MARCH 2009 CASE LAW UPDATES

Calex, Inc. and Inservco v. WCAB (Vantaggi), No. 1788 C.D. 2008 (Pa. Commw., 3/26/09)

Whether a medical expert's failure to review all medical records render the opinion incompetent. Whether the Act requires an employer to reimburse a claimant for premium payments made to secure comprehensive health insurance.

Claimant alleged a work-related low back injury. Claimant was involved in a motor vehicle accident on 1/ 14/ 06. Claimant filed a Claim Petition alleging an aggravation of low back and psychosis as a result of a closed brain injury, but later amended the petition to withdraw the claim for a psychiatric injury.

Claimant testified that he reported complaints of low back pain with stiffness in his neck and upper shoulders and numbness in his leg. Claimant denied problems prior to 3/ 2006 when he began to develop headaches and pain above his right eye. Claimant continued to work until 4/2006.

Claimant's medical expert testified with respect to claimant's neck and right upper extremity pain, as well as numbness, severe headaches and diminished strength on the right side. Claimant's medical expert also testified that claimant had not experienced any cervical problems prior to the accident but conceded the claimant did not provide him with all of the claimant's prior medical records. As such, the claimant medical expert conceded that his opinion with respect to the cervical condition was based upon the claimant's description of the motor vehicle accident. Claimant's medical expert also testified that it was unclear whether the edema and micro fractures noted on MRI were related to trauma or degenerative changes.

Defendant's medical expert noted that claimant's cervical condition could not be related to the work injury as claimant presented with only low back complaints until 6/ 2006, at which time claimant complained of cervical pain. Defendant's medical expert also noted that if claimant had injured his neck claimant would have experienced immediate and significant neck symptoms, which would not have escaped detection in a medical examination.

Claimant ultimately underwent a cervical fusion.

The WCJ found claimant to be credible. Likewise, the claimant's medical expert was found to be more credible than defendant's medical expert. The WCJ also acknowledged there were no medical records documenting claimant's neck problems until six months after the motor vehicle accident. The WCJ ultimately granted claimant's petition for an aggravation of claimant's pre-existing neck and back degenerative disease and awarded temporary total disability benefits

from 4/9/06 and ongoing. The WCJ also granted claimant's request for reimbursement of COBRA costs. The WCAB affirmed and the employer appealed to the Commonwealth Court. Employer asserted the medical evidence does not satisfy claimant's burden of proving that his neck problems are causally related to the motor vehicle accident and that the WCJ erred by awarding reimbursement of claimant's COBRA premiums.

The Commonwealth Court rejected employer's argument that claimant's description of injury changes from the time he initially treated to the time his medical expert testified. Despite noting that the medical records do not comport to claimant's complaints of neck pain, the Court relied upon the WCJ's credibility determinations. The Court further noted that there is no requirement for a medical expert to review all medical records.

The Commonwealth Court affirmed that the WCJ erred by awarding reimbursement of claimant's COBRA premiums as the Act does not require an employer to reimburse a claimant for premium payments made to secure comprehensive health insurance.

Ostrawski v. WCAB (UPMC Braddock Hosp.), No. 497 C.D. 2008 (Pa. Commw., 3/26/09)

Whether a claimant's potential earning power should be been included in the average weekly wage calculation.

Claimant sustained a work-related right foot fracture while working as a security guard. At the time of his injury, claimant had concurrent employment and tendered his resignation from the concurrent employer in anticipation of starting a new job. Claimant's termination from his concurrent employer was prior to the surgery necessitated by his work-related injury with the employer. Post-surgery, claimant was released to return to work in a modified duty capacity and partial disability benefits were paid pursuant to his modified duty position.

Claimant filed a Petition to Review Compensation Benefits asserting his weekly benefits did not include his concurrent employment in the calculation of the average weekly wage. Claimant also filed a Penalty Petition asserting that employer was aware of the concurrent employment and failed to include the wages in the average weekly wage calculation. Claimant also filed a Modification Petition upon the basis that claimant could not perform the anticipated job with the new employer.

Claimant testified that he was capable of performing his full-time employment with the employer and the concurrent employer after the work injury. Claimant further testified that he was selected for the position with the new employer but never began working due to contractual problems between this employer and the third party.

