IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michelle Walsh-Leibert, Petitioner	:	
v.	:	No. 25 C.D. 2012
Workers' Compensation Appeal Board (City of Scranton; PMA Group; and Excalibur Insurance Mgmt Svc.), Respondents	:	Submitted: November 16, 2012

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: January 4, 2013**

In this appeal, Michelle Walsh-Leibert (Claimant) challenges a Workers' Compensation Judge's (WCJ) decision that determined the City of Scranton (Employer) was entitled to a pension offset of 51.17% against Claimant's workers' compensation benefits. Claimant argues the WCJ erred in: finding she received notice of the offset; determining Employer met its burden of proving entitlement to an offset; crediting Employer's actuarial evidence; and, reopening the record to allow Employer to submit actuarial testimony. Discerning no merit in these assertions, we affirm.

In May 2002, Claimant sustained a work-related right knee strain, which Employer recognized through a notice of compensation payable (NCP).[1] In December 2002, Claimant began receiving disability retirement pension benefits.

In April 2003, Employer issued a notice of workers' compensation benefit offset (offset notice), which indicated that Employer planned to take an offset for pension benefits in the amount of $192.62, beginning on December 30, 2002.

In June 2007, Claimant filed a petition to review compensation benefit offset (review offset petition), alleging Employer took an improper offset against her workers' compensation benefits in the amount of 48.14%. Proceedings before a WCJ ensued.

Testifying by deposition, Claimant indicated she did not recall receiving Employer's offset notice in April 2003. She also testified that she began receiving disability retirement pension payments in January 2003. Additionally, Claimant explained she received her first workers' compensation check on April 7, 2003. In August 2005, Claimant's workers' compensation benefits were reduced based on the deduction of a 20% attorney fee. About a year later, a WCJ granted a modification petition, further reducing Claimant's workers' compensation benefits. Claimant later discovered her workers' compensation benefits were also reduced based on a pension offset. On cross-examination, Claimant stated she "never

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[1] Claimant received benefits under what is commonly known as the Heart and Lung Act, Act of June 28, 1935, P.L. 477, as amended, 53 P.S. §§637-638, in lieu of workers' compensation benefits from May 2002 through December 2002.

thought about" the disparity between her $938.76 workers' compensation benefit check and her bi-weekly workers' compensation rate of $1,324.00. Reproduced Record (R.R.) at 126a.

In addition, Claimant presented deposition testimony from William Hildebrant, who works for Beyer-Barber Company, an actuarial and employee benefit consulting firm. Specifically, Hildebrant serves as a benefits manager and consultant to the firm's municipal plan clients (Consultant). Consultant testified that between 1996 and 2002, Claimant's period of service, Employer's contribution to the police pension plan was 51.17%, the state aid allocation was 37.27% and the membership contribution was 11.56%.

Employer presented deposition testimony from Randee Sekol, the owner and chief actuary for Beyer-Barber Company (Employer's Expert), who has worked as an actuary for 34 years. Employer's Expert explained that Beyer-Barber serves as the actuary and consultant for Employer's police pension plan. Employer's Expert further testified that Consultant approached him and indicated he needed "a calculation as to what the percentage of total contributions made to the police [f]und were for … [Claimant], to determine what portion of credit [Employer] could take in a [w]orkers' [c]ompensation matter." R.R. at 191a. Employer's Expert testified that he had his staff prepare the calculation, and he reviewed and checked it. The calculation revealed that from 1996 to 2002, Employer contributed at least 51.17% to the police pension plan.

Ultimately, the WCJ found "unpersuasive" Claimant's testimony that she did not receive the offset notice, and that she "never thought about" the reduction in her workers' compensation benefits based on Employer's offset. WCJ Op., 2/25/10, Finding of Fact (F.F.) No. 12. The WCJ further found the only record actuarial evidence established that Employer funded 51.17% of the pension fund. Thus, the WCJ issued a decision granting the review offset petition, determining Employer was entitled to an offset of 51.17% against Claimant's workers' compensation benefits.

