

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Viola,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2678 C.D. 2010
	:	
Workers' Compensation Appeal	:	Submitted: June 3, 2011
Board (Philadelphia Gas Works),	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: August 10, 2011

In this procedurally complex appeal, Joseph Viola (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) that reversed an order of a Workers' Compensation Judge (WCJ) granting Claimant's penalty petition against Philadelphia Gas Works (Employer). Claimant contends the Board erred in reversing the WCJ for the following reasons: 1) Employer violated the Workers' Compensation Act¹ (Act) by failing to pay benefits despite the Board's denial of supersedeas; 2) Employer improperly engaged in self-help by petitioning the Board for a reconsideration of supersedeas where no such mechanism exists; and, 3) the Board's order rescinding its denial of supersedeas did not grant supersedeas, but merely returned the parties to the *status quo* that existed prior to the denial order. Upon review, we affirm.

¹ Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§1-1041.4, 2501-2708.

I. Background

A. Notice of Offset; Offset Review Petition

In December 2000, Claimant sustained a work-related lumbar spine injury for which Employer issued a notice of compensation payable. In October 2002, Claimant retired on a disability pension and began receiving pension payments. Employer filed a notice of workers' compensation benefit offset (notice of offset) asserting a credit against Claimant's wage loss benefits for Employer funded pension benefits. In 2006, Employer filed a second offset notice for a higher amount. In response to the second notice, Claimant filed a petition to review compensation benefit offset (review offset petition).

B. Initial Award

In a review offset proceeding, the employer claiming a pension benefit offset bears the burden of proving its entitlement to a credit. Dep't of Pub. Welfare v. Workers' Comp. Appeal Bd. (King), 884 A.2d 343 (Pa. Cmwlth. 2005). Here, Employer submitted the deposition testimony of its controller, Joseph F. Golden, Jr. (Controller). He testified Employer has a non-contributory pension as to employees. Employer's pension payments come from a sinking fund, which is funded entirely by contributions from Employer's revenue, by interest income, and by capital gains on its investments.

However, the WCJ did not find Controller's testimony credible or persuasive as to how Employer calculated the pension offset taken. The WCJ noted Controller is not a licensed actuary and lacked any knowledge as to how the offset calculations were made. The WCJ also found Employer's offset notice did

not attach any documents showing what amount of money Employer contributed to its pension plan. Accordingly, the WCJ granted Claimant's review offset petition, ordered Employer to pay the benefits that were offset, and awarded an unreasonable contest attorney fee. See WCJ Op., 10/19/07 (Initial Award); Reproduced Record (R.R.) at 15a-26a.

C. Vacatur of Initial Award

On appeal, the Board reversed the WCJ's unreasonable contest determination and vacated his grant of Claimant's review offset petition. See Bd. Op., 09/30/08 (First Board Decision); R.R. at 33a-40a. The Board recognized that an employer which funds 100% of a claimant's pension benefits is entitled to a credit against compensation for 100% of the pension benefits it paid the clamant. Croom v. Workers' Comp. Appeal Bd. (Pa. Hosp.), 865 A.2d 1005 (Pa. Cmwlt. 2005).

Here, Controller testified a 1968 City of Philadelphia Ordinance (Pension Ordinance) established Employer's current pension plan. Claimant's pension benefits were determined by the calculation method set forth in the Pension Ordinance. Therefore, the Board reasoned that Employer was entitled to rely on a presumption of the regularity of administrative acts of public officers. See Picknick v. Washington County Tax Claim Bureau, 936 A.2d 1209 (Pa. Cmwlt. 2007) (government unit entitled to rely on a presumption that proper administrative procedures were followed; the burden then shifts to opposing party to show those procedures were not followed). Thus, Controller's testimony, if

found credible, meets Employer's burden of proof in the review offset proceeding. Therefore, the Board determined Employer presented a reasonable contest.