The WCJ concluded the claimant had concurrent employment and was entitled to include the wages in the calculation of his average weekly wage. The WCJ also concluded that the employer was aware of the claimant's current employment. The WCJ granted each of claimant's petitions, granted a 20% penalty but denied claimant's request for attorney's fees.

The WCAB reversed the WCJ's grant of claimant's Review and Modification Petitions and remanded the matter for the WCJ to reconsider the award of penalties. On remand, the matter was assigned to a second WCJ, who concluded no penalties should be awarded to claimant despite a finding that the employer technically violated the Act. Claimant appealed the WCJ's Decision, which was affirmed by the WCAB.

Claimant appealed to the Commonwealth Court arguing that his potential earning power should be been included in the average weekly wage calculation. Claimant argued that the focus should not be on the difference between the pre-injury and the post-injury earnings, but rather pre-injury earnings and post-injury earning power. The Commonwealth Court rejected this argument noting that the initiation of actual employment is essential for a claimant's status

to constitute concurrent employment. The Court noted that when the claimant resigned his concurrent employment for reasons unrelated to the work injury, that position no longer provided him with concurrent wages.

Fox v. WCAB (Peco Enegry Company), No. 1774 C.D. 2008 (Pa. Commw., 3/23/09)

Whether the employer has subrogation rights where a governmental entity is the third-party tortfeasor.

Claimant sustained a work-related right ankle injury for which $47,813.79 in worker's compensation indemnity and medical benefits were issued. Claimant brought a civil action against the City of Philadelphia asserting the injury was due to the City's negligence and sought damages. Claimant eventually entered into a settlement agreement with the City in the amount of $150,000 plus indemnification by the City of any subrogation he had to pay to the employer. The City also agreed to represent the claimant with regard to any subrogation claim brought by employer.

Employer filed a Petition to Review Compensation Benefits seeking recovery pursuant to §319 of the Act. The parties entered into a stipulation of facts confirming claimant's $150,000 settlement recovery, litigation costs totaling $6,424.75 in connection with the third-party action, attorney's fees associated with the third-party action totaling $60,000 and payment of $47,813.79 in worker's compensation benefits. Claimant also asserted the employer could not recover its lien against claimant pursuant to §23 of Act 44. Claimant also asserted the City was entitled to a credit under the Tort Claim ct, which limits the amount of damages that are recoverable when a claimant receives or is entitled to receive insurance proceeds.

The WCJ accepted the stipulation of facts and concluded the employer had a right to subrogation against claimant's third-party recover because the employer was not attempting to file an action directly against the City, and as such, the immunity did not apply. The WCAB affirmed, which also noted §23 of Act 44 did not excuse a claimant from his obligation to reimburse an employer pursuant to §319. The WCAB also found that the Tort Claims Act did not allow the City to take a credit for amounts paid for workers' compensation against the amount it owed for the third-party tort settlement.

The Commonwealth Court affirmed, noting §23 of Act 44 does not make a governmental employer immune from subrogation. The Court also noted that granting a governmental immunity does not affect the employer's right to seek reimbursement from a claimant for a tort recovery that the claimant received from a governmental entity for the same work-related injury that employer paid compensation. Additionally, the plain language of §23 of Act 44 provides governmental agencies with immunity from claims that failed in order to protect an employer's workers' compensation subrogation claim. Lastly, the employer is not seeking to recover subrogation lien money from the City but rather the settlement already received by the claimant.

Liverinhouse v. WCAB (ADECCO), No. 1639 C.D. 2008 (Pa. Commw., 3/19/09)

Whether the WCJ erred as a matter of law in rendering medical findings not based upon the proffered medical evidence.

Claimant, *pro se*, sustained a work-related injury and that the Notice of Compensation Payable described the injury as a right shoulder sprain. Employer filed a Termination Petition alleging a full recovery. Employer also filed a Suspension Petition based upon a specific job offer. Claimant filed a Review Petition seeking to amend the description of injury to include cervical and shoulder strain as well as carpal tunnel syndrome. The employer stipulated to the cervical and shoulder strain but contested the carpal tunnel syndrome as being work-related.

