer appealed to the Board. On December 22, 2008, the Board remanded to the WCJ pursuant to the parties stipulation.³

II. The WCJ's Second Decision Circulated On November 3, 2009.

Following the remand from the Board, the WCJ made the following pertinent findings of fact:

4. A hearing was held before this WCJ on May 14, 2009, where no testimony was taken but discussion occurred

³ The parties stipulated to the following that "a remand is in order for purposes of clarifying the inconsistencies made therein." Stipulation, December 2, 2008, at 1.

with regard to inconsistencies in the decision. (emphasis added).

.....

8. This WCJ finds that paragraph seventeen [First Decision] allowing the credit is incorrect that it was intended that the claimant receive a current compensation rate of \$228.86 with a credit permitted of \$55.65 per week on and after March 23, 2007, which would equal the \$228.86 per week to which the claimant would be entitled, once the credit is taken. Prior to that date the claimant was to receive \$241.55 per week without any retroactive credit to 2003. (emphasis added).

9. By correspondence of August 21, 2009, the claimant has already received full \$284.51 per week the temporary total disability rate prior to March 23, 2007, per the decision of this WCJ of July 1, 2008. Therefore, the only issue is whether the employer is entitled to a credit after March 23, 2007. (emphasis added).

10. In order to clear up any inconsistencies this WCJ explains that finding of fact number one (1) referring to a temporary total disability rate of \$284.51, is in conflict with finding of fact number seventeen (17). Therefore, this WCJ re-avers that the compensation rate the claimant is to receive as of March 23, 2007, and continuing thereafter as \$228.86 per week reducing the disability rate by the amount of \$55.64 per week, which is the offset credit. (emphasis added).

11. This WCJ further finds it was this WCJ's intent not to permit the employer to take a credit retroactively, but only permit the credit as of a certain date, which was March 23, 2007, being the date the claimant received the LIBC 756 form. (emphasis added).

12. Therefore, this WCJ finds the employer is not entitled to a credit on the date she retired in 2003 up to March 23, 2007, but is entitled to a credit of \$55.65 per week on and after March 23, 2007.

WCJ's Decision, November 3, 2009, (Second Decision), Findings of Fact (F.F.) Nos. 4 and 8-12 at 1-2. The Board affirmed.

III. Issues.

1. Whether The Board Erred When It Affirmed The Grant Of A "Prospective Credit" To Employer Even Though The WCJ Found That Employer Misled Claimant Concerning The Consequences Of Accepting Pension Benefits?

Initially, Claimant contends⁴ that Employer was estopped from an offset of pension benefits because the WCJ found she was misinformed that the receipt of pension benefits would not affect her compensation benefits. Claimant cites Gadonas v. Workers' Compensation Appeal Board (Boeing Defense & Space Group), 931 A.2d 95 (Pa. Cmwlth. 2007) to support this proposition.

Initially, Section 204(a) of the Workers' Compensation Act (Act)⁵, 77 P.S. §71, provides that "the 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 and 306, except for benefits payable under section 306(c)." (emphasis added).

Section 204(c) of the Act, 77 P.S. § 71, provides that "[t]he employe is required to report regularly to the insurer the receipt of . . . pension benefits,

⁴ This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact were supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

⁵ Act of June 2, 1915, P.L. 736, as amended.

which post-date the compensable injury under this act Section 204(d) of the Act provides that “[t]he department shall prepare the forms necessary for the enforcement of this section and issues rules and regulations as appropriate.” (emphasis added).

Last, 34 Pa. Code § 123.501 provides that “[a]n insurer shall notify the employe of the employe’s reporting requirement under sections 204 and 311.1(a) and (d) of the act In addition, the insurer shall provide the employe with the forms required to fulfill the employe’s reporting and verification requirements under section 311.1(d) of the act.”⁶ (emphasis added).

In Gadonas, Glen Gadonas (Gadonas) had been awarded benefits of \$561.00 per week for the closed period from March 2 to March 16 and from May 15, 1998 and continuing. Because Gadonas continued to suffer from chronic low back pain, he applied for a disability retirement. “When he met with Boeing Defense and Space Group’s (Boeing) benefits administrator, Joan Scone, he was informed that his disability pension would not be offset by his worker’s compensation.” Gadonas, 931 A.2 at 97. Gadonas began to receive his disability pension in the amount of \$738.00 per month effective on May 1, 2003. Boeing then petitioned for an offset. “On November 24, 2003, he took out a loan for \$4500 and deposited the funds into a self-directed IRA, representing the amount of pension benefits that he had received.” Id. at 97. The workers’ compensation

⁶ Additionally, 34 Pa. Code § 123.502 provides that “Insurers may submit Form LIBC-760 . . . to the employe and employe’s counsel, if known, to verify, no more than once every 6 months, that the status of the employe’s entitlement to receive compensation has not changed.” (emphasis added).

judge found Gadonas' testimony credible that he intended to "roll over" these pension benefits into an IRA account. On appeal, the board reversed and concluded that "Gadonas did not establish that he rolled over his pension benefits to an IRA" and ordered "that only pension payments received within sixty days of the date of the deposit could qualify as a rollover." (footnote omitted). Id. at 98.

