IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gary Kelly,	:	
Petitioner	:	
	:	
v.	:	No. 2199 C.D. 2006
	:	Submitted: September 6, 2007
Workers' Compensation Appeal	:	
Board (US Airways Group, Inc.),	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION BY JUDGE PELLEGRINI FILED: October 26, 2007

Gary Kelly (Claimant) appeals from an order of the Workers' Compensation Appeal Board (Board) affirming a decision by the Workers' Compensation Judge (WCJ) concluding that US Airways Group, Inc. (Employer) was entitled to a credit against the workers' compensation benefits payable to him because the furlough benefits he concurrently received constituted "severance benefits" under Section 204(a) of the Workers' Compensation Act (Act), 77 P.S. §71.[1]

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §71.

The undisputed facts in this case are as follows. Claimant was a fleet service agent employed by Employer to work in its catering department. On September 20, 2004, he sustained a work-related injury when he slipped and hurt his right knee and leg, and on November 8, 2004, he filed a claim petition seeking partial disability benefits for the period of September 20, 2004, through November 7, 2004, and total disability benefits thereafter. The same day that Claimant filed his claim petition, Employer furloughed Claimant, but indicated that he would possibly be recalled to work. Pursuant to the terms of the collective bargaining agreement (CBA) between Claimant's union and Employer,[2] Claimant began receiving a furlough

[2] Article 10 of the CBA provides, in relevant part:

> A. Furlough Allowance
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> 1. Furlough allowance is paid to employees who are furloughed as a result of a reduction-in-force and for no other reason…
>
> 2. Full-time employees who have completed two (2) or more years of service, based on hire date, on the date of furloughed will receive furlough allowance at the rate of one (1) week's pay for each completed year of service, up to a maximum of fifteen (15) weeks. A week of furlough allowance is computed on the basis of the employee's base straight time hourly rate at the time of furlough, multiplied by forty (40) hours.
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> 4. Furlough allowance is paid in successive pay periods immediately following the effective date of the furlough until the employee has returned to work or the entitlement is exhausted, whichever occurs first.

(Reproduced Record at 94a.)

allowance. He was recalled to work with Employer on a part-time basis on March 21, 2005.

Because Employer originally denied that Claimant was disabled due to his work injury, his claim petition was assigned to a WCJ. The Employer agreed that Claimant was entitled to partial disability benefits from September 20, 2004, to November 16, 2004, only arguing that it was entitled to a credit against Claimant's partial disability benefits paid from November 8, 2004, through November 16, 2004, because he had received "furlough benefits" which constituted "severance benefits" within the meaning of Section 204(a) of the Act. That provision states, in relevant part:

> The severance benefits paid 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 306(c).

Claimant disagreed with Employer's interpretation of that provision that the furlough allowance was the same as severance benefits because he was not permanently separated from his employment. After a hearing,[3] the WCJ found that Claimant's

[3] At the hearing, Employer offered the testimony of John Cerilli (Cerilli), a labor and employment law attorney, who stated that within the labor and employment law setting, the term "severance benefit" pertained to "any benefit that [was] paid to an employee because of a wage loss, because they were separated from employment for one of a number of reasons, such as termination, reduction in force, layoff, plant closing, and so forth." (Reproduced Record at 65a.) He rejected the notion that an employee received severance benefits only when he had been permanently separated from his employment and explained that the circumstances under which severance benefits were paid were dependant upon the terms of a CBA between an employer and a union. He further stated that most CBAs provided for the payment of severance benefits, although an

(Footnote continued on next page…)

furlough allowance was a severance benefit as contemplated by Section 204(a) of the Act and granted Employer a credit against the workers' compensation benefits he had received for the week in question. In doing so, the WCJ relied on the definition of "severance benefit" at 34 Pa. Code. §123.2 which defined the term as "a benefit which is taxable to the employee and paid as a result of the employee's separation from employment by the employer liable for the payment of workers' compensation" and reasoned that no requirement existed in the Act or regulations that Claimant's separation from employment be permanent in order for the allowance to be considered severance benefits subject to being credited. Claimant appealed to the Board,[4] which affirmed, and this appeal followed.[5]

