NOVEMBER CASE LAW UPDATE

1. Jones v. WCAB (City of Chester), 2008 Pa. Commw. LEXIS 568, November 12, 2008

   Essential Facts:

   Claimant is a retired police officer for the City of Chester. When his employer began taking credit against his pension for his workers' compensation benefits, as provided for in the Collective Bargaining Agreement (CBA), claimant filed a Petition to Review Benefit Offset. The Petition contained no allegations, and there was no transcript of any of the hearings before the WCJ. Commonwealth Court pieced together the arguments from the briefs submitted.

   Issue:

   Does the WCJ have jurisdiction over a Petition to review Benefit Offset, where the allegation is that the employee's CBA provides for a 100% offset of workers' compensation benefits against pension benefits, and this results in a greater reduction than the Act's provision for pension credit against workers' compensation benefits?

   Holding:

   Although a WCJ does not generally have the ability to determine entitlement to benefits other than workers' compensation, for example, Heart and Lung Benefits, the WCJ does have the authority to determine questions involving the interaction between a CBA and workers' compensation benefits, if there is a question that the Act supersedes the CBA or that the CBA works to reduce statutory benefits under the Act. Inn this case, the WCJ was not required to interpret any of the provisions of the CBA. The issue involved whether the 100% offset of workers' compensation against the pension was proper. Case remanded, since the record was to scant to allow appellate review.

2. Bingnear v. WCAB (City of Chester), 2008 Pa. Commw. LEXIS 572, November 19, 2008.

Essential Facts:

This is a companion case to the prior decision. Same attorneys involved. Same fact pattern.

Issue:

Same as Jones.

Holding:

Equally sparse record. Case remanded for the same reason.

3. Community Empowerment Association v. WCAB (Porch), 2008 Pa. Commw. LEXIS 582, November 25, 2008.

Essential Facts:

Claimant was employed with a community action organization working with the underprivileged. Claimant's testimony, credited by the WCJ, was that the president of the organization made constant, crude, and repeated sexual remarks to claimant. He questioned her sexuality and asked about sexual partners. Moreover, claimant was repeatedly singled out as not being a member of the dominant religious group employed at the work place. She was subjected to repeated proselytizing and rather unusual "cleansing" rituals by a non-employee, who was given an office at the worksite by the employer.

Issue:

Rare compensable Mental/Mental case. Was claimant subjected to objectively abnormal working conditions, or was this a subjective reaction to normal working conditions? Claimant alleged both sexual and religious harassment.

Holding:

Claimant asserted numerous unwanted and inappropriate sexual advances by her employer over time. Since the WCJ found that the specific acts as alleged by claimant had in fact occurred, it was not necessary for claimant to provide corroborative information, citing Donovan v. WCAB (Academy Med. Realty), 739 A.2d 1156 (Pa. Cmwlth. 1999) and Philadelphia Electric Company v. WCAB (Miller), 643 A.2d 1186 (Pa. Cmwlth. 1994). Although the work place is not a refuge from the world, the activities found credible by the WCJ were far outside a normal professional working relationship. The court had more trouble with the religious harassment aspect of the case, but ultimately held that it also was highly unusual, permitted by the employer, and, combined with the sexual harassment, created an abnormal working condition.

4. Weney v. WCAB (Mac Sprinkler Systems, Inc.), 2008 Pa. Commw. LEXIS 587, November 26, 2008.

Essential Facts:

The dates are important in this case. Claimant fell and injured his shoulder at work on October 21, 2005. The injury was accepted by NCP, which described the injury as a left shoulder strain. On March 27, 2006, claimant filed Review Petition I, in which he alleged that the description of injury was materially incorrect, and that the proper injury was "a tear of the anterior labrum with large glenohumeral joint effusion, tendonitis or a partial tear of the supraspinatus/infraspinatus, minimal impingement, and biceps tenosynovitis." The parties Stipulated to these additional injuries, and the stipulation was adopted by the WCJ in a decision circulated on May 19, 2006. Very significantly, there was no appeal.

On May 30, 2006, just 11 days later, claimant filed Review Petition II, alleging further injuries to his neck and four herniated discs. A very heads-up employer filed an answer raising *res judicata*. All injuries had been adjudicated in Review Petition I, according to employer.

Claimant protested that Section 413(a) allows a WCJ to amend a description of injury "at any time" if it is proven that the description is incorrect. Also, there was no identity of issues with Review Petition I, since there was no mention of any neck injury in that litigation.

But claimant had neck pain immediately after the injury. When he first saw his doctor on March 27, 2006, his doctor told him that his neck problem was related to his injury, and an MRI found the herniated discs on April 25, 2006, all dates prior to the May 30, 2006 circulation of the decision on Review Petition I. In fact, as the court notes, he signed Review Petition II only 5 days after sending his stipulation to the WCJ on Review Petition I.

Issue:

Important case where there are multiple review petitions filed at different times to add additional injuries. If claimant suffers a shoulder injury, admitted by NCP, and later files a successful review petition to add additional shoulder injuries, can claimant some time later file another review petition to add neck injuries?

Holding.

Not if the neck injuries were known to claimant at the time of the pendency of the first review petition. The issue in Review Petition I was the correct description of all injuries suffered by claimant on October 21, 2005, so the issues were identical to the issues raised by Review Petition II. Moreover, The fact that Section 413(a)

allows a WCJ to amend a description of injury "at any time" if it is proven that the description is incorrect must be read so as not to conflict with traditional notions of technical *res judicata*. Since claimant's neck problems were known to claimant and had been diagnosed during the pendency of the first review petition, claimant could not later re-litigate the accuracy of the description of injury once that review petition had been decided (in this case by Stipulation). The court specifically distinguishes this situation from repeated modifications by supplemental agreement.

5. Commonwealth of Pa. Dept. of Pub. Welfare v. WCAB (Harvey), 2008 Pa. Commw. LEXIS 586, November 26, 2008.

Essential Facts:

State employee suffered a work injury in 2001 and began receiving TTD. In 2005, the state agency for whom he worked filed a Notice of Benefit Offset. Claimant filed a Petition to Review the Benefit Offset. Claimant presented no testimony. Employer presented the testimony of the Director of Benefit Determination for the State Employees' Retirement System (SERS) and the testimony of an actuary, who does consulting work for SERS. The WCJ accepted the testimony of both witnesses and dismissed claimant's petition.

On appeal, the Board remanded to the WCJ for credibility findings, and for other "critical" findings, including evidence on "the actual present value of claimant's pension fund contributions based on the historical rates of return on the SERS pension fund."

The state agency appealed, and, naturally, claimant moved to quash the appeal, since the remand order was interlocutory and not final.

Issue:

Where a WCJ affirms an employer's pension offset based upon actuarial testimony that is substantially the same as testimony offered in two prior cases in which that testimony was found to be legally sufficient to sustain the offset, can the Board remand for further evidence that may shed more light on alternative methods to calculate the proper offset?

Holding:

No. Contrary to the Board's opinion, the WCJ had made specific credibility findings in this case, which could not be disturbed. Moreover, the Board's remand order was in direct contradiction to prior holdings of Commonwealth Court affirming the propriety of the same actuarial analysis specifically approved by the WCJ in this case. In fact, one of those cases involved the Department of Public Welfare, the same state agency as in the present case. Once the WCJ made his credibility determinations and accepted the actuarial analysis, the Board could not remand for further proceedings. This is a rare case of Commonwealth Court allowing a direct appeal from a remand order.