Claimant appealed, and the Workers' Compensation Appeal Board (Board) affirmed. This appeal by Claimant followed.

On appeal,[2] Claimant argues the WCJ erred in: finding Claimant received the offset notice; determining Employer met its burden of proving entitlement to the offset; crediting Employer's actuarial evidence; and, reopening the record, over objection, to allow Employer to submit actuarial testimony.

We first consider Claimant's contention that the WCJ and the Board erred in determining Employer sent Claimant the offset notice. Specifically, Claimant asserts that, although the offset notice is dated April 6, 2003, the notice contains a stamp from the Bureau of Workers' Compensation (Bureau), which indicates the Bureau received it approximately six months later, in mid-October

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[2] Our review is limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Penn State Univ./PMA Ins. Grp. v. Workers' Comp. Appeal Bd. (Hensal), 911 A.2d 225 (Pa. Cmwlth. 2006).

2003. Claimant argues Employer offered no explanation for this clear discrepancy, which would lead a reasonable person to question whether the offset notice was actually sent to Claimant. Further, Claimant contends that neither the WCJ nor the Board offered any explanation for this discrepancy.

Pursuant to 34 Pa. Code §123.4(b): "At least 20 days prior to taking the offset, the insurer shall notify the employee, on Form LIBC-761, 'Notice of Workers' Compensation Benefit Offset,' that the workers' compensation benefits will be offset. …" Id.

With regard to whether Claimant received the offset notice here, the WCJ found (with emphasis added):

> 9. … The parties … stipulate that Ms. Brigitte Woodford acted as the adjuster on this claim up to and including April 7, 2003. If called to testify, Ms. Woodford would testify that she prepared both the Notice of Workers' Compensation Benefit Offset and the Notice of Compensation Payable in this case. Ms. Woodford would further testify that she forwarded both of these documents to the claimant via regular mail and that neither was returned by the United State[s] Post Office as undeliverable. The notices were sent to claimant at the same address to which the adjuster sent claimant a check in the amount of $6,571.32 representing payment of temporary total disability benefits retroactive to January 1, 2003. That check was also sent to the claimant via regular mail and was never returned by the Post Office as undeliverable.
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> 12. … Claimant admitted that she could not recall whether she received the Notice of Workers' Compensation Benefit Offset in April of 2003. (N.T. @ 5). Claimant acknowledged that she received wage loss benefits every two weeks in the amount of

> $938.76. (N.T. @8). … When asked about the discrepancy between the weekly compensation rate of $662.00 set forth on the Notice of Compensation Payable and the reduced amount that she was receiving in workers' compensation benefits, claimant testified that she 'never thought about it.' (N.T. @ 16). Claimant's testimony in this regard, while possible, is deemed unpersuasive. Claimant has been receiving benefits since 2003, has been involved in litigation concerning those benefits at both the WCJ level and on appeal to the Board, and has been represented by counsel since at least 2005.

F.F. Nos. 9, 12. The record supports the WCJ's findings. See R.R. at 181a-82a (stipulation); 115a, 118a, 126a (Claimant's testimony). In light of those findings, we reject Claimant's argument that Employer did not prove that it sent Claimant the offset notice.

Further, although Claimant points to the fact that the offset notice indicates the Bureau received it on October 17, 2003, it is unclear how the Bureau's date of receipt compels the conclusion sought by Claimant, that Employer did not send Claimant the offset notice. Thus, we reject Claimant's argument.[3]

Claimant next argues the WCJ and the Board erred in determining Employer proved its entitlement to the pension offset.

[3] In addition, although Claimant points out the WCJ expressed concern over the fact that Claimant filed her review offset petition approximately four years after Employer sent Claimant the offset notice, neither the WCJ nor the Board based their decisions on the timing of Claimant's filing of her review offset petition.