The WCJ concluded claimant had fully recovered from her cervical and shoulder strain. The WCJ also found that claimant could return to work without restrictions. The WCJ terminated claimant's benefits and dismissed claimant's Review Petition. The WCAB affirmed the WCJ's Decision concluding the WCJ's findings were supported by the evidence of record.

Claimant appealed to the Commonwealth Court alleging errors in the fact-finding process, which vacated the WCAB Decision and remanded the matter. The Court noted that the WCAB erred in concluding the evidence of record supported the WCJ's findings that claimant did not suffer work-related carpal tunnel syndrome as all of the experts diagnosed claimant with carpal tunnel syndrome. The Court further noted that contrary to the medical evidence, the WCJ derived his own medical opinion.

Matthews v. WCAB (Elwyn Institute), No. 1413C.D. 2008 (Pa. Commw., 3/12/09)

Whether the claimant must provide actual notice of an alleged aggravation of a work-related injury or if imputed notice of her additional injuries is sufficient.

Claimant filed a Claim Petition alleging a left knee injury. Claimant testified that she first injured her left knee on 1/ 16/ 03 and first sought treatment on 2/ 27/ 03. She continued to work until April when she was hit again in the left knee by another resident. Claimant was diagnosed with a blood clot of the lung, which she believed was related to the January 2003 knee injury. Claimant also conceded that she was involved in a motor vehicle accident while driving to physical therapy and that she also injured her knee at her sister's house. Medical evidence was submitted by both parties.

The WCJ granted claimant's Claim Petition for a closed period finding that claimant was fully recovered from the left knee injury as of 4/16/04. The WCJ found that claimant had sustained a blood clot as a result of the September 2003 motor vehicle accident, but that this accident was not related to the work injury. Both parties appealed.

The WCAB vacated, in part, the WCJ's Decision. The WCAB observed that if claimant's accident had occurred en route to physical therapy, injuries sustained in that accident would be compensable. The WCAB also specifically noted that claimant's injuries sustained in the auto accident were separate and distinct from the 1/ 16/ 03 injury and that claimant had the burden of proof on each element of her claim for injuries sustained in the motor vehicle accident.

On remand neither party produced additional evidence. The WCJ found that claimant's injury should be amended to include re-injury of the left knee, an injury to her back and a blood clot in her lung as a result of the September 2003 motor vehicle accident. The WCJ also found that claimant was totally disabled and awarded ongoing total disability benefits.

The employer appealed alleging the WCJ erred in awarding benefits for injuries sustained in the motor vehicle accident because the employer never received notice from the claimant that she believed the injuries were compensable. The WCAB agreed and reversed the WCJ's Decision. Claimant appealed to the Commonwealth Court.

On appeal, claimant asserts the employer did not preserve its lack of notice argument. Claimant also contends that she was not required to give employer notice of the 9/ 9/ 03 work injury because notice was provided for the 1/ 16/ 03 work injury. Claimant also asserted that the employer had imputed notice of her additional injuries.

The Court rejected claimant's arguments noting that the employer had no reason to raise the notice issue to the WCAB as the WCJ determined the auto accident was not work-related. In its appeal of the second WCJ Decision, the employer did raise the issue that notice was not provided by the claimant. Accordingly, the Court concluded that notice issue was properly addressed by the WCAB.

The Court also rejected claimant's second argument that notice of the 9/ 9/ 03 incident was not necessary as notice was provided for the 1/ 16/ 03 work injury. The Court concluded that an aggravation of a pre-existing condition is deemed a new injury for purposes of the Act. Claimant was required to present evidence on each element for her 9/ 9/ 03 injury to be held compensable, but claimant failed to do so.

The Court also rejected claimant's argument that employer had imputed notice of her additional injuries. In this case claimant completed an incident report but did not testify the pulmonary embolus was reported on the form. Additionally, claimant did not state on her Claim Petition that she was seeking compensation for the injuries that occurred on 9/ 9/ 03. Ultimately, the Court concluded claimant failed to communicate to the employer that she was injured in the course and scope of employment on 9/9/03.

