

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

SEPTA,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1359 C.D. 2008
	:	SUBMITTED: January 9, 2009
Workers' Compensation Appeal	:	
Board (Specca),	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER**, President Judge
 HONORABLE JOHNNY J. BUTLER, Judge
 HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: November 17, 2009

Southeastern Pennsylvania Transportation Authority (SEPTA) petitions for review of an order of the Workers' Compensation Appeal Board (Board) that reversed an order of a Worker's Compensation Judge (WCJ) granting SEPTA's application for supersedeas fund reimbursement. We reverse.¹

In this case, the WCJ granted reinstatement of disability benefits upon the retirement of SEPTA employee, Jerry Specca, and also denied the application of SEPTA for an offset based upon its payment of Specca's pension benefits, in spite

¹ By opinion and order filed April 8, 2009, a three-judge panel of this court affirmed the Board's order denying reimbursement from the supersedeas fund. We subsequently granted panel reconsideration, resulting in the present opinion and order.

of the parties' stipulation that SEPTA was entitled to such a credit.² The Board affirmed and denied SEPTA's request for supersedeas. As a result, SEPTA paid Speca a lump sum payment for past benefits due as well as an ongoing weekly benefit payment. On appeal, this court affirmed the reinstatement of benefits, but reversed the denial of a pension offset and remanded for calculation of the amount of credit due. *See Southeastern. Pa. Transp. Auth. v. Workers' Comp. Appeal Bd. (Speca)*, 822 A.2d 114 (Pa. Cmwlth. 2003). Following remand, the WCJ determined that SEPTA was entitled to credit in the amount \$210,878.29. No appeal followed.

Thereafter, SEPTA filed the underlying application for Supersedeas Fund reimbursement seeking reimbursement for its overpayment of compensation following denial of supersedeas. The WCJ granted SEPTA's application and ordered the Bureau of Workers' Compensation to reimburse SEPTA the total amount of \$210,878.29 from the Supersedeas Fund. The Board reversed, concluding that SEPTA's request for a credit was not made under either Section

² Specifically, in 1996, SEPTA offered and Speca accepted a voluntary retirement package, effective July 1, 1997. Between the time of the agreement and the retirement date, Speca suffered a work-related injury, for which a notice of compensation payable was issued. When Speca returned to work, SEPTA filed a suspension petition. In April 1997, Speca was hospitalized for a nonwork-related condition. He did not return to work for SEPTA following his discharge from the hospital. Speca then filed a reinstatement petition following his retirement. During litigation on the suspension and reinstatement petitions, Speca testified that while he could not return to his pre-injury job, he did not consider himself retired and had secured part-time employment with other employers following his retirement from SEPTA.

While the WCJ granted SEPTA's suspension petition for a closed period of time, he also granted Speca's reinstatement petition, determining that Speca could not physically return to his pre-injury full-time job and had suffered a loss of earning power through no fault of his own as of July 2, 1997. Although the WCJ granted SEPTA credit for receipt of unemployment compensation and wages earned from other employers, he specifically denied SEPTA a pension offset to the extent that it had funded Speca's pension benefits.

413 or 430 of the Workers' Compensation Act,³ 77 P.S. §§ 771-774.3, 971, as required, but rather, was made pursuant to Section 204(a) of the Act, 77 P.S. § 71(a).⁴ The instant appeal followed.

We begin by noting that entitlement to Supersedeas Fund reimbursement is governed by Section 443 of the Act,⁵ 77 P.S. § 999. Section 443(a) provides that an employer is entitled to reimbursement from the supersedeas fund where: (1) supersedeas was requested; (2) the supersedeas request was denied; (3) the request was made under Section 413⁶ or 430⁷ of the Act; (4)

³ Act of June 2, 1915, P.L. 736, *as amended*.

⁴ 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”

⁵ Section 443 was added by Section 3 of the Act of February 8, 1972, P.L. 25. Section 443(a) states:

If, in any case in which a supersedeas has been requested and denied under the provisions of section 413 or section 430, payments of compensation are made as a result thereof and upon the final outcome of the proceedings, it is determined that such compensation was not, in fact, payable, the insurer who has made such payments shall be reimbursed therefor. . . .

77 P.S. § 999(a).

⁶ Section 413 of the Act provides, in relevant part:

(a) . . . A [WCJ] designated by the department may, at any time, modify, reinstate, suspend, or terminate a notice of compensation payable, an original or supplemental agreement or an award . . . upon petition filed by either party with the department, upon proof that the disability of an injured employe has increased, decreased, recurred, or has temporarily or finally ceased

....

