[J-104-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

U.S. AIRWAYS AND RELIANCE NATIONAL C/O SEDGWICK CLAIMS MANAGEMENT SERVICES,	:	No. 18 WAP 2003
	:	Appeal from the Order of the Commonwealth Court entered October 21, 2002 at No. 2477CD2001 reversing in part the Order of the Workers' Compensation Appeal Board entered September 25, 2001 at No. A00-0659 and remanding.
v.	:	
WORKERS' COMPENSATION APPEAL BOARD (RUMBAUGH),	:	ARGUED: September 8, 2003
APPEAL OF: LINDA RUMBAUGH	:	

CONCURRING OPINION

MADAME JUSTICE NEWMAN **DECIDED: JULY 20, 2004**

I concur in the result reached by the Majority in this matter, but write separately because I am unable to agree with rationale espoused in the Majority Opinion.

In 1996, the General Assembly amended Section 413(c) of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 774.2 (also part of Act 57), thereby changing the manner in which an employer could affect the suspension of a claimant's compensation following a return to work. The key to the resolution of the instant matter, as recognized by the Majority, is contained in the statutory language of Section 413(c) which states:

> Notwithstanding any provision of this act, an insurer may suspend the compensation during the time the employe has returned to work at his prior

> or increased earnings upon written notification of suspension by the insurer to the employe and the department, on a form prescribed by the department for this purpose. The notification of suspension shall include an affidavit by the insurer that compensation has been suspended because the employe has returned to work at prior or increased earnings. The insurer must mail the notification of suspension to the employe and the department within seven days of the insurer suspending compensation.
>
> > (1) If the employe contests the **averments of the insurer's affidavit**, a **special supersedeas hearing** before a workers' compensation judge may be **requested** by the employe indicating by a checkoff on the notification form that the suspension of benefits is being challenged and filing the notification of challenge with the department within twenty days of receipt of the notification of suspension from the insurer. The special supersedeas hearing shall be held within twenty-one days of the employe's filing of the notification of challenge.
> >
> > (2) If the employe does not challenge the insurer's notification of suspension within twenty days under paragraph (1), the **employe shall be deemed to have admitted to the return to work and receipt of wages at prior or increased earnings**. The insurer's notification of suspension shall be deemed to have the same binding effect as a fully executed supplemental agreement for the suspension of benefits.

77 P.S. § 774.2 (emphasis added).

It is obvious to me that the "averments of the insurer's affidavit" refers to the return to work and the return to work at equal or increased wages. Those are the only two averments contained in the notification to the employee and the department. It is inherent in the statute that, when the employee checks the box to challenge the suspension of compensation, the challenge is limited to whether the employee returned to work and whether current earnings are equal to or greater than those prior to the work injury. In the case *sub judice*, the employee returned to work on the date indicated in Employer's suspension notice, without wage loss. It is subsequent to that return to work without wage loss that the employee left work. The Majority position would prevent a WCJ from receiving any evidence other than the Suspension Notice and the claimant's challenge. If this were in fact the intent of the General Assembly, why include a requirement for a special

supersedeas hearing within the text of the statute? Why not merely have the Bureau inform the employer that there has been a challenge and that benefits must be reinstated until further appropriate action, if any, is taken?

According to the statutory text, when the employee checks the box, that employee is "requesting a supersedeas hearing." Problems admittedly arise when a claimant requests a hearing on one issue, but other issues appear. In that instance, I believe that a WCJ is permitted to waive or modify the special rules of practice. 34 Pa. Code § 131.3(a). Further, Section 131.42 sets forth the types of evidence that are permissible in a supersedeas hearing. That section states:

> § 131.42. Evidence relating to supersedeas.
>
> (a) A party has the right to submit, and the judge may consider, one or more of the following **solely** in relation to a **request for supersedeas**.
>
> (1) Testimony of a party or witness.
>
> (2) The report of a physician.
>
> (3) The records of a physician, hospital, clinic or similar entity.
>
> (4) The written statements or reports of another person expected to be called by a party at the hearing of the case.
>
> (5) The report of an organization or governmental body or agency stating the right of the claimant to receive, be denied, have increased or decreased benefits, and the amount of the benefits being paid or payable to the claimant.
>
> (6) Other materials relevant to the request for supersedeas.

34 Pa. Code § 131.42 (emphasis added). This section itemizes the evidence that a WCJ may consider "in relation to a request for supersedeas," which is the action that results from checking the box. Section 131.42 does not limit its application to a regular request for supersedeas and I believe that it is available to the parties during a special supersedeas hearing.

In the instant matter, the subject of the proceeding was the challenge to the

suspension of benefits. When Claimant challenged that suspension, she was alleging that she had a right to continued benefits. I believe that the WCJ, in deciding whether Claimant did, indeed, have a right to continued benefits, was entitled to consider evidence proffered by both Claimant and Employer that indicated that her failure to return to work was not work related. As articulated by the Commonwealth Court, it is beyond reason to require a WCJ to turn a blind eye toward evidence entitling a party to a supersedeas when all parties are assembled. See U.S. Airways v. WCAB (Rumbaugh), 808 A.2d 1064, 1068 (Pa. Cmwlth. 2002) (citing 1 Pa.C.S. § 1922 (statutes should not be interpreted to affect absurd result)), petition for allowance of appeal granted, 820 A.2d 706 (Pa. 2003). I do not believe that it is the intent of the General Assembly that, once an insurer has suspended benefits because the claimant has returned to work, the employer must file a Petition to Suspend or Terminate benefits along with an Application for Supersedeas every time a claimant checks the box.