Consol PA Coal Company – Enlow Fork Mines v. WCAB (Whitfield), No. 971 C.D. 2008 (Pa. Commw., 1/8/09) * previously unreported

Whether the employer has an obligation to provide evidence of work availability with the claimant is released to return to any employment without conditions.

Claimant sustained a work injury in the nature of a left forearm fracture. Claimant underwent treatment, including surgery, and was ultimately released to return to work by his treating physician on a full-time basis without restrictions. Claimant testified that he believed he was removed from the employer's payroll as he was out of work for more than one year, but he was not formally notified by the employer. Employer presented no evidence of work availability and did not dispute claimant was no longer employed by the employer.

The WCJ relied upon Landmark Constructors, Inc. v. WCAB (Costello), 747 A.2d 850 (Pa. 2000), concluding the employer is required to show job availability in a case where the claimant was released to return to his pre-injury job without restrictions. Because the employer presented no evidence regarding available jobs, the WCJ denied the Suspension Petition.

The WCAB affirmed the WCJ's Decision, noting the employer is not alleviated from demonstrating job availability through a mere showing of increased capacity regardless of how great the capacity may be. The WCAB also distinguished the case of Harle v. WCAB (Telegraph Press, Inc.), 658 A.2d 766 (Pa. 1995), noting that in Harle showing job availability was unnecessary where the claimant was already performing his pre-injury job with another employer.

Employer petitioned for review of WCAB affirming WCJ Decision denying employer's Suspension Petition. The Commonwealth Court relied upon Kachinski v. WCAB (Vepco Construction Company), 532 A.2d 374 (Pa. 1987), noting the procedural requirements for the employer's burden of proof in modifying benefits rejecting employer's argument that claimant had no residual disability in the present case (loss of earning power directly attributable to the injury) and therefore the employer has not burden to establish suitable employment.

The Court further noted that reading Harle to allow for the modification of benefits simply upon a showing that an employee can return to his previous position without restriction is inappropriate as demonstrating that an employee can return to work is quite different than demonstrating that an employee did return to a position identical to his or her pre-injury position and such a reading would obliterate the seminal decision in Kachinski and undermine the employer's obligation under the Act. Accordingly, the Court concluded the employer must demonstrate job availability.

Consolidation Coal Company v. WCAB (Albani), No. 2216 C.D. 2008 (Pa. Commw., 3/5/09)

Whether the Hensal rationale applies solely to multiple employer pension plans or to all collectively funded benefit plans.

Claimant sustained a work-related injury. Employer was a contributing employer to the UMWA Health & Retirement Funds 1974 Pension Plan (Plan). Prior to working for the employer, claimant worked for approximately 17 ½ years for other employers who also contributors to the Plan. Claimant began receiving $662.00 per week in workers' compensation benefits and was also awarded disability pension benefits in 2003, receiving $17,061.44 in back payments. Claimant then began receiving $1,386.37 gross and $1,180.37 net in ongoing disability pension benefits.

On 8/ 9/ 08, employer issued a Notice of Workers' Compensation Benefits Offset seeking a weekly credit of $139.74 against claimant's pension. Employer also asserted claimant received an overpayment of $18,485.60 in workers' compensation benefits. Employer notified claimant that his workers' compensation benefits were suspended for 35 weeks with a subsequent deduction of $206.50 to recoup the overpayment. Claimant then filed a Review Petition.

Defendant presented the Plan actuary, while claimant testified and presented the testimony from the Plan comptroller. Ultimately, the WCJ found the testimony from the actuary to be credible. The WCJ denied claimant's Review Petition and concluded that the employer was not entitled to receive recoupment for the period preceding employer's issuance of its notification that it would be taking a credit. Consequently, the employer was entitled to a 51.12% credit from the pension (the contribution rate by the employer) for a weekly credit of $139.74 for a total credit of $11,318.94 for the period of 3/11/03 – 8/15/04. Both parties appealed.

