

## **Gentex v. WCAB (Morack) – Filed June 4, 2009**

**ISSUE :** Whether there was sufficient evidence contained in the record to establish that claimant provided timely notice of her hand and wrist injuries.

The claimant was a product inspector for the employer. She worked this job for approximately twenty-seven years. Her duties increased in 2003 and she began having difficulties with her hands. On January 15, 2005, she saw a doctor and was taken off work. She delivered the note taking her off work to the guard house. Claimant was referred to another doctor in February of 2005 and learned that her hand and wrist complaints were attributable to her employment. At that point she attempted to contact human resources and left a voicemail indicating that she had “work-related problems.” She sought benefits based on an alleged bilateral hand and wrist injury. The employer denied the claim. At the hearing before the WCJ, the claimant testified that her initial indication to her employer that the injuries were not work-related was changed upon being informed by a doctor that the injuries were in fact caused by work. Even though claimant was cleared to perform light duty work, she never returned because no position was made available. The representative from the employer’s human resources department indicated that she was unaware of a work-related injury until she received a copy of claimant’s Claim Petition on September 19, 2006.

The WCJ awarded benefits to the claimant and found that the employer was on notice by claimant once she realized it was a work-related matter. Even though the WCJ acknowledged that claimant filed an application for short-term disability benefits indicating that her hand and wrist injuries were not work-related, he pointed out that claimant did not know the problems were work-related until she saw the second doctor.

The Board affirmed the WCJ’s decision. The court initially noted that, because the employer claimed that the notice provisions of Sections 631 and 632 of the Act were not satisfied, the issues of both timeliness and sufficiency of the injury description were preserved for review. Even though it was inferred that the notice provided to the employer was timely, the court held that the evidence did not support a determination that there was a reasonable description of the injury. The court agreed with the defendant that the claimant’s alleged voice-mail message that she had “work-related problems” was vague and insufficient to satisfy the Act’s notice requirement. The court held that sections 311 and 312 of the Act mandate that some reasonable description of the injury be put forward.

**HOLDING:** The court reversed the order of the Board which had affirmed the decision to grant claimant’s Petition. Even though credibility determinations are not reviewable, the evidence was insufficient to support a finding that she provided proper notice of her work-related injury under the Act.

## Young v. WCAB (LGB Mechanical) – Filed June 4, 2009

**ISSUE:** Whether the percentage of benefits paid as attorney's fees to claimant's former counsels constitutes part of the employer's accrued lien for the purposes of subrogation.

The claimant sustained an injury in the course and scope of his employment in November 11, 1999. On November 13, 2001, the WCJ granted claimant's Claim Petition and awarded ongoing total disability benefits of \$294.00 per week. After the employer filed a Modification and Suspension Petition against the claimant, the parties entered into a Compromise and Release Agreement that settled the claimant's workers' compensation claim. A portion of that award was designated for the claimant's counsel. The claimant thereafter obtained a third-party recovery, and the employer sought subrogation. The WCJ held that the counsel fees previously awarded constituted part of the employer's accrued lien subject to subrogation. The Board affirmed that ruling.

On further appeal, the court agreed that the percentage of the claimant's benefits paid to his legal counsel were part of the employer's accrued lien subject to subrogation. However, as the claimant had no basis to appeal the issue of litigation costs, the Board erred in ruling on that issue. The court held that an employer has an **absolute right** to subrogation and to immediate payment of its past due lien from the recovery fund after payment of attorney's fees and expenses. Its accrued lien, per § 319 of the Workers' Compensation Act is calculated based on its payments of "compensation." The Act does not define the term "compensation." Rather, a determination of what constitutes "compensation" must be made on a section-by-section basis, looking to the language of the section and the legislative intent behind it. The court also held that the purpose of subrogation is threefold: (1) it prevents double recovery for the same injury; (2) it relieves the employer of liability occasioned by the negligence of a third party; and (3) it prevents the responsible party from escaping liability.

Section 442 of the Workers' Compensation Act protects claimants from unreasonable fees charged by their own attorneys under "improvident fee agreements." Under § 442 of the Act, a workers' compensation judge must approve a contingent fee agreement, and a 20 percent contingent fee is reasonable per se. The counsel fee designated in the fee agreement is chargeable against both present and future benefits. Money paid pursuant to a fee agreement is to be deducted from the claimant's workers' compensation benefits. The court agreed with the WCJ and the Board that the percentage of claimant's benefits paid to his legal counsel is part of the employer's accrued lien subject to subrogation pursuant to Section 319 of the Act. The court found that the fact that claimant agreed to pay a portion of his compensation to his attorney as fees does not detract from the fact that the money was due as payment for his work injury. This amount was to be paid solely as a result of the third party's negligence. Section 319 precludes the employer from having to shoulder that burden.

**HOLDING:** The court reversed the order of the Board to the extent that it indicated that litigation costs constituted part of the employer's accrued lien subject to subrogation. The remainder of the order was affirmed.

## **Allegheny Ludlum Corporation v. WCAB (Bascovsky) – Filed June 17, 2009**

**ISSUE:** Whether the Board was in error when it concluded that the defendant employer was not entitled to an offset under Section 204(a) of the Act. The employer asserted that the uncontroverted evidence establishes that the pension plan, from which claimant's benefits were paid, was funded solely by the employer.

