

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Philadelphia Gas Works,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1666 C.D. 2009
	:	
Workers' Compensation Appeal Board	:	Submitted: November 20, 2009
(Spiller),	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: January 29, 2010

Philadelphia Gas Works (Employer) petitions for review of the July 27, 2009 order of the Workers' Compensation Appeal Board (Board), which affirmed, in relevant part, a workers' compensation judge's (WCJ) decision granting the Petition to Review Benefits Offset (Review Petition) filed by Steven Spiller (Claimant) and calculating Employer's workers' compensation (WC) benefit offset by using the net, i.e., after-tax, amount of Claimant's pension benefits. Employer argues on appeal that the Board erred in affirming the use of the net amount because: (1) Philadelphia Gas Works v. Workers' Compensation Appeal Board (Amodei), 964 A.2d 963 (Pa.

Cmwlth. 2009) (en banc), has been appealed to our Supreme Court and, therefore, the Board erred in relying on this Court's holding in that decision; (2) the Board's interpretation of Section 204(a) of the Workers' Compensation Act (Act)¹ was erroneous; and (3) the Board erred in failing to calculate the amount of benefits Claimant received based on the gross amount of Claimant's pension benefits as supported by Steinmetz v. Workers' Compensation Appeal Board (Cooper Power Systems), 858 A.2d 182 (Pa. Cmwlth. 2004), and Ferrero v. Workers' Compensation Appeal Board (CH & D Enterprises), 706 A.2d 1278 (Pa. Cmwlth. 1998).

The facts are not disputed. Claimant sustained a work-related injury on October 28, 2002, for which he received WC benefits pursuant to a Notice of Compensation Payable. In 2004, Claimant began receiving pension benefits under Employer's retirement plan. On February 3, 2004, Employer issued a Notice of Workers' Compensation Benefit Offset advising Claimant that it was taking an offset against Claimant's WC benefits based on the *net* amount of Claimant's pension

¹ Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 71(a). That section provides, in relevant part:

[I]f the employe receives unemployment compensation benefits, such amount or amounts so received shall be credited as against the amount of the [WC] award made Fifty per centum of the benefits commonly characterized as "old age" benefits under the Social Security Act shall also be credited against the amount of the [WC] payments made The severance benefits paid by the employer directly liable for the payment of compensation and *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 [WC] award.*

77 P.S. § 71(a) (emphasis added) (citation omitted).

benefits. On April 27, 2006, Employer filed a second Notice of Workers' Compensation Benefit Offset indicating that it was taking an offset from Claimant's WC benefits based on the *gross* amount of Claimant's pension benefits. Claimant filed the Review Petition on May 8, 2006, arguing that Employer's use of the gross amount to calculate its offset was improper.² By order dated July 31, 2008, the WCJ granted Claimant's Review Petition, concluding that Employer was only entitled to offset the net amount of Claimant's pension benefits. Employer appealed to the Board.

In considering Employer's appeal, the Board relied on this Court's en banc decision in Philadelphia Gas Works, which was issued after the WCJ's decision and order in this case. In Philadelphia Gas Works we held that, pursuant to the Board's regulation at 34 Pa. Code § 123.8(a),³ an employer seeking to offset a claimant's benefits under Section 204 of the Act must calculate its offset based on the net amount of pension benefits the claimant receives. Philadelphia Gas Works, 964 A.2d at 964-66. Furthermore, concluding that 34 Pa. Code §123.8(a) did not conflict with Section 204(a) of the Act, this Court rejected the employer's argument that Section 204(a) of the Act, Steinmetz, and Ferrero allowed an employer to calculate its offset based on the gross amount of pension benefits a claimant receives.⁴ Philadelphia Gas

² Claimant also filed a penalty petition; however, that petition is not before this Court.

³ 34 Pa. Code § 123.8(a) states, WC "benefits otherwise payable shall be offset by the *net* amount an employe receives in pension benefits to the extent funded by the employer directly liable for the payment of workers' compensation." 34 Pa. Code § 123.8(a) (emphasis added).

⁴ In a concurring opinion, this author noted that our Court's en banc decision in Philadelphia Gas Works effectively overruled the court's panel decision in Steinmetz. Philadelphia Gas Works, 964 A.2d at 967-68 (Cohn Jubelirer, J., concurring).

Works, 946 A.2d at 966-67. Accordingly, the Board rejected Employer’s arguments and affirmed the WCJ’s determination. Employer now petitions this Court for review.⁵

Employer first argues that the Board erred in affirming the WCJ’s decision because the Board relied upon this Court’s en banc decision in Philadelphia Gas Works. Employer, who was also the employer in Philadelphia Gas Works, maintains that, because its Petition for Allowance of Appeal to our Supreme Court in that case is pending, the Board erred in basing its determination on that decision. Employer further contends that, because there is a conflict between the holding in Philadelphia Gas Works (net amounts should be used) and the holdings in Steinmetz and Ferrero (the use of gross amounts is allowable), this Court must wait until the Supreme Court resolves the conflict before following its holding in Philadelphia Gas Works. However, in Philadelphia Gas Works, an en banc decision which is on point with the facts of this case, this Court distinguished the factual scenarios in Steinmetz and Ferrero, which were panel decisions, and, effectively overruled those decisions. Pursuant to this Court’s en banc decision in Philadelphia Gas Works, an employer must use the net amount of pension benefits received to calculate its offset pursuant to Section 204(a). Unless and until our Supreme Court rules that this Court’s decision in Philadelphia Gas Works was erroneous, that holding remains the precedent by which this Court is bound.

⁵ “This Court’s standard of review is limited to determining whether there has been a violation of constitutional rights, an error of law or whether necessary findings of fact are supported by substantial evidence.” Channellock, Inc. v. Workers’ Compensation Appeal Board (Reynolds), 965 A.2d 1239, 1241 n.2 (Pa. Cmwlth. 2008).

Employer next argues that, pursuant to Section 204(a), Steinmetz, and Ferrero, it was entitled to use the gross amount of the pension benefits received by Claimant. According to Employer, the Board erred by failing to interpret Section 204(a) in this fashion and by refusing to follow the controlling precedents of Steinmetz and Ferrero. These are the same arguments Employer made in Philadelphia Gas Works, and we reject them now, as we did in Philadelphia Gas Works, for the reasons set forth in that decision.⁶

Accordingly, we affirm the order of the Board.

RENÉE COHN JUBELIRER, Judge

⁶ We also reject Employer's argument that this Court should stay this matter pending the Supreme Court's consideration of Philadelphia Gas Works. Our holding in Philadelphia Gas Works is currently the law of the Commonwealth, and we will apply it here. Employer is free to appeal this decision to our Supreme Court to be decided along with Philadelphia Gas Works, should our Supreme Court grant Employer's Petition for Allowance of Appeal in that case.

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(Spiller),	:	
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ORDER

NOW, January 29, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge