IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Chandler Minnich, Petitioner	:	
v.	:	No. 2293 C.D. 2007
Workers' Compensation Appeal Board (Wiremold Company and Phoenix Insurance Company), Respondents	:	
The Wiremold Company and Phoenix Insurance Company, Petitioners	:	
v.	:	No. 12 C.D. 2008
	:	SUBMITTED: May 9, 2008
Workers' Compensation Appeal Board (Minnich), Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: November 12, 2008**

Chandler Minnich (Claimant) and The Wiremold Company (Employer) and Phoenix Insurance Company have filed cross-petitions for review from the order of the Workers' Compensation Appeal Board (Board), which reversed in part and affirmed in part the decision of the Workers' Compensation

Judge (WCJ) with respect to a review petition filed by Employer. The issues before us are whether Employer is barred by *res judicata* from claiming a credit for short term disability benefits it paid to Claimant and whether the Board erred in awarding Employer a credit for the gross amount of long term disability benefits. We affirm.

Minnich filed a claim petition in September 2003, in which he asserted that he suffered a work-related back injury on or about August 13, 2003. While the claim was pending, Claimant received short term disability benefits funded by Employer. The claim petition was granted by the WCJ in a decision dated March 17, 2005. Employer appealed this decision to the Board, but did not include the issue of whether it was entitled to a credit for short term disability benefits in its notice of appeal, although it did argue this issue before the Board. The Board affirmed the WCJ and held that Employer had waived the issue of credit for short term disability benefits by failing to include it in its notice of appeal. Employer did not appeal the Board's decision.

Thereafter, Employer filed a review petition, seeking credit for both the short term disability benefits it had paid Claimant while the claim petition was pending, and credit for the long term disability benefits Claimant had applied for but had not yet received. At the hearing before the WCJ, Employer presented evidence of its payments to Claimant of both the short term disability benefits and long term disability benefits.[1] The parties stipulated that Claimant in fact received these payments. Notes of Testimony (N.T.), Hearing of August 16, 2006, at 5.

[1] The total amount of the short term disability or salary continuation benefits paid was $10,137.60. The long term disability benefits, paid from February 2004 through April 2006, totaled $15,857.88. Employer's Exhibit D-2, Hearing of August 16, 2006.

The WCJ determined that while it could not revisit the issue of a credit for the short term disability benefits because this issue had been finally decided by the WCJ on the original claim petition, Employer was entitled to 52 weeks of credit for long term disability benefits, but limited the credit to 80% of the weekly amount or $232.18 per week. Employer appealed, and the Board issued an opinion affirming the WCJ's denial of a credit for short term disability benefits, concluding that that claim was barred by *res judicata.* The Board also modified the award by the WCJ to Employer for a credit of the net amount of long term disability benefits to a credit for the gross amount of those benefits instead.

Claimant and Employer have since filed cross-petitions for review.[2] In his petition, Claimant argues that the Board erred in modifying the WCJ's award to provide a credit to Employer for the *gross* amount of the long term disability benefits it paid Claimant. Claimant argues that the Workers' Compensation Bureau's regulations, set forth at 34 Pa. Code §§ 123.1 – 123.11, provide that the offset or credit is to be the net amount after taxes, and further, that Section 204 of the Workers' Compensation Act (the Act), Act of June 2, 1915, P.L. 736, *as amended,* 77 P.S. § 71, is entirely consistent with these regulations. To award Employer herein the gross amount would give Employer a windfall, Claimant argues, and would be contrary to the humanitarian purposes of the Act. Finally, Claimant argues that Employer is barred from relitigating the issue of credit for short term disability benefits it paid to Claimant because that issue was finally determined by the WCJ in its March 15, 2005, decision on the original claim petition, which decision was affirmed by the Board without further appeal.

[2] Where the issue is purely one of law, our review is plenary. *Thompson v. Workers' Comp. Appeal Bd. (USF & G Co.),* 566 Pa. 420, 781 A.2d 1146 (2001).

Employer asserts that it has not waived the issue of whether it should be allowed a credit for the short term benefits it paid to Claimant. Employer argues that the WCJ's 2005 decision made no mention whatsoever of a credit for short term benefits and, that the Board's conclusion that Employer had waived the issue by not raising it in its notice of appeal, applied only to those short term benefits Employer had paid in the past but did not preclude Employer from asserting a claim for credit for any short term benefits it would pay in the future. Furthermore, with respect to the long term disability benefits, Employer asserts that both the Act and case law provide that the credit shall be based on "the amount received by the employee," and that, at the hearing before the WCJ on August 16, 2006, Claimant's attorney stipulated that Claimant received the gross amount. Employer further argues that there was no evidence of record that the Claimant actually paid any taxes on the long term benefits he received, let alone the 20% deducted for that reason by the WCJ. Therefore, Employer asserts, the Board properly modified the WCJ's award to a credit for the gross amount of the long term benefits that Employer paid Claimant.