Claimant argues that the Board erred in concluding that Employer was entitled to a credit against his workers' compensation benefits because an employee receives "severance benefits" only when he is severed or permanently separated from employment. In contrast, he contends that the furlough allowance he received was

(continued…)

employee could still retain his seniority rights and would be subject to recall for a designated period after his separation from employment. Cerilli testified that Article 10's furlough benefits were intended to be severance benefits. A copy of Claimant's wage records was also introduced reflecting the furlough benefits and denoted them as "SEV PAY."

[4] Both the Board and the WCJ rejected Claimant's alternative argument that the plain language of Section 204(a) of the Act limited the credit from severance benefits received to instances where a worker received occupational disease benefits in addition to indemnity benefits.

[5] Our scope of review of the Board's decision is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed, or whether constitutional rights were violated. *Schemmer v. Workers' Compensation Appeal Board (U.S. Steel)*, 833 A.2d 276 (Pa. Cmwlth. 2003).

provided for a non-permanent separation from employment, and because Employer never dissolved the employment relationship, that allowance does not constitute creditable severance benefits under Section 204(a) of the Act. We agree.

While a severance benefit is one paid to an employee who "separates from employment for any reason," *Hulmes v. Workers' Compensation Appeal Board (Rite Aid Corporation)*, 811 A.2d 1126, 1129 (Pa. Cmwlth. 2002), when an employee is furloughed, he or she is not separated from employment. A "furlough" from employment is unlike a "severance" from employment in that it is considered to be much different than an end, i.e., a severing of employment. For example, a soldier who is furloughed would be surprised to learn that he or she had been discharged from the service. Similarly, when an employee's employment is severed, it is done so forever, but when an employee is furloughed, the relationship is maintained but held in abeyance due to an employer's lack of work or financial resources. The employee retains the prospect of resuming his previous obligations with the employer (although sometimes to different degrees) at a future date, and, much like Claimant, seniority is unaffected. Just as Claimant's furlough did not sever his relationship with Employer, his furlough allowance was not paid as compensation for a separation from his employment.

We recognize that the General Assembly might have wished to expand the scope of what was credited against benefits to include a furlough allowance. However, it has instructed us that in interpreting statutes, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. §1921(b). If we were to conclude

that the furlough allowances constitute severance benefits, we would inevitably be expanding the scope of Section 204(a) of the Act to include a form of benefits that do not fall within the common and ordinary definition of what "severance benefits" are. Moreover, items that are omitted from a statute cannot be included if omitted, and a furlough allowance cannot be included under the guise that it is a severance benefit as used in Section 204(a). *Chiconella v. Workers' Compensation Appeal Board (Century Steel Erectors, Inc.)*, 845 A.2d 932 (Pa. Cmwlth. 2004) (definition of "insurer" in Section 401 of the Act did not include the Subsequent Injury Fund, and it was not within the Court's province to expand the definition to contemplate its inclusion). As a result, Employer is not entitled to a credit against Claimant's workers' compensation award for furlough benefits received when Claimant was expected to and did, in fact, return to work.[6]

Accordingly, the order of the Board is reversed.

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DAN PELLEGRINI, JUDGE

[6] Claimant has also argued, as he did before the Board, that Employer is not entitled to a credit against his workers' compensation award because he did not receive occupational disease benefits in addition to his indemnity benefits as required by the plain language of Section 204(a). Because of the way we have resolved his first argument, we need not address this issue.

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O R D E R

AND NOW, this 26th day of October, 2007, the order of the Workers' Compensation Appeal Board, No. A05-2857, is reversed.

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DAN PELLEGRINI, JUDGE