

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Philadelphia, :  
Petitioner :  
 :  
v. : No. 377 C.D. 2008  
 : Submitted: July 11, 2008  
Workers' Compensation Appeal Board :  
(Keys), :  
Respondent :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY  
SENIOR JUDGE FLAHERTY

FILED: September 12, 2008

The City of Philadelphia (Employer) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of a Workers' Compensation Judge (WCJ) granting Reinstatement, Review, and Penalty Petitions filed by Lawrence Keys (Claimant). We affirm.

Claimant sustained an injury to his left knee while in the course and scope of his employment on March 24, 1997. This injury was acknowledged in a Notice of Compensation Payable and he was compensated for his injury. Claimant began working a light duty job in July of 2001 until his limited duty status was terminated by Employer on August 5, 2001. Workers' compensation benefits were thereafter resumed until sometime in December of 2001 when his service-connected disability pension commenced. Employer thereafter unilaterally ceased paying Claimant's workers' compensation benefits absent a judge's decision, supplemental agreement, or a Notice of Workers' Compensation Benefit Offset, LIBC-761.

Claimant filed a Penalty Petition on January 22, 2002 alleging that Employer violated the Pennsylvania Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§1-1041.4; 2501-2708, by unilaterally ceasing his workers' compensation benefits following receipt of his service-connected disability pension. He further filed a Reinstatement Petition. The first hearing on these Petitions was held on March 12, 2002. Claimant filed a Review Petition as of October 24, 2002, alleging Employer did not present any evidence to establish a credit for its contributions to his service-connected disability pension.

By a decision dated December 21, 2004, the WCJ denied all of Claimant's Petitions. In an opinion dated August 2, 2005, the Board reversed the WCJ's decision. It reasoned that Employer failed to present any evidence concerning the extent it funded Claimant's pension benefits. Therefore, it ordered Claimant's workers' compensation benefits be reinstated. Further, the Board noted that there was no evidence in the record indicating that Employer filed a Notice of Workers' Compensation Benefit Offset.<sup>1</sup> It remanded for an appropriate penalty award.

The WCJ issued a new decision on March 15, 2007. She noted that Claimant was not paid any workers' compensation benefits from December 15, 2001 through August 21, 2005. She directed Claimant's benefits be reinstated during that period plus statutory interest. Because Employer ceased payment of

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<sup>1</sup> Contrary to the Board's statement, there is a Notice of Workers' Compensation Benefit Offset contained in the record marked as received by the Bureau of Workers' Compensation (Bureau) on September 27, 2002. (Bureau Exhibit No. 1). Supplying this document as of this date would be untimely since Employer unilaterally offset benefits over ten months prior thereto on December 15, 2001. Post-Act 57, Act of June 24, 1996, P.L. 350., a Notice of Workers' Compensation Benefit Offset shall be provided to the claimant at least twenty days prior to taking any offset for pension benefits. 34 Pa. Code §123.4(b). Neither this document, nor its legal significance is discussed by either party in their briefs to this Court.

indemnity benefits unilaterally in violation of the Act, the WCJ awarded fifty percent penalties on all unpaid compensation. The WCJ further determined Employer presented an unreasonable contest. Consequently, she awarded unreasonable contest attorney's fees of \$3,360.00. The Board affirmed in an order dated January 31, 2008. This appeal followed.<sup>2</sup>

Employer argues on appeal to this Court that the Board erred in reinstating Claimant's benefits in light of Claimant's receipt of a service-connected disability pension and contends that it need not present evidence concerning the extent it funded the pension. In support of its argument, Employer relies primarily on City of Phila. v. Workers' Compensation Appeal Board (Hunter), 912 A.2d 889 (Pa. Cmwlth. 2006) and Murphy v. Workers' Compensation Appeal Board (City of Phila.), 871 A.2d 312 (Pa. Cmwlth. 2005). These cases held that Employer could offset a claimant's workers' compensation benefits in light of his receipt of a service-connected disability pension as the payments made pursuant to the pension plan are in lieu of compensation. As indicated by this Court's recent holding in City of Philadelphia v. Workers' Compensation Appeal Board (Andrews), 948 A.2d 221 (Pa. Cmwlth. 2008), however, these cases are not applicable to matters that involve a claimant who was injured after June 24, 1996, the effective date of Act 57. In post-Act 57 cases, an employer must present evidence concerning the extent it funded the pension at issue. Id. at 227-8. Whether the pension is a service-connected disability pension or some other type of pension is not controlling. Id. at 227.