It is well-established that an employer is entitled to a credit or offset against its workers' compensation liability for the amounts paid to a disabled employee that are not wages for work performed but are in relief of the employee's inability to work. *Murphy v. Workers' Comp. Appeal Bd. (City of Philadelphia),* 871 A.2d 312, 316 (Pa. Cmwlth. 2005); *Marsh v. Workmen's Comp. Appeal Bd. (Prudential Ins. Co.),* 673 A.2d 33, 35 (Pa. Cmwlth. 1996). This is so regardless of whether the employer is making such payments while denying that it is liable to pay workers' compensation benefits. *Boeing Helicopters v. Workers' Comp.*

Appeal Bd. (Cobb), 713 A.2d 1181, 1185 (Pa. Cmwlth. 1998). Section 204(a) of the Act, 77 P.S. § 71(a), 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 award made under the provisions of sections 108 and 306, except for benefits payable under section 306(c) or 307. 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 payments made under sections 108 and 306, except for benefits payable under section 306(c) . . . 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 award made under sections 108 and 306, except for benefits payable under section 306(c). . . .

Section 204(d) of the Act directs the Pennsylvania Department of Labor and Industry (Department) to provide rules and regulations as appropriate to ensure its orderly administration. 77 P.S. § 71(d). The regulations adopted in 1998, and codified at 34 Pa. Code §§ 123.1 through 123.11, "authorize the offset of workers' compensation benefits by amounts received in unemployment compensation, Social Security (old age), severance and pension benefits, subsequent to the work-related injury." 34 Pa. Code § 123.1. Section 123.3 states that the employee "shall report to the insurer amounts received in unemployment compensation, Social Security (old age), severance and pension benefits on form LIBC-756," while Section 123.4 provides that after receipt of Form LIBC-756, the employer has the right to "offset workers' compensation benefits by amounts received by the

employee from any of the sources in § 123.3 . . . ." 34 Pa. Code §§ 123.3, 123.4. In addition, the regulations provide that where the "employee has received benefits from one or more of the sources in § 123.3 . . . subsequent to the date of injury, the insurer may be entitled to an offset" and "[t]he net amount received by the employee shall be calculated consistent with §§ 123.6 - - 123.11." 34 Pa. Code § 123.5(a) and (b). "Net" is defined in Section 123.2 as, "[t]he amount of unemployment compensation, Social Security (old age), severance or pension benefits received by the employe after required deductions for local, State and Federal taxes and amounts deducted under the Federal Insurance Contributions Act (FICA) (26 U.S.C.A. §§ 3101 - - 3126)." 34 Pa. Code § 123.2. However, the Act is silent on whether the offset should be "net" or "gross," and characterizes the amount to be offset as "such amount or amounts so received," and "which are received by an employe . . . ." Section 204(a), 77 P.S. § 71(a).

Claimant contends that the Board erred in modifying the credit awarded by the WCJ from the net amount because *Steinmetz v. Workers' Comp. Appeal Bd. (Cooper Power Systems)*, 858 A.2d 182 (Pa. Cmwlth. 2004), the case cited by the Board, inexplicably fails to mention the regulations at 34 Pa. Code §§ 123.1 – 123.11, and also because that case relied on *Ferrero v. Workers' Comp. Appeal Bd. (CH & D Enterprises)*, 706 A.2d 1278 (Pa. Cmwlth. 1998), which was decided before the regulations were effective. Claimant also asserts that the language in Section 204(a) of the Act, "amount or amounts so received" by an employee, is consistent with the regulations and supports a conclusion that the offset should be in the "net" amount.

In *Steinmetz v. Workers' Comp. Appeal Bd. (Cooper Power Systems)*, 858 A.2d 182 (Pa. Cmwlth. 2004), the claimant filed a review petition alleging

employer improperly took an offset for his severance benefits based on the gross amount he received rather than the net amount after taxes. Both the WCJ and the Board denied claimant's review petition, after which he petitioned this court for review. We determined that Section 204 of the Act made no provision for the offset of the net amount of severance benefits received, but instead, provided for an offset for the amount actually received by the claimant, and he had received the gross amount. The court based its rationale both on the wording in the Act, that the offset is to be based on the "amount received," and on *Ferrero*, stating that, "pursuant to the plain language of Section 204(a) and *Ferrero*, Employer correctly took an offset for the gross amount . . . ." *Id.* at 185.