The WCAB reversed the WCJ's Decision to the extent that it denied Claimant's Review Petition. The WCAB held that the actuarial testimony presented by the employer was not sufficient to support employer's right to an offset because the testimony did not comport to the requirements of 34 Pa. Code § 123.10, which states in relevant part,

> (a) When the pension benefit is payable from a multi-employer pension plan, only that amount which is contributed by the employer directly liable for the payment of workers' compensation shall be used in calculating the offset to workers' compensation benefits.
>
> (b) To calculate the appropriate offset amount, the portion of the annuity purchased by the liable employer's contributions shall be as determined by the pension fund's

> actuary. The ratio of the portion of the annuity purchased by the liable employer's contributions to the total annuity shall be multiplied by the net benefit received by the employee from the pension fund on a weekly basis. The result is the amount of the offset to be applied to the workers' compensation benefit on a weekly basis.

The WCAB noted that the actuary did not base her calculations on the actual amounts contributed by employer concluding the actuary refused to consider evidence with respect to the hours worked by each employee for each company during a particular period of employment and the applicable rates.

The WCAB also found that Pennsylvania State University v. WCAB (Hensal), 911 A.2d 225 (Pa. Commw. 2006), was not controlling because Hensal involved a ***multiple*** employer pension plan, whereas this case involved a ***multi-employer*** pension plan.

Employer then petitioned the Commonwealth Court for review of the WCAB order. The Court concluded that Hensal is controlling in this case. The Court further noted that the rationale of Hensal is applicable to ***all*** collectively funded benefit plans, not merely to multiple employer plans, noting that collective funding and the potential for post-retirement funding create unique hurdles to proving an employer's defined benefits contribution for pension offset purposes.

Further, the Commonwealth Court relied upon Section 204(a) of the Act, which states,

> (a) No agreement, composition, or release of damages made before the date of any injury shall be valid or shall bar a claim for damages resulting therefrom; and any such agreement is declared to be against the public policy of this Commonwealth. The receipt of benefits from any association, society, or fund shall not bar the recovery of damages by action at law, nor the recovery of compensation under article three hereof; and any release executed in consideration of such benefits shall be void: Provided, however, That if the employe receives unemployment compensation benefits, such amount or amounts so received shall be credited as against the amount of the award made under the provisions of sections 108 and 306, except for benefits payable under section 306(c) or 307. Fifty per centum of the benefits commonly characterized as "old age" benefits under the Social Security Act (49 Stat. 620, 42 U.S.C. 301 et seq.) shall also be credited against the amount of the payments made under sections 108 and 306, except for benefits payable under section 306(c): Provided, however, That the Social Security offset shall not apply if old age Social Security

> benefits were received prior to the compensable injury. The severance benefits paid by the employer directly liable for the payment of compensation and the benefits from a pension plan ***to the extent funded*** by the employer directly liable for the payment of compensation which are received by an employe shall also be credited against the amount of the award made under sections 108 and 306, except for benefits payable under section 306(c). The employe shall provide the insurer with proper authorization to secure the amount which the employe is receiving under the Social Security Act.

On the basis of Pennsylvania State University v. WCAB (Hensal), 911 A.2d 225 (Pa. Commw. 2006), the Court reversed and remanded the matter to the WCAB for further proceedings.

Ward v. WCAB (City of Philadelphia), No. 1775 C.D. 2008 (Pa. Commw., 3/2/09)

Whether the claimant sustained his burden of proving a worsening of condition after modification of benefits due to claimant's prior bad-faith failure in applying for available positions.

Claimant sustained work-related strain/ sprain of the neck and the low back. Claimant performed light duty for a short period of time but subsequently began receiving total disability benefits. Claimant's benefits were then modified based upon claimant's failure to apply in good-faith for occupationally appropriate position. Attempts to terminate claimant's benefits were unsuccessful and claimant continued to receive partial disability benefits. Claimant then filed a Petition to Reinstate total disability benefits alleging total disability. During the course of the WCJ's proceedings, claimant exhausted his right to partial disability benefits.

Claimant testified and presented medical evidence from his family physician and his orthopedic surgeon. The WCJ found the orthopedic surgeon did not testify that claimant's condition worsened and also found the testimony of the family physician to be irrelevant to the pending litigation as the claimant's family physician was contrary to previously established facts that claimant was capable of working with restrictions.

The WCJ denied claimant's petition noting claimant did not establish that his physical condition worsened such that he could no longer perform the position previously identified as available to claimant. The WCAB affirmed.

