

FEBRUARY 2009 CASE LAW UPDATES

Philadelphia Gas Works v. WCAB (Amodei), No. 350 C.D. 2008 (Pa. Commw., 2/4/09)

Facts: Claimant was injured on 3/26/97 and received workers' compensation benefits in the amount of \$542.00 per week. When claimant retired from PGW, he began receiving a pension which was fully funded by PGW. On 1/26/01, PGW issued a Notice of Compensation Benefit Offset (NCBO #1), notifying claimant that it would be taking a weekly offset against his WC benefits for the *net* amount of pension benefits he received (\$264.10). On 4/27/06, PGW issued a NCBO #2, indicating that it would be taking a weekly offset against claimant's WC benefits for the *gross* amount of claimant's pension benefits.

Claimant filed a Review Offset Petition to challenge NCBO #2, arguing that PGW could only take an offset for the net amount of his pension benefits. The WCJ agreed with claimant and granted his Petition, set aside NCBO#2, and reinstated NCBO #1. PGW appealed and the WCAB affirmed the WCJ's Decision. PGW appealed to the Commonwealth Court.

Issue: Whether, under Section 204(a) of the Workers' Compensation Act, an employer is entitled to take an offset against a claimant's indemnity benefits for the *gross* amount of pension benefits he receives, or whether the offset is only for the *net* amount of pension benefits received.

Holding: After analyzing the relevant Bureau regulations that apply to Section 204(a), particularly 34 Pa. Code § 123.8(a) which applies to pensions, the Court held that **an employer is only entitled to an offset against a claimant's WC benefits for the *net* amount of pension (or severance, unemployment compensation or Social Security "old age") benefits received.**

In doing so, the Court effectively overruled its previous decision in Steinmetz v. WCAB (Cooper Power Systems), 858 A.2d 182 (Pa. Commw. 2004), in which it held that an employer was permitted to use a claimant's gross receipt of severance benefits in calculating the WC benefit offset. In Judge Cohn Jubelirer's concurrence in the PGW opinion, she noted that the Court had not considered any regulatory provisions when deciding Steinmetz.

The Court also noted that an employer may *initially* calculate the offset using the gross amount of benefits received, but will later be responsible for repaying the amounts previously offset and paid in taxes by the claimant should the claimant request such repayment. See 34 Pa. Code § 123.4(f).

Dept. of Labor & Industry, Bureau of Workers' Compensation v. WCAB (Crawford & Co.), No. 2211 C.D. 2007 (Pa. Commw., 2/2/07)

Facts: Claimant received weekly WC benefits for a work-related injury he sustained in July 1995. On **6/1/04**, claimant underwent medical treatment for his injury. On **7/19/04**, the employer filed a Termination Petition (alleging full recovery as of 3/16/04); the employer requested supersedeas relief in connection with the Termination Petition. The WCJ denied this request for supersedeas on 8/30/04. On **10/11/04**, the insurer was presented with a medical bill for the 6/1/04 treatment in the amount of \$35,405.45. This bill was paid on **1/25/05**.

The WCJ eventually granted the Termination Petition on 6/28/05, and the WCAB later affirmed.

The insurer subsequently filed an Application for Supersedeas Fund Reimbursement, and requested reimbursement for the medical bill paid on 1/25/05 in the amount of \$35,405.45. The WCJ granted the Application over the arguments of the Bureau that the treatment for which the bill was issued was performed *before* the employer's request for supersedeas relief and therefore precluded the employer from getting reimbursement for same. The Bureau appealed, and the WCAB affirmed the WCJ. The Bureau then appealed to the Commonwealth Court.

Issue: Whether an insurer is entitled to reimbursement from the Supersedeas Fund for payments of medical bills made after its request for supersedeas (and denial of same) when the treatment at issue was provided before the request.

Holding: In cases where all of the requirements under Section 443 of the Act have been met (1. supersedeas requested; 2. supersedeas denied; 3. request made in a proceeding under Section 413 or 430; 4. payments were continued because supersedeas was denied; and 5. it was later determined that such compensation was not, in fact, payable), "**reimbursement may be had for all payments actually made after supersedeas denial**, including payment of benefits awarded retroactively for earlier periods of disability." In fact, the Court noted that the plan language of Section 443 puts the focus on "*payments* made rather than on periods of disability" and held that "**the right to reimbursement relates to payments made after denial of a supersedeas request.**" The Court recognized that previous case law had stood for the general rule that supersedeas reimbursement may not operate retroactively, but relied on more recent cases in support of its decision in this case. See Mark v. WCAB (McCurdy), 894 A.2d 229 (Pa. Commw. 2003) and Bureau of Workers' Compensation v. WCAB (Consolidated Freightways, Inc.), 876 A.2d 1069 (Pa. Commw. 2005).