As a result, the Board vacated the WCJ's Initial Award and remanded the case in order for the WCJ to apply the presumption of regularity of administrative acts and to properly assign the burden of proof on rebuttal to Claimant. See R.R. at 38a. The Board further directed the WCJ on remand to make credibility determinations, findings of fact and conclusions of law consistent with the Board's opinion. Id. at 38a-39a.

D. WCJ's Remand Award

On remand, the WCJ found Employer is not a government unit and therefore the presumption of the regularity of administrative acts does not apply. The WCJ further determined Employer never raised this presumption during the hearing and thus waived it. Accordingly, the WCJ adopted his earlier decision granting Claimant's review offset petition. As a consequence, despite the Board's determination that Employer presented a reasonable contest, the WCJ again awarded unreasonable contest attorney fees. See WCJ's Op., 06/25/09 (Remand Award); R.R. at 27a-31a.

E. Employer's Supersedeas Request

Employer appealed the Remand Award and petitioned for supersedeas. By order dated August 10, 2009, the Board denied Employer's petition for supersedeas. R.R. at 42a. This August 2009 order provided in pertinent part:

[U]pon consideration of [Employer's] Petition for Supersedeas filed in the above-captioned case, the said Petition for Supersedeas is hereby denied. Statutory Interest is to be paid on past due compensation.

Id.

On August 27, Employer filed a petition for reconsideration of supersedeas with the Board. Ultimately, on September 17, 2009, the Board issued an order granting Employer's reconsideration petition and rescinding its previous order denying supersedeas. Id. at 44a. This September 2009 order provided in pertinent part:

[Employer's] Petition for Reconsideration of Supersedeas is granted; our order of August 10, 2009 is rescinded pending a final decision on this case by the Board.

Id.

F. Claimant's Penalty Petition

Meanwhile, on August 17, 2009, Claimant filed the penalty petition currently at issue. In it, Claimant alleged Employer violated the Act and regulations by refusing to pay compensation as ordered in the Remand Award despite the Board's order denying supersedeas. Id. at 1a-2a. Claimant sought a 50% penalty on past due compensation. Id. at 2a.

G. WCJ's Penalty Award

In February 2010, the WCJ circulated a decision that granted Claimant's penalty petition and assessed a 50% penalty on all compensation past

due as a result of Employer's failure to comply with the Remand Award following the Board's August 2009 denial of supersedeas. See WCJ Op., 02/19/10 (Penalty Award); R.R. at 53a-60a. The WCJ determined Employer violated the provisions of the Act and the Board's Special Rules of Administrative Practice and Procedure (Board's Special Rules), 34 Pa. Code §§111.1-111.35, by failing to pay the past due compensation following denial of supersedeas.

The WCJ also found the Board's September 2009 order granting reconsideration did not actually grant supersedeas, but merely returned the parties to the *status quo* prior to the denial order. Penalty Award, Finding of Fact No. 8; R.R. at 58a. Therefore, the WCJ reasoned that the supersedeas was ultimately deemed denied by operation of law under 34 Pa. Code §111.24(b). Id.

H. Reversal of Penalty Award

Employer appealed the Penalty Award, and the Board reversed. See Bd. Op., 11/18/10 (Second Board Decision);² R.R. at 63a-72a. First, the Board determined its September 2009 order operated to grant supersedeas. The Board reasoned as follows:

² Although not a part of the certified record in this case, the Board also issued a decision and order on November 18, 2010, vacating the WCJ's Remand Award. See Viola v. Phila. Gas Works, 2010 WL 4912403 (Pa. Work. Comp. App. Bd., No. A09-1235, filed November 18, 2010); Employer's Br. (Appendix). Based on the WCJ's failure to comply with the remand instructions in the Board's 2008 decision, the Board vacated the Remand Award and remanded the review offset proceeding to a different WCJ. Id. Claimant argues the Board's decision is not part of the record and should not be considered. However, Claimant concedes the Board vacated the Remand Award and that the review offset petition remains pending. See Claimant's Br. at 5, n.1; Claimant's Reply Br. at 1-3. In light of Claimant's acknowledgment of the Board's decision and its obvious relevance here, we take judicial notice of it. See Pa. R.E. 201.