On appeal, Gadonas argued, among other things, "that the [b]oard erred by failing to take into account how employer [Boeing] misled Gadonas with regard to its intention to take a pension offset against workers' compensation benefits." Id. at 98. This Court stated:

Equitable estoppel arises in the workers' compensation arena when an employer by its acts, representations or admissions, or by its silence when it ought to speak out, intentionally or through culpable negligence induces another to believe that certain facts exist and that person rightfully acts on the belief, so that he will be prejudiced if the employer is permitted to deny the facts In the absence of expressly proved fraud, estoppel will not be found based upon acts that are consistent with honest purpose and absence of negligence as with their opposite, and when there is no concealment, misrepresentation or other inequitable conduct, a claimant may not claim that estoppel arises from his own omission or mistake

The Court concludes that the circumstances here estop Employer [Boeing] from disputing that the pension payments Gadonas received initially should be treated as rollovers. Gadonas testified that he met with the benefits administrator to discuss the possibility of taking a disability pension. He ultimately applied through the benefits administrator and was informed by her when it was approved. Despite untenable characterization of the testimony Employer [Boeing] quotes, there is no question that one of Gadonas' concerns was the effect of a disability pension on his workers' compensation benefits

and that the benefits administrator said that there would be none. For the reasons he stated, Gadonas did not take steps at that time to ascertain if there were some legal means to shelter his pension benefits. The WCJ credited Gadonas' testimony, and the WCJ's credibility findings are binding on this Court as well as the Board when they are substantiated by the evidence of the record (emphasis added and citations omitted).

Id. 100-01. In Gadonas, this Court reversed the Board's determination that "only pension payments received within sixty days of the date of deposit could qualify as a rollover." Id. at 98.

While Gadonas is instructive, it does not control the present controversy. In Gadonas, the issue was whether Boeing was entitled to an offset of compensation benefits when Gadonas rolled over his pension benefits into an IRA account more than sixty days after receipt. In Gadonas, this Court reviewed the pertinent state regulation and federal statute that controlled pension benefit rollovers. Specifically, 34 Pa. Code § 123.9(c). 34 Pa. Code § 123.9(c) provides:

Pension benefits which are rolled over into an IRA or other similarly restricted account may not offset workers' compensation benefits, so long as the employe does not withdraw or otherwise utilize the pension benefits from the restricted account while simultaneously receiving workers' compensation benefits from the liable employer. (emphasis added).

Further, 26 U.S.C. § 408(d)(3)(A) provides that a rollover contribution will be allowed:

[When] the entire amount received (including money and any other property) is paid into an individual retirement account or individual retirement annuity (other than an endowment contract) for the benefit of such individual not later than the 60th day after the day on which he receives the payment or distribution[.] (emphasis added).

In Gadonas, Gadonas waited more than sixty days to deposit his pension benefits into an IRA account based upon Boeing's representation that the receipt of pension benefits would not affect his workers' compensation benefits. In Gadonas, this Court concluded that "the circumstances here estop Employer [Boeing] from disputing that the pension payments Gadonas received initially should be treated as rollovers." Id. at 101. In Gadonas, this Court specifically addressed the narrow issue of whether the \$4,500.00 in pension benefits paid to Gadonas and deposited into his IRA account could be offset by Boeing. Boeing never sought an offset of compensation benefits against Gadonas' future receipt of pension benefits and as a result that issue was not before this Court.

However, as the Board properly concluded, this Court's precedent does control. In Maxim Crane Works v. Workers' Compensation Appeal Board (Solano), 931 A.2d 816 (Pa. Cmwlth. 2007), Richard Solano (Solano) had suffered a work-related injury during his employment with Maxim Crane Works (Maxim Crane) and continued to work for Employer until his termination in December of 2000. "On April 4, 2003, Claimant [Solano] and Employer [Maxim Crane] entered into an agreement for compensation benefits, which was later modified by supplemental agreement dated September 12, 2003." Id. at 817. A substantial time later on June 6, 2005, Maxim Crane sent Solano Form LIBC-756 (Employee's Report of Benefits for Offsets) where Solano "confirmed his receipt of old age Social Security benefits." Id. at 817. And "on August 3, 2005, Claimant [Solano] received Form LIBC-761-Notice of Workers' Compensation Benefit Offset, notifying him that Employer [Maxim Crane] was taking a credit that would offset his weekly workers' compensation benefits, and that a credit

from 14 months of prior old age Social Security benefits would also be recouped” Id. at 817. Solano petitioned for review and the workers’ compensation judge, after hearing, found that Maxim Crane “was only entitled to an offset starting on June 6, 2005-the date Claimant [Solano] first received the form to report his old age Social Security benefits.” Id. at 817. The Board affirmed with minor modifications of the workers’ compensation judge’s calculation of Solano’s weekly benefits.

