[J-50-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ROSALYN GUNTER, Appellant v. WORKERS' COMPENSATION APPEAL BOARD (CITY OF PHILADELPHIA), Appellee	:	No. 37 EAP 2001 Appeal from the Order of the Commonwealth Court entered on March 5, 2001, at No. 2062 CD 2000, affirming the decision of the Workers' Compensation Appeal Board 771 A.2d 865 (Pa. Cmwlth. 2001) ARGUED: April 9, 2002

CONCURRING OPINION

MR. JUSTICE NIGRO **DECIDED: June 16, 2003**

I agree with the majority that the City can properly challenge Appellant's petition for workers' compensation benefits in spite of its previous payment of injured on duty ("IOD") benefits. However, unlike the majority, I would not reach that conclusion by artificially equating IOD benefits to workers' compensation benefits for purposes of applying Section 771 of the Workers' Compensation Act, 77 P.S. § 771. As the City points out, the required procedures for the award of IOD benefits are very different from those applicable to the issuance of a notice of compensation payable ("NCP") for workers' compensation benefits. See Slip Op. at 8-9 (Philadelphia Civil Service Regulation 32 regarding IOD benefits neither contains a formal NCP procedure nor sets forth a time in which the investigation of a claim for compensation must be completed.) As such, I do not agree with the majority's implicit suggestion that it may be appropriate to restrict an employer's ability to modify or

set aside IOD benefits to the same extent that an employer's ability to modify or set aside an NCP for workers' compensation benefits is restricted by section 771.

Accordingly, rather than relying on 77 P.S. § 771 in the instant case, I would merely hold that where, as here, IOD benefits are awarded by an unauthorized individual, without a formal investigation, and clearly in error, the employer will not be estopped from later terminating those benefits and, in addition, disputing the claimant's entitlement to workers' compensation benefits. Significantly, although Appellant argues otherwise, this situation is readily distinguishable from that in Sammons v. Civil Service Commission of City of Philadelphia, 673 A.2d 998 (Pa. Cmwlth. 1996), where the Commonwealth Court held only that an employer may not terminate IOD benefits based on an assertion that the employee was never injured, when the employer had "an opportunity to, and in fact did, investigate the nature and existence of Employee's disability before placing Employee on 'injured-on-duty' status." 673 A.2d at 1002.

Finally, I cannot help but comment, as did the majority, that the Appellant does not even argue to this Court that she was ever, in fact, entitled to the four months of IOD benefits that she collected. Nevertheless, she now attempts to inflate her ill-gotten spoils by essentially contending that the mere fact that she obtained them necessarily entitles her to more of the same, only this time in the form of workers' compensation benefits. In my view, Appellant should simply consider herself fortunate to have received four months of gratuitous benefits. Were the question of her entitlement to retain those benefits before this Court, I would surely be inclined to order them repaid to the City.