Upon review, we conclude, first that the WCJ erred in determining that the September Order did not grant Supersedeas. The WCJ's interpretation of the September Order as resulting in a denial of Supersedeas, after the Board had already issued the August Order denying Supersedeas, must be rejected as constituting an absurd result. Moreover, a WCJ does not have the authority to review orders entered by the Board. [Gregory v. Workers' Comp. Appeal Bd. (Narvon Builders), 926 A.2d 564 (Pa. Cmwlth. 2007)]. Thus, we conclude that the September Order had the effect of granting Supersedeas, and that the WCJ could not effectively overrule the Board's order by reinterpreting it. Id.

Second Board Decision at 4-5; R.R. at 68a-69a.

Second, the Board considered the legal effect of its order granting supersedeas on reconsideration. It reasoned:

even if the Board's September Order were found to be invalid by an appellate tribunal, the WCJ's award of a penalty was not appropriate as [Employer] was justified in relying on the September Order granting Supersedeas, in that reliance on even an invalid Supersedeas order has been found to be proper. [Penn Window & Office Cleaning Co. v. Workmen's Comp. Appeal Bd. (Pearsall), 550 A.2d 610 (Pa. Cmwlth. 1988)]. We further believe the Board was justified in granting [Employer's] Motion for Reconsideration of Supersedeas, based on the general principle that a tribunal should have the authority to correct errors in its own decisions. See generally [Moore v. Moore, 535 Pa. 18, 634 A.2d 163 (1993)] (holding that "[a] trial court always has the authority to reconsider its own judgment"). Moreover, we find no case law indicating that an administrative agency of the Commonwealth lacks the authority to reconsider its own Supersedeas orders.

Id. at 5; R.R. at 69a.

Third, the Board rejected Claimant's argument that even assuming the September 2009 order granted a supersedeas, Employer should have paid all past due compensation up to the date of that order. The Board reasoned (with emphasis added):

[W]e consider the period of time after the August Order and prior to the September Order; Claimant responds in brief that even assuming the September Order is valid to grant Supersedeas, [Employer] should have paid Claimant all past due amounts up to the August 10, 2009 issue date when the August Order denying Supersedeas was issued, and continued to pay the total disability rate until its request for reconsideration was ruled upon. In this respect, Claimant cites to [Snizaski v. Workers' Comp. Appeal Bd. (Rox Coal Co.), 586 Pa. 146, 891 A.2d 1267 (2006)], to the effect that payment was due once the August Order was issued denying Supersedeas, as after that date, Supersedeas was no longer pending.

On the contrary, we reject this contention, as we believe the September Order granting Supersedeas on reconsideration was part and parcel of [Employer's] initial request for Supersedeas, and that the stay was extended for that period of time. As noted above, we believe that under the facts herein, the Board was justified in following up its initial denial of Supersedeas by granting [Employer's] request for reconsideration, in order to correct its oversight in initially denying Supersedeas. Thus, we conclude that the Supersedeas issue remained pending before the Board, the period of the stay was extended, and that no penalty was therefore appropriate for [Employer's] failure to pay benefits after the August Order and prior to the September Order.

Id. at 5-6; R.R. at 69a-70a.

Fourth, the Board observed that after it issued its September 2009 order granting supersedeas, Claimant sought reconsideration. Claimant's actions were therefore contradictory, in that he sought reconsideration and also disputed the authority of the Board to grant it to Employer. The Board determined such inconsistent positions should not be permitted. See Commonwealth v. Mangini, 493 Pa. 203, 425 A.2d 734 (1981) (generally, where counsel could avail itself of two contradictory or mutually exclusive alternatives, counsel must pick one or the other).