By the Act of June 24, 1996, P.L. 350 (Act 57), the Legislature amended Section 204(a) of the Workers' Compensation Act[4] (Act) to allow employers to claim an offset against workers' compensation benefits for pension benefits simultaneously received by an employee. Section 204(a) of the Act states, in pertinent part (with emphasis added):

> 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 employee shall also be credited against the amount of the award ….

In a review offset proceeding, the employer claiming a pension benefit offset bears the burden of proving its entitlement to a credit. Glaze v. Workers' Comp. Appeal Bd. (City of Pittsburgh), 41 A.3d 190 (Pa. Cmwlth. 2012). The employer bears the burden of proving the extent to which it funded the pension plan at issue. Id. An employer in a review offset proceeding is entitled to present actuarial evidence to establish the extent it funded a claimant's defined-benefit pension plan. Dep't of Pub. Welfare v. Workers' Comp. Appeal Bd. (Harvey), 605 Pa. 636, 993 A.2d 270 (2010); Glaze; Pennsylvania State Univ./PMA Ins. Grp. v. Workers' Comp. Appeal Bd. (Hensal), 911 A.2d 225 (Pa. Cmwlth. 2006).

Further, in order to meet its burden, an employer "need not show the actual dollar amounts of its contributions to a defined benefit pension plan; rather, credible actuarial evidence is sufficient to meet the employer's burden of proving

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

the extent to which it funded the plan and to form the basis for the calculation of the pension offset." Horner v. Workers' Comp. Appeal Bd. (Liquor Control Bd.), 22 A.3d 1097, 1101 (Pa. Cmwlth. 2011).

In determining Employer proved its entitlement to an offset here, the WCJ made the following relevant determinations (with emphasis added):

> 10. Claimant took the deposition testimony of William Hildebrant .... (Claimant's Exhibit #4). Mr. Hildebrant is employed by Beyer-Barber Company. Beyer-Barber Company provides pension actuarial services for the defendant. Based upon claimant's employment dates with the defendant, July 19, 1996 through December 2002, Mr. Hildebrant testified that the defendant funded 51.17% of claimant's disability retirement pension benefits. Mr. Hildebrant acknowledged that he is not an actuary.
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> 11. Mr. Randy Sekol, owner and chief actuary of Beyer-Barber Company, testified on behalf of the defendant (Defendant's Exhibit #9). Mr. Sekol is a member of the American Academy of Actuaries, a member of the Society of Pension Actuaries, and has worked as an Actuary for 34 years. As Chief Actuary of Beyer-Barber Company, he is the Actuary and Consultant for the defendant's Police Pension Plan. Based upon claimant's employment dates with the defendant and in his capacity as Actuary and Consultant for the defendant's Police Pension Plan, Mr. Sekol opined that the defendant contributed at least 51.17% to claimant's disability retirement pension fund.
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> 13. Section 204(a) of the Act entitles the defendant/employer to an offset for claimant's pension benefits to the extent that the defendant/[Employer] funded those benefits. Defendant is entitled to a dollar for dollar offset. *34 Pa. Code § 123.1.* In this case, the only actuarial evidence of record establishes that the defendant funded 51.17% to claimant's pension fund.

> Claimant's challenge to the calculated amount of the defendant's funding of claimant's pension and the footnoted exasperation (*Proposed Findings of Fact and Conclusions Of Law on Behalf of Claimant*, footnote 4, pages 5-6) concerning the basis for the 48.14% offset previously taken by the defendant, is rejected as unsupported by the evidence of record.
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> 14. Based upon a review of the evidence as a whole and the uncontested actuarial testimony of record, it is found as fact that defendant contributed 51.17% to claimant's pension fund. Defendant is entitled to an offset/credit of 51.17%.

