

**SIGNIFICANT CASE LAW DEVELOPMENT  
IN THE PENNSYLVANIA WORKERS' COMPENSATION ACT**

**By MITCHELL I. GOLDING, ESQ.  
CAMPBELL, LIPSKI & DOCHNEY**

**SEPTEMBER 2014 NEWSLETTER**

**CREDIT/PENSION OFFSET**

- The Employer who funded the claimant's pension benefit was the same entity who paid the claimant's workers' compensation for purposes of Section 204(a) of the Act, and thus entitled to a pension benefit offset, where the claimant's time of injury named employer had acquired the claimant's prior named employer who funded 95.71% of Claimant's pension benefit in a "merger and fast purchase", meaning they had acquired the stock of former employer.

This meant that the claimant's employer who funded 95.71% of Claimant's pension was a wholly-owned subsidiary of claimant's employer who paid his workers' compensation.

When the operations of the two corporations merged the claimants newly named employer assumed responsibility for Claimant's work injury on behalf of claimant's prior named employer, who remained Claimant's employer, which entitle the employer to the offset. To hold otherwise would effectively erase the prior named employer's contributions to Claimant's pension. It would also result in a windfall for Claimant in violation of Section 204(a) of the Act

Although this matter did not involve a merger governed by Section 1929 of the Business Corporation Law of 1988, the principle applied that the surviving corporation succeeds to both the rights and liabilities of the constituent corporation.

- Section 204(a) of the Act provides that 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 employee shall also be credited against the amount of the employee's disability benefits.

The party seeking to change the status quo in a workers' compensation case bears the burden of proof. When the change to the status quo is a reduction due to pension offset, the employer bears the burden of proving the extent to which it funded the pension plan in question.

## **FACTS**

Claimant began working for Marianna on January 4, 1973.

On September 1, 2000, FairPoint acquired Marianna. Claimant continued to be an employee of Marianna, but the Human Resources Department for all employees of all FairPoint subsidiaries was managed by FairPoint.

Although not specifically explained, it appears that all employees in the “FairPoint family of subsidiaries” were covered by the same workers’ compensation plan or policy

On June 13, 2008, Claimant sustained a compensable back injury.

Claimant was off work from June 16, 2008, through November 11, 2008. Claimant returned to light-duty work on November 12, 2008, but went off work a day and a half later because of pain from his injury; he did not believe he could perform the light-duty position.

Claimant did not work after November 13, 2008.

Claimant began receiving workers’ compensation benefits at a rate of \$733.67 per week pursuant to a NCP.

On June 28, 2010, Claimant notified FairPoint in writing of his intention to retire on July 1, 2010.

On January 4, 2011, FairPoint filed a Notice Of Workers’ Compensation Benefit Offset, alleging that an offset of \$454.58 per week would be charged against Claimant’s workers’ compensation disability. This offset was based upon the percentage of Claimant’s pension benefit that was employer-funded.

Claimant filed a petition to review compensation benefit offset alleging that because Marianna, not FairPoint, had funded the pension plan, FairPoint was not entitled to an offset.

Fairpoint’s witness testified that FairPoint’s acquisition of Marianna as a “merger and fast purchase.” Specifically, FairPoint acquired the stock of Marianna. Marianna was a wholly-owned subsidiary of FairPoint. However, the operations of the two corporations were merged, and FairPoint managed all personnel matters. This includes FairPoint’s control of the workers’ compensation benefits of all employees in all the FairPoint subsidiaries. Stated otherwise, when FairPoint assumed responsibility for Claimant’s work injury, it did so on behalf of Marianna, which remained Claimant’s employer

The WCJ finding employer's evidence denied Claimant's petition to review offset. The WCJ found that, as a result of FairPoint's acquisition of Marianna, FairPoint and Marianna were the same entity for the purpose of determining whether Claimant's compensation benefits were subject to an offset. The WCJ found that Claimant's weekly compensation disability rate was \$310.40 after the offset was applied.

The WCAB affirmed the WCJ holding that FairPoint succeeded to Marianna's right to a pension offset. The WCAB further held that the WCJ erred in the calculation of Claimant's modified weekly benefit rate. The Board found that applying the offset of \$423.27 per week to Claimant's modified weekly disability benefit of \$123.01 reduced Claimant's weekly compensation benefit to \$0.

Claimant's appeal followed.

## **ISSUE**

Whether the employer was entitled to the pension offset where the company whose stock was acquired by employer funded the pension?

## **HOLDING OF THE COMMONWEALTH COURT**

The employer was entitled to the offset.

When the operations of the two corporations merged the claimants newly named employer assumed responsibility for Claimant's work injury on behalf of claimant's prior named employer, who remained Claimant's employer, which entitle the employer to the offset.

To hold otherwise would effectively erase the prior named employer's contributions to Claimant's pension. It would also result in a windfall for Claimant in violation of Section 204(a) of the Act

Although this matter did not involve a merger governed by Section 1929 of the Business Corporation Law of 1988, the principle applied that the surviving corporation succeeds to both the rights and liabilities of the constituent corporation.

## **PRACTICAL APPLICATION**

The court will look carefully at the nature of the nature of the acquisition and merger upon determining whether the succeeding entity is entitled to the offset.

It would be advantageous to the defense practitioner to have a specialist in corporate law assist in the analysis of such issues.