For these reasons, the Board held the WCJ erred in awarding a penalty based on Employer's failure to pay the past due benefits specified in the Remand Award following the Board's August 2009 order denying supersedeas. Claimant petitions for review.

II. Issues

Claimant contends the Board erred in reversing the WCJ's penalty award for the following reasons: 1) the WCJ correctly determined Employer violated the Act by failing to pay past due benefits following the Board's August 2009 order denying supersedeas; 2) because the Board's Special Rules do not provide for a reconsideration of supersedeas, the Board erred in granting reconsideration; and, 3) the Board's September 2009 order rescinding its denial of supersedeas did not grant supersedeas but merely returned the parties to the *status quo* that existed prior to the denial order.³

³ Whether to impose a penalty for a violation of the Act is a matter of discretion. McKay v. Workmen's Comp. Appeal Bd. (Bethenergy Mines, Inc.), 654 A.2d 262 (Pa. Cmwlth. 1995). **(Footnote continued on next page...)**

III. Discussion

A. Argument

1. Employer's Noncompliance After Denial of Supersedeas

Claimant first contends the WCJ correctly determined Employer violated the Act when it refused to pay Claimant past due compensation as directed following the Board's August 2009 order denying supersedeas. Rather than pay the past due compensation, Employer petitioned for reconsideration of supersedeas. Five weeks then passed with Employer in violation of the Remand Award before the Board granted reconsideration of supersedeas.

Claimant argues the Board erred in citing Penn Window for the proposition that Employer justifiably relied on the September 2009 order granting supersedeas, even if that order was later held invalid. Claimant contends the case is distinguishable on its facts.

In contrast, the Claimant argues the WCJ properly awarded a penalty in the present case, and he relies on the following language in Snizaski:

When the Act and the Board's supersedeas regulations are read *in pari materia*, the logical conclusion is that an employer can be deemed in default only if it fails to seek supersedeas while pursuing additional review or refuses to make a compensation payment after its supersedeas request is denied. To hold otherwise would render the Board's supersedeas

(continued...)

Our review is limited to determining whether the Board abused its discretion in reversing the WCJ's imposition of a penalty against Employer. Id.

regulations and authority a nullity. Moreover, we agree with the Commonwealth Court below that it is absurd and unreasonable to construe the Act as if it intended that the prospect of a penalty assessment should depend on the unpredictable fortuity of the outcome of the supersedeas request. Penalties should be tied to some discernible and avoidable wrongful conduct.

586 Pa. at 163, 891 A.2d at 1278 (footnotes omitted).

In sum, Claimant contends Employer violated the Act and engaged in “discernable and avoidable wrongful conduct” when it refused to pay past due benefits following issuance of the Board’s August 2009 order denying supersedeas. Further, Employer relied on the “unpredictable fortuity” of the outcome of its reconsideration petition. Consequently, Employer violated the Act and its regulations by failing to pay Claimant’s past due benefits upon issuance of the Board’s order denying supersedeas. Snizaski.

2. Board’s Reconsideration of Supersedeas

Second, Claimant asserts that all Board proceedings are governed by the Board’s Special Rules. Section 435 (c) of the Act, 77 P.S. §991(c). The Special Rules governing supersedeas are found at 34 Pa. Code §§111.21-11124. Despite detailed provisions, there is no provision authorizing a petition for reconsideration of supersedeas.

Further, Claimant contends that there were no special circumstances, such as a claimant returning to work or newly discovered evidence, which warranted reconsideration of supersedeas. Rather, the Board presumably denied the first supersedeas request after evaluating it pursuant to 34 Pa. Code §111.21(6)

(petitioner for supersedeas must make a strong showing that: it is likely to prevail on the merits; it will suffer irreparable harm if denied the requested relief; the issuance of a stay will not substantially harm other interested parties; and, the issuance of a stay will not adversely affect the public interest).