F.F. Nos. 10, 11, 13, 14. The WCJ's relevant determinations are directly supported by the unrebutted actuarial testimony of Employer's Expert. See R.R. at 194a-95a, 227a, 76a. Thus, Claimant's argument that Employer did not prove entitlement to the offset fails.[5]

Nevertheless, Claimant challenges the amount of the offset, arguing the 51.17% Employer contribution derived by Employer's Expert constitutes an actuarial error because it is based on an averaging method that did not take into account that from 1996 through 2000, Employer contributed substantially more than it did in 2001 and 2002. Claimant asserts the record reveals the offset is unreasonably "skewed" because Employer's funding of the pension in the first few years of Claimant's six-year employment was based on unfunded pension

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[5] Claimant also points out that, before the Workers' Compensation Judge (WCJ), Employer initially relied on an earlier decision by a different WCJ regarding the extent to which Employer contributed to its pension fund. As discussed throughout this opinion, however, Employer subsequently submitted the deposition testimony of an actuary, whom the WCJ deemed credible. Further, the WCJ here did not rely on the earlier WCJ decision in determining the applicable pension offset; rather, the WCJ here based his decision on the credible actuarial evidence. As such, we fail to see the significance of Employer's initial reliance on an earlier WCJ decision.

liabilities for years pre-dating her employment. Pet'r's Br. at 17. Claimant contends a more accurate figure representing Employer's "actual" contribution, without making up prior years' unfunded liabilities, is about 11.37%. Id.

Claimant's argument is based on what she alleges are deficiencies in Employer's Expert's calculations, which she sought to highlight during cross-examination of this witness. However, Claimant did not present expert actuarial evidence in opposition to Employer's Expert's testimony to support her claims that Employer's Expert's calculations are flawed or to show the materiality or relevance of these alleged deficiencies.

In School District of Philadelphia v. Workers' Compensation Appeal Board (Davis), 38 A.3d 992 (Pa. Cmwlth. 2011), appeal denied, ___ Pa. ___, 47 A.3d 849 (2012), we rejected a similar attack on an employer's actuarial evidence. There, we reversed decisions by the workers' compensation authorities that denied an employer's review offset petition. Specifically, we determined the compensation authorities erred in relying on certain admissions elicited during cross-examination of an employer's actuary where the claimant did not present her own evidence showing the materiality and relevance of her attacks on the actuary's opinions. In so doing, we pointed to our Supreme Court's decision in Harvey, where the Court "alluded [to the fact] that claimants, at least as a practical matter, may bear some burden of going forward with contrary evidence after the party bearing the initial burden puts forward a credible prima facie case." Davis, 38 A.3d at 999 (citing Harvey, 605 Pa. at 655-56, 993 A.2d at 282-83) (quotations omitted); see also Glaze, 41 A.3d at 208 ("[the] [c]laimants failed to show how, if

at all, the use of the data and sources [the] [c]laimant's [e]xpert found more reliable or appropriate would materially impact the extent of [the] [e]mployer's contributions as determined by [the employer's actuary].")

Here, Employer presented credible actuarial evidence establishing the extent of its contributions and its corresponding right to an offset. On the other hand, Claimant did not present expert testimony to support her counsel's attempts to undermine Employer's Expert's calculations on cross-examination. Rather, Claimant presented the testimony of Consultant who agreed with Employer's Expert that Employer funded 51.17% of the pension during the applicable period.

Moreover, although Claimant emphasizes that Employer contributed significantly less in 2001 and 2002 than it did between 1996 and 2000, Employer's Expert adequately explained the bases for his calculation. In particular, on cross-examination Employer's Expert described in detail how the timing of his company's annual actuarial valuations of the plan and the amortization of high actuarial gains in 1997 and 1998 resulted in significantly lower Employer contributions beginning in 2001. See R.R. at 197a-200a, 224a-26a. Employer's Expert further testified that if Employer's contributions were greater in 2001 and 2002 (as they were between 1996 and 2000), this would have increased the offset. R.R. at 226a-27a. As a result, we discern no error in the WCJ's ultimate determination that Employer is entitled to an offset of 51.17% in accordance with the credited actuarial testimony of Employer's Expert.[6]

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[6] Claimant further asserts this Court's decision in Hensal, cited by the Board, is distinguishable because the actuarial testimony provided by Employer's Expert here is "slight to cursory" as compared to that presented in Hensal. Pet'r's Br. at 19. Contrary to Claimant's
(Footnote continued on next page…)

Claimant also argues the WCJ erred in reopening the record, over her objection, to allow Employer to submit the testimony of its actuary. Further, Claimant contends, contrary to the Board's statement, she was not afforded the opportunity to submit responsive actuarial testimony.