The Commonwealth Court affirmed, noting the claimant's testimony failed to demonstrate how his current condition affected his ability to perform the position previously identified as available and refused in bad-faith by claimant. The Court also rejected claimant's argument that the WCJ capriciously disregarded competent evidence.

City of Philadelphia v. WCAB (Grevy), No. 924 C.D. 2008 (Pa. Commw., 3/27/09)

Whether employer is entitled to a dollar for dollar credit/ offset for 100% of the disability pension benefits paid to claimant or whether employer is entitled to an offset/ credit only to the extent that employer funded such benefits.

Claimant sustained a work-related puncture wounds to his left upper back, arm and lung as a result of being stabbed by an inmate while working as a correctional officer for employer. Claimant was disabled as a result of the injuries. Claimant was separated from his employment due to his injuries, and following separation, claimant applied for service-connected disability pension benefits. As part of the application process, claimant signed a document entitled "Agreement RE: Workmen's Compensation," which discussed the interplay between workers' compensation benefits and service-connected disability pension benefits paid or payable to claimant. After claimant was awarded pension benefits, employer ceased paying workers' compensation benefits to claimant.

Claimant filed two Reinstatement Petitions and two Penalty Petitions. Claimant alleged entitlement to reinstatement of benefits and violations of the Act by ceasing payments without following the proper procedures. Employer filed a Modification Petition seeking an offset/credit against claimant's disability pension benefits.

The WCJ concluded payment to claimant of disability pension was in lieu of workers' compensation and that employer was entitled to a dollar for dollar offset/ credit against claimant's workers' compensation for the pension benefits paid to claimant. The WCJ also concluded the employer violated the Act by ceasing payment of claimant's workers' compensation benefits without obtaining of filing a supplemental agreement, final receipt, notice of order from the BWC; thus, penalties were awarded. The WCJ also found employer's contest was unreasonable in part. The WCJ dismissed claimant's Reinstatement Petitions, granted claimant's Penalty Petitions and granted employer's modification petition.

Claimant appealed to the WCAB arguing the WCJ erred by concluding employer was entitled to a dollar for dollar offset/ credit for 100% of the pension benefits when section 204(a) permits an offset/credit only to the extent that employer funded such benefits. The WCAB affirmed the WCJ's grant of the Modification Petition but remanded the matter to determine the amount of offset/credit to which employer was entitled.

Based upon actuarial testimony on remand, the WCJ concluded employer was entitled to a 73.149% offset/ credit. Claimant appealed to the WCAB as did the employer. The WCAB concluded the actuarial testimony was sufficient and affirmed the WCJ's Decision on remand. Employer appealed to the Commonwealth Court.

Employer argued the WCAB erred in reversing and remanding the WCJ's initial Decision where the WCJ concluded employer was entitled to a dollar for dollar credit for pension benefits paid. Essentially, employer argued it is entitled to a dollar for dollar offset/ credit for 100% of the disability pension benefits paid because those benefits were paid to claimant in lieu of workers' compensation.

The Commonwealth Court affirmed the WCAB, concluding that the WCAB acted properly in awarding employer an offset/ credit and in remanding the matter back to the WCJ to render a determination as to the extent of the offset/ credit to which employer was entitled where employer established that it contribute some amount of money to the pension fund each year based on the actuarial evaluation, but did not establish what amounts were contributed to the pension plan of which the claimant was a member for the years in question.

City of Philadelphia v. WCAB (Calderazzo), No. 923 C.D. 2008 (Pa. Commw., 3/27/09)

Whether employer is entitled to a dollar for dollar credit/ offset for 100% of the disability pension benefits paid to claimant or whether employer is entitled to an offset/ credit only to the extent that employer funded such benefits. Whether employer can unilaterally cease workers' compensation benefits based upon its entitlement to an offset/ credit for disability pension benefits.

Claimant sustained a work-related injury to her shoulder, neck, arm, hand, leg and buttocks while employer as a police officer as a result of a motor vehicle accident. Claimant was awarded temporary total disability benefits in the amount of $497.68 per week. Three years later claimant was separated from her employment for reasons related to her work injuries; thereafter, claimant applied for service-connected disability pension benefits. As part of the application process, claimant signed a document entitled "Agreement RE: Workmen's Compensation," which discussed the interplay between workers' compensation benefits and service-connected disability pension benefits paid or payable to claimant. Claimant was awarded disability pension benefits in the amount of $509.06 per week.