On appeal, Maxim Crane argued that it was entitled to a credit for old age Social Security benefits prior to Solano’s receipt of Form LIBC-756. This Court rejected Maxim Crane’s argument and concluded:

We can find no support in the Act or regulations to support Employer’s [Maxim Crane’s] assertion that it has an absolute right to a retrospective offset. While Claimant [Solano] began receiving old age Social Security benefits in January 2003, the undisputed evidence shows that Claimant [Solano] did not receive Form LIBC-756 until June 6, 2005. While Claimant [Solano] does owe a duty to report receipt of old age Social Security benefits, the regulations place the initial duty upon the employer or insurer to notify the employee of the reporting requirements and provide the employee with the proper forms. Based upon our review of the Act and corresponding regulations, we conclude that the WCJ did not err or abuse his discretion in determining that Employer [Maxim Crane] was only entitled to an offset as of the date claimant [Solano] received the form on June 6, 2005. (emphasis added).

Maxim Crane Works, 931 A.2d at 819.

Here, the WCJ denied Employer’s request for a retrospective compensation offset from 2003, the date of Claimant’s retirement, up until March

23, 2007, when Claimant received the LIBC-756 form. This Court concurs with the Board's conclusion that:

There is no doubt that in the instant matter, Claimant began receiving pension benefits in 2003. Yet, Defendant [Employer] did not send Claimant the LIBC form, requiring her to report the receipt of those benefits until March, 2007, four years later. Therefore, like the employer in *Maxim Crane*, Defendant [Employer] did not act with due diligence in informing Claimant of the reporting requirements, and the WCJ did not err in his determination that Defendant [Employer] was not entitled to a credit prior to Claimant's receipt of the LIBC form. However, pursuant to *Maxim Crane*, Defendant [Employer] was entitled to an ongoing credit based on Claimant's receipt of pension benefits as of the date she received the LIBC form. (emphasis in original and added).

Board's Opinion, September 22, 2010, at 8.

2. Whether The WCJ Failed To Issue A Reasoned Decision?

Claimant next contends that the WCJ's second decision only addressed the issue as to the dates of the credit and failed to address the inconsistencies concerning his prior credibility findings. Essentially, Claimant asserts that while the WCJ found Claimant was misled, the WCJ failed to explain why Employer was still entitled to a prospective offset of pension benefits.

Section 422(a) of the Act, 77 P.S. § 834, provides:

Neither the board nor any of its members nor any workers' compensation judge shall be bound by the common law or statutory rules of evidence in conducting any hearing or investigation, but all findings of facts shall be based upon sufficient competent evidence to justify same. All parties to an adjudicatory proceeding are

entitled to a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached. The workers' compensation judge shall specify the evidence upon which the workers' compensation judge relies and state the reasons for accepting it in conformity with this section. When faced with conflicting evidence, the workers' compensation judge must adequately explain the reasons for rejecting or discrediting competent evidence (emphasis added).

In Daniels v. Workers' Compensation Appeal Board (Tristate Transport), 574 Pa. 61, 76, 828 A.2d 1043, 1053 (2003), our Pennsylvania Supreme Court noted that "a decision is 'reasoned' for the purpose of section 422(a) if it allows for adequate review by the WCAB without further elucidation and if it allows for adequate review by the appellate courts under applicable reviewable standards . . . [a] reasoned decision is no more, and no less." (emphasis added).

Here, the WCJ set forth concise findings of fact concerning the testimony of Claimant and Sotak and explained the basis of his findings and credibility determinations. See WCJ's First Decision, F.F. Nos. 5-10 and 14 at 1-4. The WCJ also reviewed Gadonas⁷, and found there was no deliberate intent on the part of the Employer to mislead Claimant. See WCJ's First Decision, F.F. No. 12 at 3. Last, the WCJ found that Maxim Crane controlled and that Employer was not

⁷ Additionally, this Court rejected Claimant's first argument on appeal that Gadonas prohibited Employer from any future offset of compensation benefits.

entitled to a retrospective credit. See WCJ's First Decision, F.F. No. 13 at 3-4.
This Court is satisfied that the WCJ issued a reason decision.

Accordingly, this Court affirms.

BERNARD L. MCGINLEY, Judge

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ORDER

AND NOW, this 25th day of May, 2011, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

BERNARD L. McGINLEY, Judge