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<sup>2</sup> Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated. Sysco Food Servs. of Phila. v. Workers' Compensation Appeal Board (Sebastiano), 940 A.2d 1270 (Pa. Cmwlth. 2008).

Section 204(a) of the Act, 77 P.S. §71(a), was amended by Act 57 and provides, in pertinent part:

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 made under sections 108 and 306, except for benefits payable under section 306(c)....<sup>3</sup> (Emphasis added)

Claimant was injured in 1997, after the effective date of Act 57. Consequently, amended Section 204(a) of the Act and Andrews govern Employer's right to offset benefits. As such, Employer needed to present evidence concerning the extent to which it funded Claimant's pension in order to determine the appropriate offset. It failed to present such evidence. Consequently, no error was committed in granting Claimant's Reinstatement and Review Petitions.

Employer nonetheless contends that Claimant authorized a suspension of his benefits when he signed a document entitled "Agreement Re: Workmen's Compensation" (Agreement) on August 17, 2001 and, therefore, his benefits should not be reinstated. It adds that it had the option to either reduce Claimant's pension benefits or reduce Claimant's workers' compensation benefits.

The Agreement reads:

WHEREAS, applicant has applied to [Board of Pensions and Retirement of the City of Philadelphia] for

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<sup>3</sup> It is of interest that amended Section 204(a) of the Act indicates that an employer is entitled to offset a claimant's workers' compensation benefits based on the claimant's receipt of a "pension" without drawing a distinction between a "service-connected disability pension" or any other type of pension.

service-connected disability retirement benefits by reason of disability sustained by applicant...

WHEREAS, under the Retirement System Ordinance of December 3, 1956... under which I am entitled to retire... it is provided that the [Board of Pensions and Retirement of the City of Philadelphia] *shall deduct from such retirement... the amount of any Workmen's Compensation benefits which I may receive or to which I may become entitled, and*

WHEREAS, no application for such Workmen's Compensation Benefits has been filed by me or no award of such benefits has been made to me, or having received an award, *the said award has been suspended, and...*

NOW, THEREFORE, in consideration of the following and intending to be legally bound hereby it is agreed as follows:

...

2. In the event that any Workmen's Compensation benefits... should be awarded to applicant then the *benefits previously paid to the applicant or applied on his behalf under the Retirement System Ordinance aforesaid shall be considered and determined to be payments of Workmen's Compensation...* The City of Philadelphia shall be entitled to credits for such payments against any award of such Workmen's Compensation...

3. *Thereafter there shall be deducted from such retirement... payable to me the amount of Workmen's Compensation benefits paid or payable to me...<sup>[4]</sup>*

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<sup>4</sup> Section 22-401 of Employer's Retirement System Ordinance (RSO) states:

(4) *Benefit Amount.* Upon retirement for service-connected disability, a member shall receive an annual retirement benefit equal to seventy percent (70%) of the member's final compensation...

(a) If the member receives or is entitled to receive, for and during a period of disability, compensation from the City Treasury of the City, workers' compensation benefits or payments in the nature of workers' compensation benefits from any source, *such disability retirement benefits shall be reduced by the amount of such compensation, benefits or payments for*

(Emphasis added).

Reproduced Record (R.R.) at 100a.

Essentially, Employer argues that this agreement should have the same effect as a Notice of Workers' Compensation Benefit Offset or a Supplemental Agreement. Employer's argument, however, is flawed. *Assuming arguendo* that upon signing this document, the Agreement's language that "having received an award [of workers' compensation benefits], the said award has been suspended" reflected Claimant's desire to suspend his benefits in order to receive his pension, we note that this document was not filed with the Department. A copy of a Notice of Workers' Compensation Benefit Offset shall be filed with the Department. 34 Pa. Code §123.4(d). Pursuant to Section 409 of the Act, 77 P.S. §733, a supplemental agreement, LIBC-337, shall be filed with the Department as well. This agreement that Employer suggests authorized it to suspend Claimant's benefits was obviously not made on an appropriate Bureau form. Moreover, it was not perfected by filing the document with the Department. Therefore, it is questionable what legal significance it would have before the workers' compensation authorities such as the WCJ and the Board.

