

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| City of Philadelphia, | : | |
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| Petitioner | : | |
| | : | |
| v. | : | No. 532 C.D. 2008 |
| | : | SUBMITTED: August 22, 2008 |
| Workers' Compensation Appeal | : | |
| Board (Harris), | : | |
| Respondent | : | |

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: November 6, 2008

The City of Philadelphia petitions this court for review of a Workers' Compensation Appeal Board (Board) order that reversed a WCJ's decision awarding the City a pension offset and awarding Andrea Harris, a former City employee, a penalty.¹

Harris worked for the City of Philadelphia when she suffered an injury in the course of her employment as a police officer on November 24, 1999. Based on this injury, Harris was granted a service-connected disability pension on November 21, 2002, and her workers' compensation benefits were suspended.

In December 2002, the City filed a Notice of Workers' Compensation Benefit Offset, asserting its right to a full credit for Harris' service-connected

¹ Harris did not cross-appeal from the Board's decision to reverse the penalty award, so only the offset issue is before us.

disability pension benefits.² Harris subsequently filed a Petition to Review Benefit Offset and a Penalty Petition contending that the City unilaterally terminated her workers' compensation benefits. The City presented the deposition testimony of James Kidwell of the City's Board of Pensions and Retirement in support of its notice of benefit offset and in opposition to Harris' penalty petition.

By decision circulated April 21, 2005, the WCJ granted the City a bi-weekly offset of \$1,233.45, but also awarded Harris a penalty "of five percent (5%) of the Workers' Compensation Benefits that were reduced through circulation date [sic] of this Decision." WCJ's decision (circulated April 21, 2005) at 2. Both the City and Harris appealed the WCJ's determination to the Board, which reversed. The Board reasoned that Section 204(a) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 71(a), authorized the City to take a credit for Harris' disability pension benefits "but only to the extent funded by" it. Board opinion (No. A05-1171) at 6.³ The Board further stated:

Mr. Kidwell's credible testimony is relevant evidence, which a reasonable person might accept as adequate, in

² The City checked the box providing that its offset was for, inter alia: "Pension benefits to the extent funded by the employer directly liable for the payment of your workers' compensation benefits due to an injury occurring on or after June 24, 1996. This employer can also take credit for investment income which is attributable to this contribution." Certified Record (C.R.), Notice of Workers' Compensation Benefit Offset, Exhibit J-1, at 2.

³ Section 204(a) of the Act, 77 P.S. § 71(a), 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 employe shall also be credited against the amount of the award made under sections 108 [occupational disease] and 306 [total and partial disability], except for benefits payable under section 306(c) [specific loss benefits].

making a finding that [Harris'] pension plan was a defined benefit plan.

However, [the City] was still required to produce some evidence to establish its entitlement . . . namely, actuarial testimony to establish the extent to which it provided funding. [The City] did not present the testimony of an actuary, and Mr. Kidwell did not offer any evidence to establish the extent to which [the City] funded [Harris'] pension plan. Rather, he only testified that [the City's] annual contribution to the Pension Fund is based on a yearly report submitted by an actuary. [The City] did not submit that report as evidence, and did not call its actuary to testify to its contents. Indeed, the part of the Notice of Workers' Compensation Benefit Offset (Notice of Offset) issued by [the City], which is normally used to show how the offset was calculated, was left blank. In this circumstance, the WCJ erred in granting [the City] a biweekly benefit offset.

Id. at 6-7 (citation omitted).

The City's petition for review to this Court followed. In its brief, the City now argues that the Board erred in reversing the WCJ's decision to offset because: (1) it was supported by substantial, competent evidence and was a reasoned decision; (2) Harris's service-connected disability pension represented payment in lieu of workers' compensation; and (3) Harris is not entitled to receive workers' compensation benefits simultaneously with a service-connected disability pension. Essentially, the City, citing *City of Philadelphia 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), argues that Section 204(a) of the Act is irrelevant to service-connected disability pension benefits because they constitute payments in lieu of workers' compensation, automatically entitling the City to an offset. The City further argues that Harris is not entitled to both benefits because her receipt of a

service-connected disability pension results from the same injury for which workers' compensation benefits were awarded.⁴

First, we note the City is correct that this court in *Murphy* determined that Linda Murphy, a former City police officer, was paid a service-connected disability pension due to her work-related injury and that an offset was proper because the pension benefits were paid in lieu of workers' compensation. We reasoned in this regard:

The test for whether pension benefits may be offset against workers' compensation benefits depends upon whether the pension payments were made as a result of the claimant's inability to work. . . . If payments are made only due to an accrued entitlement built up as a result of the claimant's employment, such as wages, no offset is permitted. . . . If, however, the payments are made in lieu of workers' compensation, the employer is entitled to the offset.

Murphy, 871 A.2d at 316 (citations omitted). Thereafter, in *Hunter*, we relied on *Murphy* to conclude that the service-connected disability benefit paid to Thomas Hunter, a retiree from the City's police department who was also injured in the course of his work, was likewise paid in lieu of workers' compensation.