In addition, Claimant asserts the Board's reasoning, that the petition for reconsideration was "part and parcel" of the initial supersedeas request and thus extended the period of stay so Employer could delay payment, is tortured and illogical. Rather, the Board's denial of the initial request triggered Employer's obligation to pay. To hold that a second supersedeas request extended the stay would open the door for any employer to delay payments by simply requesting reconsideration of supersedeas. This, Claimant argues, clearly violates Snizaski.

3. Supersedeas Order

Claimant also contends the Board's September 2009 order did not grant supersedeas, but merely rescinded the earlier order denying supersedeas. The WCJ interpreted the September 2009 order as reinstating the *status quo* prior to the August 2009 order denying supersedeas. Therefore, because the Board took no action for five weeks, Employer's reconsideration request was deemed denied 20 days after the answer was due by operation of law. 34 Pa. Code §111.24(b).

B. Analysis

1. Penalty Provisions of Act

Section 435 of the Act pertinently provides (with emphasis added):

(d) The department, the board, or any court which may hear proceedings brought under this act shall have the power to impose penalties as provided herein for violations of the provisions of this act or such rules and regulations or rules of procedure:

(i) Employers and insurers may be penalized a sum not exceeding ten per centum of the amount awarded and interest accrued and payable: Provided, however, That such penalty may be increased to fifty per centum in cases of unreasonable or excessive delays. Such penalty shall be payable to the same person to whom the compensation is payable.

77 P.S. §991(d)(1).⁴ The purpose of the Act's penalty provisions is to provide the Department of Labor and Industry (Department) with the powers and mechanisms necessary to enforce the Act. Yespelkis v. Workers' Comp. Appeal Bd. (Pulmonary Assocs. Inc.), 986 A.2d 194 (Pa. Cmwlth. 2009).

The Act contemplates an award of penalties only where a claimant prevails on the merits of a case. Shannon v. Workmen's Comp. Appeal Bd. (City of Erie-Fire Dep't), 691 A.2d 1010 (Pa. Cmwlth. 1997). Normally, if no compensation awarded, there can be no penalties imposed.

2. Review Offset Petition Remains Pending

Here, the Board held the WCJ erred in granting Claimant's review offset petition. First Board Decision at 4-5; R.R. at 37a-38a. The Board reasoned that Controller's testimony, if believed, satisfied Employer's burden of proving it fully funds Claimant's pension benefits and is entitled to the offset taken.

⁴ Section 435 of the Act was added by the Act of February 8, 1972, P.L. 25.

Accordingly, the Board vacated the Initial Award and remanded to the WCJ for a determination whether Claimant produced sufficient evidence to rebut the presumption that Controller properly calculated Claimant's pension benefits and the offset taken.

Nevertheless, on remand, the WCJ disregarded the Board's instructions and declined to apply the presumption of administrative regularity. See Remand Award at 2; R.R. at 31a. Moreover, the WCJ readopted the findings of fact and conclusions of law reached in the vacated Initial Award. Id.

Claimant concedes the Board ultimately vacated the Remand Award and again remanded for further proceedings. See Viola v. Phila. Gas Works, 2010 WL 4912403 (Pa. Work. Comp. App. Bd., No. A09-1235, filed November 18, 2010). In this decision, the Board determined the WCJ erred in exceeding the scope of the 2008 remand order by not applying the presumption of regularity of administrative acts. See Budd Co. v. Workers' Comp. Appeal Bd. (Kan), 858 A.2d 170 (Pa. Cmwlth. 2004) (WCJ must confine proceedings to the issues specified in the Board's remand order). Here, the WCJ reconsidered *whether* the presumption should apply and determined it did not. Essentially, the WCJ overruled the Board's decision.

As a result, the Board again vacated the compensation award. As Claimant concedes, the merits of his review offset petition remain pending before the workers' compensation authorities.