Moreover, Employer's argument that Employer may either reduce Claimant's pension benefits or reduce Claimant's workers' compensation benefits must fail. Employer's witness, James Kidwell, deputy director for the Board of Pensions and Retirement for Employer, testified that when an employee applies for a service connected-disability pension, he is scheduled to meet with a counselor. R.R. at 49a. He stated that at the interview session, the applicant is advised that should the service-connected disability pension be granted while he is receiving

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the period such compensation, benefits or payments are paid or payable...

workers' compensation benefits, "the pension benefit would be reduced dollar for dollar against the service connected disability pension or – reduced dollar for dollar by the amount of workers' comp." *Id.* at 50a. He was questioned about the significance of the Agreement referenced above. He reiterated that the counseling staff "uses it as a notice... that should the applicant be awarded the workers' comp and... awarded the service connected disability, *that the service connected disability pension would be reduced dollar for dollar against the workers' comp award.*" *Id.* (Emphasis added). This would be consistent with the language contained in the RSO.<sup>5</sup>

Indeed, the only language that would seem sufficient to permit Employer from using the full amount received in pension benefits to offset workers' compensation payments is when an individual is receiving his service-connected disability pension and is subsequently awarded workers' compensation benefits at a later date. This language is contained in the Agreement in Section 2 wherein it indicates that in this situation, any money already received from the pension should be considered as payments toward the award of compensation. As noted, however, this Agreement is not contained on an appropriate bureau form, nor was it perfected by filing a copy with the Bureau. Furthermore, as stated in Andrews, public policy prohibits an employer from utilizing an employee's own funds to satisfy its workers' compensation obligation. Andrews, 948 A.2d at 227 (citing Pennsylvania State Univ. v. Workers' Compensation Appeal Board (Hensal), 911 A.2d 225, 228 (Pa. Cmwlth. 2006)). This is a predominant reason for requiring an employer to establish the extent to which it funded an employee's

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<sup>5</sup> We offer no opinion on the legality of reducing a claimant's pension benefits by the amount he receives in workers' compensation benefits. That issue is not before us. The issue currently before us is whether Employer was within its rights to unilaterally cease payment of workers' compensation benefits in light of Claimant's receipt of a service-connected disability pension.

pension. As Employer has not established the extent to which it funded Claimant's pension benefits, it has not established the amount it may offset Claimant's indemnity benefits. We reiterate that there was no error in reinstating Claimant's benefits.

Employer further argues that the WCJ erred in awarding penalties. We disagree.

Section 435(d)(i) of the Act, 77 P.S. §991(d)(i), provides that an employer may be penalized ten percent of the amount awarded for its failure to comply with the Act or its supporting regulations and that, in cases of unreasonable or excessive delays, the penalties may be increased up to fifty percent. A claimant who files a penalty petition must first meet his initial burden to prove that a violation of the Act occurred. Shuster v. Workers' Compensation Appeal Board (Pennsylvania Human Relations Comm'n), 745 A.2d 1282 (Pa. Cmwlth. 2000). Thereafter, the burden shifts to the employer to prove that a violation of the Act had not occurred. Id. at 1288. The decision to impose penalties as well as the amount of penalties is within the discretion of the WCJ. Brutico v. Workers' Compensation Appeal Board (US Airways, Inc.), 866 A.2d 1152 (Pa. Cmwlth. 2004). The WCJ's decision regarding penalties will not be disturbed on appeal absent an abuse of discretion. Department of Pub. Welfare v. Workers' Compensation Appeal Board (Overton), 783 A.2d 358 (Pa. Cmwlth. 2001).