In the case *sub judice*, Employer argues that there was no evidence whatsoever that Claimant paid any taxes on the long term disability benefits he received. Moreover, Employer argues that the only evidence submitted with respect to the amount of long term disability benefits Claimant received was at the hearing before the WCJ, wherein the parties stipulated as to the amount received by the Claimant and that amount was the gross amount of long term disability benefits. *See*, N.T., Hearing of 8/16/06, at 5 and 6; Employer's Exhibit D-2. We have reviewed the record and find no evidence, testimonial or documentary, which establishes anything other than that Employer paid Claimant long term disability benefits totaling $15,857.88. Therefore, Employer is entitled to offset the gross amount of these long term benefits it paid to Claimant against Claimant's workers' compensation benefits, as this was the "amount received" by him. *Steinmetz; Ferrero.* In any event, the regulations in the Code also provide that where a claimant has in fact paid taxes on certain benefits received and the employer has offset the pre-tax amount against the claimant's workers' compensation benefits,

the claimant may request a repayment from the insurer of the amounts paid in taxes previously included in the offset. *See,* 34 Pa. Code § 123.4(f). While the regulations do provide a definition of "net," and not one for "gross," this does not mean, as Claimant would have us hold, that the Act precludes any conclusion other than that offsets are to be calculated based on the "net" amount of any payments made in lieu of workers' compensation benefits. In fact, we believe that the very fact that Section 123.4(f) allows an employee to "request a repayment for amounts previously offset and paid in taxes . . . [by] notify[ing] the insurer in writing of the amounts paid in taxes previously included in the offset," 34 Pa. Code § 123.4(f), indicates that the Act, if not exactly explicit, allows for either scenario to occur. We conclude, therefore, that the Board properly modified the WCJ's award to provide that Employer was entitled to a credit for the full amount of long term disability benefits it actually paid to Claimant.

We turn now to the sole issue presented by Employer, that is, whether the Board erred in concluding that the issue of whether Employer was entitled to a credit for short term disability benefits it paid to Claimant was barred by the doctrine of *res judicata.* Employer argues that it is seeking a *future* credit for Claimant's short term disability benefits and, therefore, the issue in this proceeding is different from the issue which was decided by the Board in 2006 when it concluded that Employer had waived the issue of whether it was entitled to a *past* credit for short term disability benefits it paid Claimant. According to Employer, then, the issues are not the same and *res judicata* does not apply. We disagree.

The doctrine of *res judicata* prevents a party from relitigating claims and issues in subsequent proceedings. *Henion v. Workers' Comp. Appeal Bd. (Firpo & Sons, Inc.),* 776 A.2d 362, 365 (Pa. Cmwlth. 2001). "Technical *res*

judicata applies when four conditions exist: (1) identity of the thing sued upon or for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality or capacity of the parties suing or sued." *Merkel v. Workers' Comp. Appeal Bd. (Hofmann Indus.)*, 918 A.2d 190, 192-93 (Pa. Cmwlth. 2007) (citation omitted). However, as correctly pointed out by the Board in its opinion, the doctrine of *res judicata*:

> applies not only to matters that were actually litigated in the prior proceeding, but also to matters that could have been, or should have been, litigated in the prior proceeding. Merkel v. WCAB (Hoffman Industries), 918 A.2d 190 (Pa. Cmwlth. 2007). In other words, res judicata applies to issues that were, in effect, waived in the prior proceeding. Id.

Board's Opinion, December 6, 2007, at 3. Employer's notice of appeal from the WCJ's decision on the claim petition did not include the issue of a credit for the short term disability benefits it paid to Claimant. The Board concluded that this issue was waived by Employer's failure to include it in its notice of appeal.[3] As there was no further appeal, this issue was correctly determined to have been definitively resolved by the WCJ in 2005 on the claim petition. *Merkel.* Moreover, with respect to Employer's attempt to differentiate between past and future credit for short term disability benefits, the Board properly rejected this argument, stating that:

> [o]n the contrary, the issue of whether Defendant was entitled to a future credit for Claimant's short-term

[3] Issues not properly preserved before the Board are deemed waived. *Matticks v. Workers' Comp. Appeal Bd. (Thomas J. O'Hora Co.)*, 872 A.2d 196, 202 (Pa. Cmwlth. 2005).

> disability benefits is the same issue as that which Defendant waived when it appealed the 2005 Decision. Both issues involve the same substantive question of law, that being whether Defendant was entitled to a credit, be it in the past, present or future, for Claimant's short-term disability benefits.

Board's Opinion, December 6, 2007, at 5. Therefore, with respect to Employer's review petition, we conclude that the WCJ correctly determined that he was precluded from ruling on the issue of credit for short term disability benefits under the doctrine of *res judicata*.

Accordingly, having determined that the Board committed no error, we affirm the order of the Board in all respects.

BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 12th day of November 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge