

workers' compensation benefits at the rate of \$330.90 per week based on her average weekly wage of \$496.40. Claimant later applied for and received a disability retirement pension through the State Employees' Retirement System (SERS), retroactive to February 18, 1997.

By notice of workers' compensation benefit offset dated May 19, 2003, Employer notified Claimant that her workers' compensation benefits were being offset as a result of her receipt of these pension benefits. According to the notice, an offset credit of \$41,006.56 was sought as of June 9, 2003, thereby reducing her workers' compensation benefits to zero. This notice also informed Claimant that the offset credit would continue through November 14, 2006, after which time Claimant would again receive workers' compensation benefits, albeit at a reduced rate.²

In response to this notice, Claimant filed a petition to review compensation benefits offset and a petition for penalties. With respect to her review petition, Claimant alleged that Employer was taking an improper credit for disability benefits. With respect to her penalty petition, Claimant alleged that Employer violated the Pennsylvania Workers' Compensation Act (Act)³ by attempting to take an improper credit and thereby illegally suspending all wage loss compensation as of June 9, 2003. Employer filed answers to each of these petitions simply denying that it was attempting to take an improper credit for Claimant's pension benefits. The petitions were assigned to the WCJ and the case proceeded with hearings.

² Due to Claimant's continued receipt of pension benefits, this notice further informed her that after the offset credit is exhausted, i.e., November 14, 2006, she will receive her regular compensation benefits minus the pension offset.

³ Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§1-1041.4; 2501-2626.

At these hearings, Claimant presented the deposition testimony of Linda Miller, Director of the Benefits Determination Division of the State Employees' Retirement System (SERS), on her own behalf. Ms. Miller testified that Claimant was a member of SERS by virtue of her employment with the Commonwealth. Ms. Miller proceeded to explain that SERS is a "defined benefit plan." (N.T., Deposition of Ms. Miller, p. 7).⁴ Ms. Miller further explained that under this plan, the amount of a member's retirement benefits is calculated using a specific formula, which takes into consideration years of service, present value and final average salary multiplied by two percent and then multiplied by a class of service multiplier established by SERS.⁵ After analyzing the formula as applied to Claimant, and making additional calculations, Ms. Miller indicated that she and her staff arrived at a figure of \$541.77 as representing the portion of Claimant's disability retirement pension funded by Employer.⁶ In other words, this figure represented the amount of Employer's monthly pension offset.

Ultimately, the WCJ issued a decision and order granting Claimant's review and penalty petitions and awarding Claimant attorney fees for Employer's

⁴ While Ms. Miller's deposition is included in a reproduced record attached to Claimant's brief, the reproduced record is not properly numbered. Hence, we cite to the pages of the original transcript.

⁵ After applying this formula, SERS determined Claimant's monthly benefit amount to be \$834.28.

⁶ Ms. Miller explained that SERS then multiplies the monthly benefit amount of \$834.28 times twelve to achieve an annual benefit amount of \$10,011.36. SERS then multiplies the annual benefit amount, \$10,011.36, times an annuity/life expectancy factor, in this case 11.67200, to arrive at a total present value of her retirement account in the amount of \$116,852.59. SERS proceeds to subtract a member's contributions, plus interest at a rate of 8.5%, which equates to \$40,970.02, from the total present value to arrive at a figure representing Employer's funding obligation to the account, \$75,882.57. In order to determine the appropriate offset, SERS then divides Employer's funding amount by the aforementioned annuity/life expectancy factor of 11.67200, which renders an annual pension offset of \$6,501.25, a monthly pension offset of \$541.77 and a weekly pension offset of \$125.02.

deemed unreasonable contest. In rendering his decision, the WCJ accepted the testimony of Ms. Miller as credible and worthy of belief. Nevertheless, the WCJ found that said testimony establishes that Employer did not determine its actual contribution to Claimant's pension and, therefore, had no basis upon which to determine its offset. The WCJ also found that Employer's filing of a notice of workers' compensation benefits offset without the appropriate calculations constituted a violation of the Act and its regulations.

With respect to this finding, the WCJ explained that Section 204(a) of the Act, 77 P.S. §71(a), sets forth Employer's entitlement to an offset, but only "to the extent funded by the employer," thereby necessitating a determination of the amounts it actually contributed to the pension. However, in this case, the WCJ noted that the testimony of Ms. Miller established that Employer and/or SERS calculated the pension offset by using Claimant's contribution amounts alone, without regard to Employer's contribution amount or information relating to investment income, which Employer is entitled to include on a "prorata basis." Act 57 Regulations, 34 Pa. Code §123.8(d).

Based upon these findings, the WCJ concluded that Employer failed to meet its burden of establishing an entitlement to the pension offset under Section 204(a) of the Act. As such, the WCJ directed that Claimant's total disability benefits be reinstated as of June 9, 2003. The WCJ also concluded that Claimant had met her burden of establishing that Employer had violated the Act and/or the regulations by filing its notice of workers' compensation benefits offset without making the necessary calculations. The WCJ imposed a penalty in the amount of fifty percent (50%) of the benefits due Claimant as of June 9, 2003. Further, the WCJ concluded that Employer's

contest in this matter was unreasonable and that Claimant was entitled to an award of attorney fees.⁷

Employer thereafter filed an appeal with the Board alleging that the WCJ erred as a matter of law in concluding that it failed to establish its right to a pension offset pursuant to Section 204(a) of the Act. Employer also alleged that the WCJ erred as a matter of law in concluding that it had violated the Act and/or the regulations with respect to the offset. Further, Employer alleged that the WCJ erred as a matter of law in concluding that its contest in this matter was unreasonable. The Board reversed the decision and order of the WCJ.

With respect to Claimant's review petition and the pension offset, the Board held that the testimony of Ms. Miller, which the WCJ accepted as credible and worthy of belief, constituted sufficient evidence in support of its burden relating to an offset under Section 204(a) of the Act.⁸ With respect to the penalty petition, the Board held that the grant of the same was improper as the WCJ based his decision in this regard on the erroneous conclusion that the testimony of Ms. Miller was insufficient in proving Employer's entitlement to an offset. Since the Board was reversing the decision of the WCJ with respect to Claimant's review and penalty petitions, the Board further held that Employer's contest was reasonable as a matter of law. Claimant then filed a petition for review with this Court.

⁷ Since counsel for Claimant had not presented any evidence relating to a quantum merit fee, the WCJ awarded said counsel twenty percent (20%) of the penalty award.

⁸ In reaching this holding, the Board indicated that Employer had met its burden consistent with the recent decision of this Court in Pennsylvania State University v. Workers' Compensation Appeal Board (Hensal), 911 A.2d 225 (Pa. Cmwlth. 2006), petition for allowance of appeal denied, 593 Pa. 743, 929 A.2d 1163 (2007).

On appeal,⁹ Claimant argues that the Board erred as a matter of law in reversing the decision of the WCJ. More specifically, Claimant argues that the Board erred in concluding that the testimony of Ms. Miller constituted sufficient evidence in support of Employer's entitlement to a pension offset under Section 204(a) of the Act. We agree.

Section 204(a) of the Act allows an employer to seek an offset against workers' compensation benefits for persons receiving social security, severance pay, and pensions when such additional payments are simultaneously received by the claimant. Kramer v. Workers' Compensation Appeal Board (Rite-Aid Corporation), 584 Pa. 309, 883 A.2d 518 (2005). Specifically, Section 204(a) provides, in pertinent part, that:

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 employee shall also be credited against the amount of the award made under sections 108 [occupational disease] and 306 [partial and total disability], except for benefits payable under section 308(c) [specific loss benefits].

77 P.S. § 71(a).

As noted by the Board, the issue of the pension offset was recently discussed by this Court in Hensal, an *en banc* decision, as well as the companion case of

⁹ Our scope 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. Tri-Union Express v. Workers' Compensation Appeal Board (Hickle), 703 A.2d 558 (Pa. Cmwlth. 1997). We also note our Supreme Court's decision in Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002), which held that "review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which such question is properly brought before the court." Leon E. Wintermyer, Inc., 571 Pa. at 203, 812 A.2d at 487.