## **PLEADINGS/MEDICAL TREATMENT/ CONSTITUTIONALITY**

- Strictness of pleadings is not required in workers' compensation matters. Therefore, the employer did not waive the issue of compensability of Ayurvedic therapy by failing to expressly plead the defense.
- Services provided by non-licensed medical providers are only compensable if they are provided under the supervision of or upon referral by a licensed practitioner.

Ayurvedic treatments, which consist of massages and oil treatment, received in India were not compensable where there was no evidence that the claimant, a LPN, was trained in massage therapy or that she exercised supervisory control over the practitioners in India or in any way guided them during the provision of Ayurvedic treatments. Therefore the claimant failed to establish either that the Ayurvedic services were provided under the supervision of, or upon referral or prescription from, a licensed Pennsylvania health care practitioner.

- The services of a massage therapist, who is not licensed or otherwise authorized by the Commonwealth to provide health services, are not reimbursable under the Act, even if the services are prescribed by a health care provider.
- Section 109 of the Act limiting payment of medical bills to services by Pennsylvania licensed health care providers is not unconstitutional under the equal protection clauses of both Pennsylvania and the United States Constitutions, as well as under the Commerce Clause of the United States Constitution.

This is because no legislative distinction is been made between non-injured and injured workers since the Act does not address non-injured workers, and the Act applies equally to all individuals receiving workers' compensation benefits. Because no classification for the unequal distribution of benefits had been created, there is no equal protection violation.

Section 109 of the Act does not violate the Commerce Clause because the law does not mandate that only in-state providers may be licensed in Pennsylvania, and is not facially discriminatory since out-of-state providers are treated no differently than in-state providers; all health care providers must be licensed by Pennsylvania.

*Babu, v. WCAB (Temple Continuing Care Center) 166 C.D. 2014 (Decision by Judge Colins, September 15, 2014) 9/14*

## **FACTS**

Claimant, a LPN, suffered a compensable injury on February 28, 2000.

The claimant was awarded workers' compensation after successfully litigating a Claim Petition. The claimants appealed certain findings to the WCAB who remanded this

matter back to the WCJ regarding Ayurvedic medical treatment Claimant sought in 2001 for the February, 2000 work injury.

The WCJ affirmed his decision and the Commonwealth Court, in an unpublished decision held:

*Services provided by non-licensed medical providers are compensable if they are provided under the supervision of or upon referral by a licensed practitioner. ... In addition, employers are only required to pay medical expenses that are causally related to the work injury. ... The Ayurvedic treatment fails both of these requirements. There was no evidence that the treatment Babu underwent was pursuant to prescription or referral, and in fact, Babu's own expert said she would not prescribe it. In addition, the WCJ found that the bill did not sufficiently explain what procedures were done, making the determination of whether the treatment was work-related impossible. Because both of these defects are sufficient to deny reimbursement, the WCJ properly found the Ayurvedic treatment was not compensable.*

As a result of the subsequent June 8, 2008 work injury, Claimant filed a Claim Petition on February 17, 2009 alleging injuries to her left shoulder, neck, left upper extremity, and right shoulder, seeking weekly indemnity and medical benefits.

The claimant testified that the Ayurvedic she received following her second injury was in fact prescribed by a treating physician and/or by deeming Claimant, a licensed registered nurse, as the requisite "supervising health care practitioner" over her own care in India.

On March 29, 2012, the parties entered into a Compromise and Release Agreement that resolved a penalty petition, a reinstatement petition filed with reference to the prior work injury, and a termination petition filed by Employer.

However, the 2009 Claim Petition remained open solely for the WCJ to determine the compensability of the Ayurvedic medical care.

The WCJ dismissed the 2009 Claim Petition finding specifically that: Claimant received treatment at an Ayurvedic center in India; the providers in both instances were identified as Dr. M. Nasimudeen, B.A.M. and Jose Vaidyar; these practitioners were not licensed providers in Pennsylvania; the services provided were not under the supervision of a licensed Pennsylvania health care practitioner; and the medical certificates submitted by Claimant for their services did not describe the treatment, what body parts the treatment was applied to, or include any medical reports required by relevant sections of the Act.

The WCAB affirmed and claimant's appeal followed.

Upon filing her appeal claimant argued that the employer failed to raise the issue of compensability of its treatment in its answer.

Claimant also argued that the parties were bound by the earlier Commonwealth Court decision that the services of the Ayurvedic treatment providers, although unlicensed in the Commonwealth, are compensable so long as they are *prescribed by*, or *provided under the supervision of* a licensed practitioner.

### **ISSUE**

Whether the Ayurvedic treatments received in India were compensable?

### **HOLDING OF THE COMMONWEALTH COURT**

The treatments were not reasonable or necessary.

Ayurvedic treatments received in India were not compensable because there was no evidence that the claimant, a LPN, was trained in massage therapy or that she exercised supervisory control over the practitioners in India or in any way guided them during the provision of Ayurvedic treatments.

Therefore the claimant failed to establish either that the Ayurvedic services were provided under the supervision of, or upon referral or prescription from, a licensed Pennsylvania health care practitioner.

### **PRACTICAL APPLICATION**

The treatment provided to the claimant in India was not compensable because there was no evidence it was provided the under the supervision of or upon referral by a licensed practitioner.