As we indicated above, a Notice of Workers' Compensation Benefit Offset shall be provided to the claimant in post-Act 57 cases at least twenty days prior to taking any offset for pension benefits. 34 Pa. Code §123.4(b). Moreover, unilateral cessation of a claimant's benefits triggers the penalty provisions of the Act. M.A. Bruder & Son, Inc. v. Workmen's Compensation Appeal Board (Harvey), 485 A.2d 93 (Pa. Cmwlth. 1984).



In the present matter, Employer unilaterally ceased paying Claimant's workers' compensation benefits as of December 15, 2001. It did not resume making workers' compensation benefits until August 21, 2005 following the Board's order directing Claimant's benefits be reinstated.

As explained in Brutico, the decision as to whether to award penalties and their amount is at the discretion of the WCJ. Moreover, Section 435(d)(i) of the Act indicates that in the case of excessive delays, penalties may be increased up to fifty percent. Regardless of whether Employer would have ultimately been entitled to a pension offset had it presented sufficient evidence, it did unilaterally cease payment of Claimant's benefits absent the proper documentation and did not pay any indemnity benefits for nearly four years.<sup>6</sup> The WCJ awarded fifty percent penalties on all unpaid compensation due to this violation. We see no abuse of discretion as required by Overton to warrant a reversal of that award.<sup>7</sup>

Employer further argues on appeal that the WCJ erred in finding it presented an unreasonable contest and, in turn, awarding unreasonable contest attorney's fees. We disagree.

Section 440(a) of the Act, 77 P.S. §996(a), provides that if an employer contests liability it will be liable for claimant's costs, including counsel

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<sup>6</sup> Employer makes no argument that if a penalty is appropriate for its violation of the Act that the fact that it did file a Notice of Workers' Compensation Benefit Offset in September of 2002 should limit the severity of the penalty even though such document was clearly untimely.

<sup>7</sup> Employer asserts that the Board erred in the first instance when it remanded for an award of a penalty in its August 2, 2005 Opinion. It argues that the WCJ did not award penalties in her original decision and, as penalties are awarded at the WCJ's discretion, Brutico, the Board abused its discretion by remanding for an award of penalties. Employer misconstrues the WCJ's findings in her original December 21, 2004 decision. In that decision, the WCJ found that claimant had failed to establish a violation of the Act. Based on that finding, the WCJ had no discretion to exercise regarding the award of a penalty. Because the Board reversed the WCJ and found that claimant had established a violation of the Act, it appropriately remanded to the WCJ to exercise her discretion in awarding penalties.

fees, if the matter is resolved in whole or in part in the claimant's favor. That section specifies, however, that attorney's fees may be excluded if the employer presents a reasonable contest. The reasonableness of an employer's contest depends upon whether the contest was prompted to resolve a genuinely disputed issue. Coyne v. Workers' Compensation Appeal Board (Villanova Univ.), 942 A.2d 939 (Pa. Cmwlth. 2008). The employer has the burden of presenting sufficient evidence to establish a reasonable basis for its contest. Frankford Hosp. v. Workers' Compensation Appeal Board (Walsh), 906 A.2d 651 (Pa. Cmwlth. 2006). Whether a reasonable basis exists for an employer's contest of liability is a question of law and therefore subject to this Court's review. Steeple v. Workers' Compensation Appeal Board (Pa. Liquor Control Bd.), 796 A.2d 394, (Pa. Cmwlth. 2002).

Claimant sustained his work injury in 1997. As a result, Act 57 controls and pursuant to amended Section 204(a) of the Act, Employer had to present evidence concerning the extent it funded Claimant's pension benefits in order to take an appropriate offset. Employer never presented any evidence concerning the extent to which it funded Claimant's pension benefits. Consequently, consistent with Frankford Hosp., it failed to present a reasonable contest and the WCJ committed no error in awarding attorney's fees over and above Claimant's award of compensation.

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JIM FLAHERTY, Senior Judge

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Workers' Compensation Appeal Board	:	
(Keys),	:	
	:	
Respondent	:	

**ORDER**

AND NOW, this 12<sup>th</sup> day of September, 2008, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

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JIM FLAHERTY, Senior Judge