Department of Public Welfare/Western Center v. Workers' Compensation Appeal Board (Cato), 911 A.2d 241 (Pa. Cmwlth. 2006), petition for allowance of appeal denied, 593 Pa. 742, 929 A.2d 1163 (2007).¹⁰ In Hensal, we noted that “[b]ecause an appreciation of the funding of defined benefit pension plans requires knowledge beyond that possessed by laypersons, it is a subject particularly amenable to testimony by experts.” Hensal, 911 A.2d at 232. We further noted that “the extent to which an employer funded a particular employee’s defined benefit pension can only be determined by an actuarial formula.” Id. Thus, we held in Hensal that “[s]ince an employer cannot provide evidence of actual contributions for the use of an individual member of a defined benefit pension plan, it may meet its burden of proof...with expert actuarial testimony.” Id. In Hensal, the employer presented the testimony of Ms. Miller, similar to the present case, and also presented the testimony of a SERS actuary. As the WCJ in Hensal never made a credibility determination with respect to the actuary’s testimony, we remanded the matter to the WCJ.

In the companion case of Cato, the employer again presented the testimony of Ms. Miller as well as the testimony of a SERS actuary. The WCJ in Cato accepted the testimony of Ms. Miller and the SERS actuary as credible and competent and relied upon that testimony in denying the petition of claimant in that case to review compensation benefits offset. The Board reversed the WCJ’s decision in Cato, concluding that the record lacked sufficient evidence establishing the employer’s funding of the claimant’s disability pension. On appeal, we reversed the decision and order of the Board, relying on our holding in Hensal that the employer’s burden in these

¹⁰ The decision in Cato was rendered by a three-judge panel and was not considered *en banc*. Nevertheless, both decisions were authored by the Honorable Robert Simpson.

types of cases may be met with the presentation of expert actuarial testimony. In Cato, the WCJ found such testimony to be credible.

In the present case, Claimant herself presented the deposition testimony of Ms. Miller. Employer, on the other hand, failed to present any evidence on its behalf, including any expert actuarial testimony. This case is similar to our previous decision in Department of Public Welfare/Polk Center v. Workers' Compensation Appeal Board (King), 884 A.2d 343 (Pa. Cmwlth. 2005). In King, a claimant who was first receiving disability benefits through workers' compensation later received additional pension benefits. His employer filed a notice of workers' compensation benefits offset pursuant to Section 204(a) of the Act. Claimant filed a petition to review alleging that the employer had improperly calculated the offset. At the hearing before the WCJ, the only expert to testify was Ms. Miller. The employer did not offer any expert actuarial testimony. The WCJ in King found that Ms. Miller's testimony failed to establish that employer paid any funds into the pension system. The Board affirmed the WCJ's decision in King. On appeal, we affirmed the decision and order of the Board noting that employer failed to establish that it funded the pension plan and failed to explain how the interest rate or other actuarial calculations were derived.

As the opinions cited above require the presentation of expert actuarial testimony by an employer seeking a pension offset under Section 204(a) of the Act, and no such testimony was presented in this case, we must conclude that the Board erred as a matter of law in reversing the decision and order of the WCJ.¹¹

¹¹ We note that, in her brief to this Court, Claimant focuses her argument upon various alleged errors with respect to the testimony of Ms. Miller, especially in relation to the numerous figures she discussed therein. Upon our review of said testimony, we fail to see these errors. Nevertheless, the cases discussed above mandate reversal of the Board in the present case.

Accordingly, we reverse the order of the Board and reinstate the order of the WCJ granting Claimant's review petition and penalty petition.

JOSEPH F. McCLOSKEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Cordova Tucker,	:	
Petitioner	:	
	:	
v.	:	No. 2307 C.D. 2007
	:	
Workers' Compensation Appeal Board	:	
(Norristown State Hospital),	:	
Respondent	:	

ORDER

AND NOW, this 20th day of June, 2008, the order of the Workers' Compensation Appeal Board is hereby reversed, and the decision and order of the Workers' Compensation Judge is reinstated.

JOSEPH F. McCLOSKEY, Senior Judge