(a.1) The filing of a petition to terminate, suspend or modify a notice of compensation payable or a compensation agreement or award as provided in this section shall automatically operate as a request for a supersedeas to suspend the payment of compensation . . . where the petition alleges that the employe has fully recovered

(Footnote continued on next page...)

compensation was continued because supersedeas was denied; and (5) in the final outcome of the proceedings, it was determined that such compensation was not, in fact, payable to the claimant. *See also The Boeing Co. v. Workers' Comp. Appeal Bd. (Horan)*, 977 A.2d 92 (Pa. Cmwlth. 2009), petition for appeal filed September 28, 2009, at 723 MAL 2009. Here, the only real issue is whether SEPTA's request for supersedeas was pursuant to the provisions of Section 413 or 430. Due to the confusion surrounding this specific requirement, this court provided an analytical framework to aid in resolution of the issue in *Mark v. Workers' Compensation Appeal Board (McCurdy)*, 894 A.2d 229 (Pa. Cmwlth. 2006).

First, in order to determine whether a request for supersedeas is made pursuant to Section 413 or 430, the procedural stage at which the initial request is made must be identified, that is, whether the request is initially made to the WCJ or requested in the context of an appeal from an adverse decision. *Mark*, 894 A.2d at

(continued...)

and is accompanied by an affidavit of a physician on a form prescribed by the department to that effect

(a.2) In any other case, a petition to reinstate, suspend or modify a compensation agreement or other payment arrangement or award as provided in this section shall not automatically operate as a supersedeas but may be designated as a request for a supersedeas, which may then be granted at the discretion of the [WCJ]. . . .

77 P.S. §§ 772, 774.

⁷ Section 430 of the Act, 77 P.S. § 971, provides:

(a) The lien of any judgment entered upon any award shall not be divested by any appeal.

(b) Any insurer or employer who terminates, decreases or refuses to make any payment provided for in the decision without filing a petition and being granted a supersedeas shall be subject to a penalty as provided in section 435 [77 P.S. § 991], except in the case of payments terminated as provided in section 434 [77 P.S. § 1001].

234-35. Second, the recency of the liability must be determined, that is, whether employer is seeking to suspend a previously established liability or a new decision. *Id.* A closer examination of the two statutory provisions reveals the significance of these two factors.

Section 413 governs changes to an employee's present compensation status regarding an accepted work injury. Pursuant to Section 413, a WCJ may change a notice or agreement if materially incorrect⁸ or modify, reinstate, suspend or terminate compensation where disability has changed.⁹ Therefore, a supersedeas request under Section 413 "is addressed to a *WCJ* to suspend a previously established payment liability, usually in conjunction with a petition to *reduce* compensation (suspension, modification or termination.)" *Id.* at 234 (emphasis in original).

Section 430, on the other hand, "involves appeals from an adverse decision of a WCJ to the Board. . . . [and a] supersedeas request under Section 430 is addressed to the *Board* (or to this Court) to suspend a recent decision on appeal." *Id.* at 234-35. As we noted in *Mark*, requests under Section 430 typically involve significant retroactive benefits; liability has not previously been established or liability has been reinstated or enlarged and benefits continue to accrue during the course of the litigation. *Id.* at 235.

Turning to the instant appeal, SEPTA argues that, contrary to the Board's conclusion, its supersedeas request was made pursuant to Section 430 of the Act. SEPTA further contends that the Board's reliance on *City of Wilkes-Barre*

⁸ See Section 413(a) of the Act, 77 P.S. § 771.

⁹ Section 413(a), 77 P.S. § 772.

v. Workers' Compensation Appeal Board (Spaide), 868 A.2d 620 (Pa. Cmwlth. 2004) is misplaced.¹⁰ We agree with both counts.

Consideration of the factors identified in *Mark* leads to the conclusion that SEPTA's request for supersedeas was made pursuant to Section 430 (the same conclusion reached by the WCJ, *see* WCJ's decision circulated February 7, 2006, Finding no. 7). The request was made to the Board in connection with SEPTA's appeal and sought to suspend the WCJ's decision reinstating liability for the payment of compensation. This court's recent precedential decision in *Boeing* commands the same conclusion, and is directly controlling.