Nonetheless, these cases do not aid the City here because *Murphy* and *Hunter* both suffered their work-related injuries before 1996, when Section 204(a) was amended by Act 57.⁵ More recently, this court decided *City of Philadelphia v.*

⁴ As evidence that Harris is not entitled to receive both benefits, the City points to the agreement that she executed with the pension board when seeking the full amount of her retirement or survivorship benefits. Specifically, the City notes that Harris agreed that "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" C.R., "Agreement Re: Workmen's Compensation."

⁵ Act of June 24, 1996, P.L. 350.

Workers' Compensation Appeal Board (Andrews), 948 A.2d 221 (Pa. Cmwlth. 2008), wherein Cynthia Andrews began receiving a service-connected disability pension from the City, which later unilaterally ceased paying her workers' compensation benefits. In deciding whether the WCJ erred in reinstating Andrews' benefits because she was receiving a service-connected disability pension, we explained:

The Employer's right to a pension offset in post-Act 57 cases no longer turns on whether the pension constitutes payments in lieu of compensation. Nor does it matter, contrary to Employer's assertion, that the pension is a service-connected disability pension. In so holding, we do not suggest in any fashion that *Hunter* or *Murphy*, or any of the cases that predated those opinions that discussed the issue of whether a claimant's pension benefits were paid in lieu of compensation as opposed to deferred compensation, are no longer good law. The scope of those cases, however, is limited to matters wherein the claimant was injured prior to the effective date of Act 57.

Andrews, 948 A.2d at 227.

Citing *Department of Public Welfare Polk Center v. Workers' Compensation Appeal Board (King)*, 884 A.2d 343 (Pa. Cmwlth. 2005), we further stated: "In order to take advantage of amended Section 204(a) of the Act allowing for Employer to offset Claimant's workers' compensation benefits in light of Claimant's receipt of a pension, it needed to present evidence as to the extent it funded the pension plan." *Andrews*, 948 A.2d at 227-28. We also noted, pursuant to *Pennsylvania State University v. Workers' Compensation Appeal Board (Hensal)*, 911 A.2d 225 (Pa. Cmwlth. 2006), that where, as here, "there is a defined-benefit plan, an employer cannot meet its burden of establishing the

amount of its offset absent actuarial testimony.” *Andrews*, 948 A.2d at 227.⁶ A defined-benefit plan is “[a] pension plan in which the benefit level is established at the commencement of the plan and actuarial calculations determine the varying contributions necessary to fund the benefit at an employe’s retirement.” 34 Pa. Code § 123.2.

In the matter at bar, as previously stated, the City presented the deposition testimony of James Kidwell, the Pension Program Administrator for its Board of Pensions and Retirement, who testified that Harris applied for a service-connected disability benefit. Mr. Kidwell testified that a person who receives a service-connected disability benefit along with workers’ compensation paid by the City would have his or her service-connected disability benefit reduced dollar for dollar. Notes of Testimony, Testimony of James Kidwell, October 21, 2003, at 13-14. He also testified that the pension board returned Harris’ pension fund contributions to her, *id.* at 17-18, but that the interest or assets that her contributions created for the fund are being used to pay her service-connected disability pension. *Id.* at 23. He also admitted that the contributions paid by almost 30,000 city workers and the assets that those contributions earned for the pension fund are being used to pay for Harris’ service-connected disability pension. *Id.* at 25. Mr. Kidwell further recognized that the City’s annual contribution is determined by an actuary; *id.* at 30; that its contribution to the pension fund differed with each year, *id.* at 32, but that he did not know any of the numbers “off the top of [his] head.” *Id.* at 32-33. He also stated that, at one time, the Commonwealth contributed directly to the pension fund, but now those contributions go directly to the City, and he is not certain if they make it to the

⁶ The City does not appear to contest that a defined-benefit plan is at issue here.

pension fund. *Id.* at 35-36.⁷ Last, Mr. Kidwell explained that a service-connected disability pension “is calculated based on final compensation, which is either the employee’s rate of pay on separation, or the last full one year of pensionable earnings, and the employee is entitled to 70 percent of final compensation as an annual benefit.” *Id.* at 57. The City did not present any actuarial testimony to complement the testimony of Mr. Kidwell or meet the City’s burden pursuant to *Hensal*.

“[T]he employer bears the burden of proving the extent it funded the pension plan in question.” *Andrews*, 948 A.2d at 227 (citing *King*). Here, the City failed to meet that burden. It neither provided actuarial testimony, nor showed how the offset was calculated on the Notice of Workers’ Compensation Benefit Offset form. C.R., Exhibit J-1 at 2.⁸ For all of the above reasons, the Board’s order is affirmed.

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President Judge

⁷ Nevertheless, Mr. Kidwell somewhat contradictorily indicated that, beyond the employees’ mandated contributions, the remaining funding for the pension comes from the City. *Id.* at 56.

⁸ The City argues that “Respondent agreed to a suspension of Workers’ Compensation benefits in order to receive the full amount of her pension.” City’s brief at 14. To the extent that the City is making an argument that Harris has contractually foregone her workers’ compensation benefits, we need not address it. This is an entirely different argument from those raised in the petition for review – and upon which it based its claim from the beginning – that for various reasons the City established that it was entitled to an offset pursuant to the terms of the Act.

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ORDER

AND NOW, this 6th 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