For these reasons, a penalty award cannot be based on past due compensation ordered in the Remand Award. Shannon. Accordingly, the Board did not abuse its discretion in reversing the Penalty Award. Id.

3. Board's Reconsideration of Supersedeas

Moreover, the Board did not abuse its discretion by considering Employer's petition for reconsideration of supersedeas. To its credit, the Board candidly acknowledged its August 2009 denial of supersedeas was an "oversight." See Second Board Decision at 6; R.R. at 70a. The Board stated, "we believe, that under the facts herein, the Board was justified in following up its initial denial of Supersedeas by granting [Employer's] request for reconsideration, in order to correct its oversight in initially denying Supersedeas." Id. We agree.

Contrary to Claimant's assertion, the Board believed it did not properly evaluate the merits of Employer's initial supersedeas request, which must include a determination as to whether Employer made a strong showing of a likelihood of success on the merits. See 34 Pa. Code §111.21(6)(i); Linton v. Workers' Comp. Appeal Bd. (Amcast Indus. Corp.), 895 A.2d 677 (Pa. Cmwlth. 2006). Moreover, the grant or denial of supersedeas is a matter within the Board's discretion. Linton.

Given the WCJ's disregard of the remand instructions in the First Board Decision, we discern no abuse of discretion in the Board's conclusion that it properly reconsidered granting supersedeas. The Board's interpretation of its own rules and regulations must be given reasonable deference. Stanish v. Workers'

Comp. Appeal Bd. (James J. Anderson Constr. Co.), 11 A.3d 569 (Pa. Cmwlth. 2010).

4. Supersedeas Order

Finally, we reject Claimant's contention that the Board's September 2009 order did not grant supersedeas. Claimant contends the WCJ properly determined the September 2009 order merely rescinded the August 2009 order denying supersedeas and returned the parties to the *status quo* as it existed prior to that order. Consequently, Claimant asserts the WCJ properly found that the petition for reconsideration was deemed denied by operation of law because the Board failed to rule on it within 20 days of Claimant's answer to the petition. 34 Pa. Code §111.24(b).

In response, Employer contends its motion for reconsideration asked that supersedeas be granted.⁵ It asserts the Board, in granting reconsideration, effectively granted supersedeas without the need for additional language.

On review, the Board concluded the WCJ erred in determining the September 2009 order did not grant supersedeas. The Board rejected the WCJ's interpretation of the order as absurd. Second Board Decision at 5; R.R. at 69a. It also recognized that a WCJ lacks the authority to review a Board order. Gregory.

⁵ Regrettably, Employer's petition for reconsideration of supersedeas and Claimant's answer to the petition are not part of the certified record in this appeal. As such, we cannot review their contents. See Budd Co. v. Workers' Comp. Appeal Bd. (Kan), 858 A.2d 170 (Pa. Cmwlth. 2004) (this Court will not consider extra-record evidence).

We agree with the Board. Significantly, the Claimant acted as though he also agreed with the Board. In particular, in October 2009, Claimant filed a motion to vacate the Board's September 2009 order granting supersedeas. Clearly, the Claimant understood the Board's September 2009 order granted supersedeas.

More importantly, a WCJ lacks authority to review a Board order granting supersedeas. Gregory. Here, at best, the WCJ's interpretation of the Board's order is inconsistent with that of the Board. Consequently, the Board's interpretation prevails. Id. Thus, we discern no error or abuse of discretion in the Board's conclusion that its September 2009 order effectively granted supersedeas. See Second Board Decision at 5; R.R. at 69a.

IV. Conclusion

For the above reasons, we affirm the Board's order reversing the WCJ's Penalty Award.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Viola,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2678 C.D. 2010
	:	
Workers' Compensation Appeal	:	
Board (Philadelphia Gas Works),	:	
Respondent	:	

ORDER

AND NOW, this 10th day of August, 2011, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

ROBERT SIMPSON, Judge