In *Boeing*, the claimant sustained a work-related injury and returned to work in a light-duty capacity. After he was laid off, he filed a claim petition. In granting the petition, the WCJ failed to give employer an offset credit for severance pay and unemployment compensation benefits received by the claimant. Employer appealed and in connection therewith, filed a request for supersedeas. The Board denied supersedeas as to the award of temporary total disability benefits. In its subsequent opinion, the Board concluded that pursuant to Section 204(a) of the Act, the employer was entitled to offset credits for the benefits

¹⁰ In *Spaide*, the claimant's injury was accepted through a notice of compensation payable. The claimant retired in January 2000, and the employer filed a petition to review compensation benefit offset for monthly pension benefits the claimant had been receiving since retirement. The WCJ concluded that the employer was entitled to the offset pursuant to Section 204(a) and granted the petition in May 2002, effective December 1, 2000. Thereafter, the employer filed an application for Supersedeas Fund reimbursement, seeking reimbursement for overpayments of compensation paid during the period December 1, 2000, through May 16, 2002. This court affirmed the Board's reversal of the grant of reimbursement. In doing so, we rejected the employer's argument that it requested supersedeas in a proceeding under Section 413 of the Act, noting instead that the employer's right to relief stemmed from Section 204(a), which does not provide for Supersedeas Fund reimbursement and cannot be equated with a petition filed pursuant to Section 413.

received by the claimant. A WCJ granted the subsequent request for Supersedeas Fund reimbursement, but the Board reversed, relying, as it did in this case, on *Spaide*.

On appeal, we concluded that *Spaide* was not controlling, stating:

Unlike in *Spaide*, Employer here is asserting that it filed a request for supersedeas in a proceeding under Section 430 of the Act, and not Section 413. In *Spaide* and [*Department of Labor & Industry, Bureau of Workers' Compensation v. Workers' Compensation Appeal Board (Exel Logistics)*], 827 A.2d 529 (Pa. Cmwlth. 2003), *aff'd*, 586 Pa. 85, 890 A.2d 1045 (2005)], this Court considered the issues of whether petitions filed pursuant to Section 306(f.1)(8), [77 P.S. § 531(8)] and Section 204(a) of the Act could be equated with petitions to suspend, modify, or terminate benefits filed pursuant to Section 413 of the Act. *Here, however, Employer sought supersedeas under the provisions of Section 430 and it is, therefore, irrelevant that the offsets/credits sought by Employer are derived from Section 204(a), and not Section 413. Section 430 of the Act allows an employer or insurer to request a supersedeas to suspend its obligation to pay workers' compensation benefits to a claimant pursuant to an order of a WCJ or the Board while that order is being appealed to the Board or this Court. . . .* The purpose behind Employer requesting a supersedeas was to suspend Employer's recently established liability to pay Claimant workers' compensation benefits pending the outcome of the appeal that it filed with the Board. Therefore, we conclude that Employer's request for supersedeas was filed in a proceeding under Section 430.

Boeing, 977 A.2d at 100-01 (citation omitted, emphasis added). In *Boeing*, this court also observed that, in *dicta*, the court in *Spaide* conflated the concept of a claimant's entitlement to benefits with the concept of payment of those benefits, noting that "the purpose of the Supersedeas Fund is 'to protect an insurer who makes compensation *payments* to a claimant who ultimately is determined not to

be entitled' to those payments.” *Id.* at 103 [quoting *State Workers’ Ins. Fund v. Workers’ Comp. Appeal Bd. (Shaughnessy)*, 837 A.2d 697, 702 (Pa. Cmwlth. 2003)].¹¹ Thus, *Boeing* demonstrates that with respect to applications for Supersedeas Fund reimbursement *under Section 430*, the source of the credit is irrelevant. “Section 430 . . . allows an employer or insurer to request a supersedeas to suspend its obligation to pay workers’ compensation benefits to a claimant pursuant to an order of a WCJ . . . while that order is being appealed to the Board” *Id.* at 103. Accordingly, the fact that SEPTA’s right to a credit or offset stemmed from Section 204(a) rather than a challenge to Specca’s underlying disability in a proceeding under Section 413 is not determinative. Therefore, we agree that SEPTA has satisfied the requirements of Section 443 and is entitled to reimbursement from the Fund.

Based upon the foregoing, the order of the Board is reversed.

BONNIE BRIGANCE LEADBETTER,
President Judge

¹¹ We note that *Spaide* is distinguishable on other grounds. A close reading of the opinion in *Spaide* reveals that not only did the employer fail to request supersedeas, but it never made payments based upon a denial of supersedeas. The employer in *Spaide* was successful before the WCJ; its petition to review compensation benefit offset for pension benefits was granted and it was awarded a monthly credit against compensation due. In attempting to recoup previously paid benefits from the Fund, Employer unsuccessfully argued that the automatic supersedeas request provision applied because it had filed its review benefit offset request on a form which, when used under circumstances not present in *Spaide*, acts as an automatic supersedeas request under Section 413. This court correctly ruled that no request was made under Section 413, and that the benefit offset provisions of Section 204, like other provisions of the Act governing substantive rights, provided no *independent* basis for Supersedeas Fund reimbursement.

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		:
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Board (Specca),		:
	Respondent	:

ORDER

AND NOW, this 17th day of November, 2009, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby REVERSED.

BONNIE BRIGANCE LEADBETTER,
President Judge