Here, after Claimant deposed Consultant, who works for Beyer-Barber Company, she sought an extension of time to depose Employer's Expert, an actuary. R.R. at 388a. The WCJ denied Claimant's request, and closed the record in March 2009. R.R. at 390a, 391a. However, three months later, the WCJ reopened the record, rescinding his earlier denial of Claimant's request for an extension of time to depose an actuary. R.R. at 392a. In response, Claimant declined to submit actuarial testimony and requested a decision on her review offset petition at that time. R.R. at 393a. Shortly thereafter, Employer requested an opportunity to depose an actuary, and the WCJ approved this request, over Claimant's objection. R.R. at 394a, 395a, 397a, 398a, 399a.

In his decision, the WCJ explained he reopened the record to allow for submission of the deposition of an actuary after this Court issued its decisions in City of Philadelphia v. Workers' Compensation Appeal Board (Calderazzo), 968 A.2d 841 (Pa. Cmwlth. 2009) and City of Philadelphia v. Workers' Compensation Appeal Board (Grevy), 968 A.2d 831 (Pa. Cmwlth. 2009). See F.F. No. 7. In

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(continued…)

assertions, our review of the actuarial testimony presented by Employer's Expert here, see Reproduced Record at 187a-264a, reveals that it contains comparable information to the actuarial testimony summarized in our decision in Hensal. See Hensal, 911 A.2d at 229-230.

those cases, we determined that where an employer does, in fact, contribute to a claimant's pension fund, the fact-finder should determine the extent to which the employer funded the pension, and, if the fact-finder has not done so, a remand is appropriate. To that end, in Calderazzo, we stated:

> [T]here is no question from the record that [the [e]mployer did contribute some amount of money to the pension fund each year based on an actuarial evaluation. Under these circumstances, we believe that the Board abused its discretion by denying [the] [e]mployer any offset/credit. The Board should have remanded this matter back to the WCJ for the purpose of receiving actuarial testimony regarding [the] [e]mployer's contributions to Pension Plan B during the years relevant to this matter and rendering a determination as to the amount of the offset to which [the] [e]mployer is entitled. See [Grevy] (concluding that the Board acted properly in awarding [the [e]mployer an offset/credit and in remanding the matter back to the WCJ to render a determination as to the extent of the offset/credit to which [the] [e]mployer was entitled where [the] [e]mployer established that it contributed some amount of money to the pension fund each year based on an actuarial evaluation, but did not establish what amounts were contributed to the pension plan of which the claimant was a member for the years in question). If the Board's decision were allowed to stand, Employer would be required to compensate [the [c]laimant twice for the same injuries, and [the] [c]laimant would receive a double recovery; this result is unacceptable.

Id., 968 A.2d at 849-50 (citation omitted, emphasis added).

Here, because it is clear that Employer did, in fact, contribute to the pension fund, no abuse of discretion is apparent in the WCJ's decision to reopen the record to allow for submission of actuarial testimony to determine the extent to

which Employer funded the pension plan. See, e.g., Sharkey v. Workers' Comp. Appeal Bd. (Tempo, Inc.), 739 A.2d 641 (Pa. Cmwlth. 1999) (WCJ has discretion to reopen the record, once closed, and such a decision will be not reversed absent abuse of discretion). Further, contrary to Claimant's suggestions, the WCJ did, in fact, allow Claimant an opportunity to submit testimony by an actuary, but Claimant declined to do so. R.R. at 392a-93a.

For all the foregoing reasons, we affirm.

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ROBERT SIMPSON, Judge

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Mgmt Svc.), :
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ORDER

AND NOW, this 4th day of January, 2013, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

ROBERT SIMPSON, Judge