On September 17, 2003, claimant petitioned for review of compensation benefit offset and requested a review of the benefit offset calculation made by the employer due to the claimant's receipt of retirement pension benefits. The claimant testified that he began to receive pension benefits on July 1, 2003 and that he also received on the same date a lump-sum net payment which was based on vacation pay. He stated that the employer paid his pension benefits and that another company would begin to pay his pension benefits after a certain date. The WCJ found that the worker sustained a compensable injury and that the employer issued a corrected notice of workers' compensation benefit offset by which it indicated that it was going to take an offset for pension benefits. The WCJ held the employer properly took an offset for the special payment or lump sum payment and the monthly pension benefits. The Board reversed and concluded that the WCJ erred by determining that the defendant met its burden of establishing that it was entitled to an offset of claimant's lump sum payment and monthly pension benefits under these circumstances. It also concluded that to be entitled to an offset, it had to present evidence of the amount that it actually contributed to the claimant's pension plan in order to be entitled to an offset. The defendant contends that the Board erred when it concluded that the employer was not entitled to an offset – specifically, the defendant asserts that the uncontroverted evidence established that the pension plan, from which claimant's benefits were paid, was funded solely by the employer.

The court reversed the Board's decision. The court determined that the WCJ, as the ultimate fact finder in workers' compensation cases, has exclusive province over questions of credibility and evidentiary weight in whole or in part. The court held the evidence established that the employer was not required to produce actuarial testimony to support an offset. Under the "defined contribution plan" the contribution was calculated solely on the accumulated contributions and earnings in the employee's account. The employer's evidence sufficiently met its burden to prove that it was entitled to an offset.

**OUTCOME:** The Workers' Compensation Appeal Board was reversed. The WCJ has exclusive province over questions of credibility and evidentiary weight in whole or in part.

## **The Boeing Company v. WCAB (Horan) – Filed June 24, 2009**

**ISSUE:** Whether the employer met the requirements of Section 443 of the Act to receive reimbursement from the Supersedeas Fund for overpayments of workers' compensation made to claimant which resulted from an application of the offset/credit provisions of Section 204(a) of the Act.

Claimant sustained an injury to his low back while working as a material handler for the defendant on February 4, 2004. Following his injury, claimant was placed on light-duty with no wage loss from February 4, 2004 to December 23, 2004. At that time he was laid off. Claimant then filed a Claim Petition seeking acknowledgment of his work-injury and payment of temporary total disability benefits as of December 24, 2004 and ongoing.

The WCJ issued a Decision and Order granting claimant's Claim Petition and directed defendant to pay claimant TTD benefits plus interest for past due benefits. Unreasonable contest fees were also awarded. The WCJ did not acknowledge defendant's entitlement to any offset/credit for unemployment compensation and severance benefits received by claimant.

The defendant appealed the WCJ's Decision and Order arguing that the WCJ erred in failing to award offset/credits for the unemployment compensation and severance benefits received by claimant. In connection with its appeal, defendant filed a request for supersedeas. By Order dated December 6, 2005, the Board granted defendant's request for supersedeas as to the award of unreasonable contest attorney's fees, but denied the request as to the award of TTD benefits. After considering the defendant's appeal, the Board issued an Opinion and Order on August 22, 2006 affirming, but modifying, the WCJ's Decision and Order. The Board concluded that, pursuant to Section 204(a) of the Act, the defendant was entitled to offsets/credits for the unemployment compensation and severance benefits received by claimant.

The employer subsequently filed its Application for Supersedeas Fund Reimbursement. The Bureau of Workers' Compensation, acting as the conservator of the Fund, challenged the request. The matter was assigned to a WCJ who conducted a hearing. The WCJ subsequently issued a Decision and Order granting reimbursement from the Supersedeas Fund. The WCJ found that defendant was not entitled to reimbursement from the Supersedeas Fund for the unreasonable contest attorney's fees because applicable case law does not allow for reimbursement of such fees, and because the Board had granted supersedeas as to the payments of those fees.

The Bureau appealed the WCJ's Decision and Order arguing that the WCJ erred in granting defendant Supersedeas Fund reimbursement for offsets/credits awarded under Section 204(a) of the Act. The Board subsequently issued an Opinion and Order reversing the WCJ's Decision and Order. The Board concluded that defendant is not entitled to reimbursement from the Supersedeas Fund.

The defendant argued to the Commonwealth Court that the Board erred in reversing the WCJ's Decision and Order granting defendant reimbursement from the supersedeas

fund. The defendant contended that it satisfied all of the requirements set forth in Section 443 of the Act governing the granting of reimbursement from the Supersedeas Fund. The defendant contended that claimant's entitlement to benefits was first established through the WCJ's Decision and Order. The WCJ granted the litigated Claim Petition and directed the defendant to pay claimant TTD benefits but failed to acknowledge defendant's entitlement to any offsets/credits pursuant to section 204(a) of the Act. The employer argued that they could not engage in self-help to take automatic offsets/credits because to do so would have subjected them to penalties.

The court held that the Board erred in reversing the WCJ's decision and order granting the employer reimbursement from the Workers' Compensation Supersedeas Fund. The employer met all of the statutory requirements to receive reimbursement from the Supersedeas Fund, and the important distinctions in the case were that the Board's determination effectively lowered the amount of workers' compensation benefit payments to which the claimant was entitled based on the fact that the claimant had already received compensation for his lost wages through other means (unemployment compensation), and due to the fact that the claimant returned to work before the employer could obtain its offsets/credits, the employer's only remedy to recover the overpayments that it made to the claimant was through the Supersedeas Fund.

**OUTCOME:** The court reversed the Board's order. The court held that the claimant was not entitled to all of the workers' compensation benefits payments he received pursuant to the WCJ's original award because of the defendant's entitlement to offset/credits for the unemployment compensation and severance benefits received by claimant. Because the claimant returned to work before the defendant could obtain its offsets/credits, the defendant's only remedy to recover the overpayments that it made to claimant was through the Fund.