Under the facts of the present case, the court held that "what matters is that the treatment in question was later determined to be ineligible for payment, and **the bill for that treatment was submitted to and paid for by Insurer after supersedeas was requested and denied,**" noting that the date of service for the medical expense in question was not controlling.

Channellock, Inc. v. WCAB (Reynolds), No. 884 C.D. 2008 (Pa. Commw., 12/11/08)

* previously unreported

Facts: Claimant sustained an annular tear and a herniation at L5-S1 after falling to the floor of an industrial-size vat while cleaning same at work. Claimant ultimately returned to work in a modified duty position, but that position was eliminated when a certain part of employer's plant closed. Claimant was then placed in a "no work" position. When claimant fell asleep one day on the job, he was written up and warned that he would be fired if he fell asleep again.

Claimant requested a transfer to a more stimulating job - cleaning pliers. Although he believed this job exceed his physical capabilities per his doctor's instructions, he continued to work in this job for a period of time until his doctor told him to stop working altogether.

Employer filed a Termination/Suspension Petition, alleging that claimant had fully recovered from his work injuries. Claimant filed a Reinstatement Petition alleging a recurrence of disability. The WCJ denied employer's petitions, and granted claimant's Reinstatement Petition, finding that claimant was not physically capable of performing any of the jobs offered by employer, including the "no work" position which required claimant to stay alert and awake. The WCJ noted that there was "no specific approval for the 'no work' position by [claimant's] physician or the IME physician," and that claimant's medications for his work injuries caused him to be drowsy. The employer appealed.

Issue: Whether the employer was entitled to a suspension of claimant's benefits for claimant's failure to continue working in the "no work" position which the employer maintains was available to claimant.

Holding: The Court distinguished this case from Ryan v. WCAB (Port Erie Plastics, Inc.), 639 A.2d 866 (Pa. Commw. 1994). In that case, the claimant's treating physician had specifically approved the "no work" position for her, and claimant was under no threat of termination in performing same. The Court held in Ryan that the "no work" position was not made in bad faith, and could not be said to be "not available" under the requirements of Kachinski v. WCAB (Vepco Constr. Co.), 532 A.2d 374 (Pa. 1987).

The Court also reiterated that an "employer is not required to produce medical evidence of a change in condition when the modification [or suspension] petition is premised not on a change in physical condition, but on the fact that the employer made a medically approved position available to the claimant."

In the present case, however, neither claimant's doctor nor the IME doctor approved the "no work" position. In fact, claimant's doctor testified that, while claimant could physically return to sedentary work, the medications he was taking could impair his abilities by causing him to fall asleep. Additionally, claimant was under threat of termination if he was found asleep on the job again. Therefore, the Court held that the "no work" position was not within claimant's capabilities.

As this position was not “medically approved” for claimant, the Court held that, under Kachinski, it was “Employer’s burden to show that Claimant was capable of performing the no-duty work; however, the credible medical testimony does not prove that Claimant would be able to perform such work.”

Michel v. WCAB (United States Steel Corp.), No. 2045 C.D. 2008 (Pa. Commw., 2/26/09)

Facts: Employer filed a Termination Petition based upon a full recovery from its IME doctor that claimant had fully recovered from his lumbar strain. The WCJ granted the Termination Petition, which claimant appealed. The Board remanded the matter to the WCJ for claimant to present additional evidence.

On remand, claimant's medical expert testified that claimant had also sustained work-related annular tears. This doctor cited a discogram for a positive showing of these findings. Defendant's medical expert again testified that claimant was fully recovered from his lumbar strain, and that any annular strains claimant might have were not work-related. During his testimony, defendant's medical expert described the discogram as a "subjective test."

The WCJ once again granted defendant's Termination Petition, finding that claimant was fully recovered from his work-related lumbar strain. The Board affirmed the WCJ's Decision following claimant's appeal. Claimant then appealed to the Commonwealth Court.

Issue: (1) Whether defendant's medical expert was incorrect in stating that there was no objective evidence to support claimant's ongoing pain, as he considered the discogram to be a subjective test.

(2) Whether the WCJ failed to issue a reasoned decision by crediting on the testimony of defendant's medical expert.

Holding: Following a review of case law from Arkansas and Louisiana about discograms and whether they are considered objective, subjective, or both, the Court held that "a discogram is a diagnostic test that has both objective and subjective components." Nonetheless, it is not irrelevant in evaluating a claimant's symptoms/conditions simply because of its subjective components (whereas it would be in Arkansas).

The Court also reiterated the principle that "a lack of an objective basis for pain does not, in and of itself, mean that disability has ended and termination is warranted."

In terms of the second issue, the Court held that the WCJ's decision was reasoned because it could not be said that defendant's medical expert's opinion was based on any inaccurate or false information. The Court also held that it was within the WCJ's province to resolve the factual dispute between the parties' medical experts. The Court affirmed the WCJ.