

## Pennsylvania Workers' Compensation Update - 1st Quarter '09

### Commonwealth Court Cases

#### **Department of Labor & Industry, Bureau of Workers' Compensation v. WCAB (Crawford & Company), 2211 C.D. 2007 (Filed, February 2, 2009)**

**Issue:** Is insurer entitled to supersedeas fund reimbursement for medical treatment rendered prior to request for supersedeas but billed and paid after supersedeas denied?

**Answer:** Yes.

**Analysis:** On June 1, 2004, Claimant underwent medical treatment for his work injury. On July 19, 2004, Employer filed a Termination Petition alleging recovery as of March 16, 2004 and requested supersedeas. The WCJ denied the request for supersedeas. On October 11, 2004, the insurer was billed for the June 1 treatment. Insurer paid the bill. Thereafter, the WCJ granted Employer's Termination Petition and the Board later affirmed.

Insurer filed an Application for Supersedeas Fund Reimbursement, seeking reimbursement for payment of the subject medical bill. The Bureau argued that as the treatment was rendered to Claimant prior to the supersedeas request, payment was not subject to reimbursement. The WCJ disagreed and the application was granted. The Board affirmed and this appeal by the Bureau followed.

In deeming Insurer's Application proper, the Commonwealth Court noted that at all times relevant, the Insurer provided benefits to the Claimant and, at no time, wrongfully stopped providing benefits. The Court stressed, meanwhile, that the language of the Act "is clear in its focus on payments made rather than on period of disability" and that there is no specific language prohibiting the reimbursement of benefits which preceded the petition in regard to which supersedeas was sought. Accordingly, the right to reimbursement relates to payments made after denial of a supersedeas request.

**Conclusion:** The date upon which the medical treatment is billed and paid, not rendered, is controlling for purposes of determining the appropriateness of supersedeas fund reimbursement. This is an important decision and in termination petitions, the claims professional should be careful to document exactly when a bill was received. The Court fails to address whether reimbursement would be appropriate if the bill had been received prior to the supersedeas request denial but paid following the supersedeas denial. In all likelihood any such bill would not be subject to supersedeas refund.

#### **Philadelphia Gas Works v. WCAB (Amodei), 350 C.D. 2008 (Filed, February 4, 2009)**

**Issue:** Whether workers' compensation benefits are to be offset by the gross amount an employee receives in pension benefits?

**Answer:** No. Offsets are to be based on the net amount an employee receives in pension benefits.

**Analysis:** The facts of this case were not in dispute. Pursuant to an Agreement of Compensation, Claimant had been receiving benefits for a 1997 injury. Thereafter, Claimant retired from the Employer and began receiving pension benefits from a plan fully funded by the Employer. In 2001, Employer issued a Notice of Compensation Benefit Offset (NCBO), reducing Claimant's indemnity benefits by the net amount of his pension benefits.

In 2006, Employer issued a second NCBO reducing Claimant's benefits by the gross amount of his pension benefits. Claimant filed a Review Offset Petition, alleging that the Employer was entitled only to a credit for

the net amount of pension benefits he received. The WCJ granted the petition and the Board affirmed. Employer appealed.

Employer relied on *Steinmetz v. WCAB (Cooper Power Systems)*, 858 A.2d 182 (Pa.Cmwlth. 2004), which held that an employer's offsets for severance benefits are to be based on the gross amount of benefits received by a claimant. The Court refused to apply *Steinmetz* to pension benefits cases.

The Court acknowledged that although Section 204(a) does not specify that the pension offset is limited to the net amount of the pension, the applicable regulation, 34 Pa.Code §123.8(a) limits the pension offset to net pension benefits.

**Conclusion:** While this case only dealt with pensions, the Court specifically expands the case to cover all benefits that are subject to offset (pension, severance, unemployment and social security old age).

**Fox v. WCAB (PECO Energy Company), No. 1774 C.D. 2008 (Filed March 23, 2009)**

**Issue:** Does the employer/insurer's Section 319 subrogation right apply to third party recoveries against government entities?

**Answer:** Yes.

**Analysis:** Pursuant to an NCP, insurer paid \$47,813.79 in indemnity and medical benefits. Claimant subsequently filed a third party claim against the City of Philadelphia (City) for negligence in causing his work injury. Claimant entered into an agreement with the City for \$150,000.00 in damages as well as indemnification by the City of any subrogation he had to pay to insurer/employer. Employer filed a Petition to Review Compensation Benefits to recover its lien. The WCJ granted the petition and the Board affirmed. Claimant appealed.

Claimant argued that Section 22 of Act 44, 77 P.S. § 501, which provides that a government entity is immune from "claims of subrogation or reimbursement from a claimant's tort recovery with respect to workers' compensation benefits" prohibited the employer/insurer from recovering its subrogation lien. The Court rejected this argument. The Court held that Section 22 provides immunity to the government only for the government's failure to protect the insurer's subrogation right. The Court further noted that the insurer was not seeking recovery from the government entity but from the claimant who was not protected by this immunity.

**Conclusion:** The party against whom the claimant makes a third party recovery as a result of the work injury cannot defeat the subrogation right of the employer/insurer even if the third party is subject to sovereign immunity should it fail to protect the employer/insurer's subrogation right.

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