Claimant filed a Reinstatement Petition and a Penalty Petition alleging that the employer unilaterally ceased paying workers' compensation benefits and that she was entitled to reinstatement of the same. Claimant filed a second Penalty Petition alleging the failure to reimburse her for work-related prescription expenses.

The WCJ concluded that employer was entitled to a credit/ offset of claimant's workers' compensation benefits against her disability pension benefits pursuant to the Pension Agreement. The WCJ also concluded that claimant was not entitled to a reinstatement of her workers' compensation benefits because claimant agreed to a suspension of such benefits in the Pension Agreement. The WCJ further concluded that the employer violated the Act by failing to file the Pension Agreement with the BWC, and as a result, granted a 20% penalty.

Both parties appealed to the WCAB, which concluded the WCJ did not err in determining that employer had violated the Act and was subject to penalties, but also concluded the WCJ did err in determining that claimant had agreed to a suspension of her workers' compensation benefits by signing the Pension Agreement. The WCAB also noted that the WCJ failed to consider employer violated the Act by failing to enter into a Supplemental Agreement or obtain an appropriate order to suspend claimant's benefits. The matter was remanded to the WCJ to reconsider the penalty award.

Moreover, the WCAB concluded that the WCJ erred in granting employer an offset/ credit and in failing to reinstate claimant's benefits. The WCAB concluded that claimant's disability

pension benefits were payments in lieu of workers' compensation benefits and that employer failed to meet its burden of presenting evidence to establish the extent that it funded the plan. Therefore, the WCAB reversed the WCJ's denial of claimant's Reinstatement Petition and also remanded the matter for the WCJ to award unreasonable contest attorney's fees.

Employer subsequently filed a Petition for Review, which was quashed b the Commonwealth court, concluding the WCAB's interlocutory order was not immediately appealable.

A remand hearing was held and a Decision issued. The WCJ assessed a 35% penalty on wage loss benefits due and unreasonable contest attorney's fees were awarded. Employer appealed the WCJ's Decision on the remand to the WCAB, which was affirmed. Employer appealed to the Commonwealth Court asserting the WCAB erred in denying an offset/ credit for the disability pension benefit, the WCJ and WCAB erred in assessing penalties and the WCJ and WCAB erred in assessing unreasonable contest attorney's fees.

The Court concluded the employer was entitled to an offset/ credit as employer satisfied its burden of proving that the disability pension benefits paid to claimant were payments in lieu of workers' compensation. The Court noted that the pension benefits paid to claimant were for the same injury for which she was receiving workers' compensation and her receipt of pension benefits were not conditioned upon years of service. Moreover, the Pension Agreement contains express language indicating the pension will be reduced by workers' compensation benefits. As such, employer was entitled to an offset/ credit for the disability pension benefits paid to claimant.

Further, the Court noted the WCAB should have remanded the matter back to the WCJ for the purposes of receiving actuarial testimony regarding employer's contributions during the years relevant to this matter and rendering a determination as to the amount of the offset to which employer is entitled. City of Philadelphia v. WCAB (Grevy), No. 924 C.D. 2008 (Pa. Commw., 3/27/09).

The Court also affirmed the award of penalties rejecting employer's argument that it was allowed to take cease workers' compensation payments based upon its entitlement to an offset/ credit for the disability pension benefits paid to claimant as employer unilaterally suspended claimant's benefits without following the procedures outlined in the Act.

Lastly, with respect to unreasonable contest attorney's fees, the Court concluded that employer successfully proved its entitlement to an offset/ credit for disability pension benefits, and as such, employer had a reasonable basis for contesting claimant's Reinstatement Petition. However, employer also unilaterally claimant's benefits, which resulted in an unreasonable contest with respect to the claimant's Penalty Petitions.

The matter was remanded for receipt of actuarial evidence regarding employer's contributions and its entitlement to the offset/ credit. The matter was also remanded for reconsideration of the amount of the penalty. Lastly, the matter was remanded for the WCJ to recalculate the amount of the unreasonable contest attorney's fees.