

## Chapter 58      PENSION OFFSETS IN WORKERS' COMPENSATION

### 58.01 HISTORICAL BACKGROUND

Prior to 1996, the Pennsylvania Workers' Compensation Act did not explicitly provide for a credit against worker compensation indemnity payments for pension benefits payable to the claimant. There were several developing appellate case law precedents which considered the issue of credit or offset, however, that remedy was not widely considered.

In 1993, the Act 44 Amendments to the Pennsylvania Workers' Compensation Act provided a credit against the amount of an award of indemnity wage loss benefits for the amount of unemployment compensation benefits received by the claimant. This amendment applied to cases where the injury occurred on or after August 31, 1993, the effective date of the amendments.

In 1996, the Act 57 Amendments to the Pennsylvania Workers' Compensation Act allowed additional credit and offset for pension, severance, and Old-Age Social Security payments. Although there were two effective dates for portions of Act 57, the pension credit amendment became effective immediately for injuries occurring on or after June 24, 1996.

### 58.02. STATUTORY LANGUAGE

The amended §204 (a) now read, in part:

”...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 employee, shall also be credited against the amount of the award made under §§108 and 106, except for benefits payable under §306 (c)...”.

Section 204 (c) the employe is required to report regularly to the insurer the receipt of unemployment compensation benefits, wages received in employment or self-employment, benefits commonly characterized as “old age” benefits under the Social Security Act, severance benefits and **pension benefits**, which post-date the compensable injury under this act, subject to the fraud provisions of Article XI.

[1] Regulations were promulgated by the Bureau of Workers' Compensation, for the offset of unemployment compensation, Social Security (Old-Age), severance, and pension benefits at Title 34 Labor & Industry, Chapter 123 General Provisions, Part II, §123.1, through and including, §123.11.

### **58.03 LIMITATIONS UPON ASSERTION OF THE PENSION CREDIT**

#### **[1] Limitations established in the statutory language -**

- a. The date of injury must be on or after June 24, 1996.
- b. Employer must be directly liable for the payment of worker compensation benefits.
- c. Credit is for benefits from a pension plan actually received by the employee.
- d. The pension credit does not apply to specific loss of use, loss of hearing, or disfigurement benefits provided by §306 (c).
- e. The pension credit does apply to occupational disease benefits paid pursuant to §108.
- f. The pension credit does not apply to compensation paid in the case of a work-related death, pursuant to §307.

#### **[2] Limitation upon amount of credit – Case Law**

Employers have argued that the pension credit includes all contributions and investment earnings, beyond those specifically made by the employee. This argument typically arises regarding payments made by governmental or quasi-governmental bodies.

In the situation where a state agency would be compelled by statute to make contributions to a school district pension plan, ONLY the contributions specifically made by the employer responsible for payment of workers' compensation benefits are allowed as a credit.

See: Pittsburgh Board of Education v. WCAB (Schulz) (Pa. Cmwlt. 2004)  
Pittsburgh Board of Education v. WCAB (Dancho) (Pa. Cmwlt. 2003)  
Township of Lower Merion v. WCAB (Tansey) (Pa. Cmwlt. 2001).

#### **58.04 IDENTIFICATION OF THE WORKER COMPENSATION CASES FOR A POSSIBLE PENSION CREDIT**

**First**, we can narrow this search by limiting our review to “open” worker compensation cases, with a date of injury on or after June 24, 1996.

**Second**, the cases subject of this review are further limited to cases where the claimant receives partial or total disability indemnity wage loss benefits, injury (and occupational disease), pursuant to §306. We advise our employer and insurer clients to screen their open worker compensation files for this review.

**Third**, as employers may provide pension benefits, based upon years of service, sometimes separate and apart from one’s chronological age, it is not sufficient to merely pick a specific age for review. In review and assertion of a credit for Social Security Old-Age Benefits, one may employ this strategy. However, this screening method would render incomplete results in identification of cases where a pension credit may be available.

#### **58.05 UTILIZATION OF THE WORKERS’ COMPENSATION PROCEDURES FOR IDENTIFICATION OF PENSION CREDIT CASES.**

In the Act 57 Amendments of §204 of the Pennsylvania Workers’ Compensation Act, a provision was added to require the employee to report “regularly” to the insurer, the receipt of unemployment compensation benefits, wages received in employment or self-employment, benefits commonly characterized as “old-age” benefits under the Social Security Act, severance benefits, and pension benefits which post date the compensable injury under this Act, subject to the fraud provisions of Article XI.

The Act 57 Amendments directed the Bureau of Workers’ Compensation to prepare the necessary forms for the enforcement of this section, and to issue rules and regulations, as appropriate. The necessary forms were prepared and include:

- LIBC756, Employee’s Report of Benefits (Unemployment Compensation, Social Security [Old-Age], Severance and Pension Benefits) for Offsets.
- LIBC761, Notice of Worker’s Compensation Benefit Offset.

- LIBC750, Employee Report of Wages and Physical Condition.
- LIBC760, Employee Verification of Employment, Self-Employment or Change in Physical Condition.

**QUERY NO. 1:** May the employer/insurer utilize LIBC750, “Employee Report of Wages and Physical Condition,” to request information, including pension benefit status?

On LIBC750, Question No. 5 reads “Is there any other information you are aware of that is relevant in determining your entitlement to, or amount of compensation?”

Admittedly, this question does not make a specific inquiry regarding claimant’s pension benefit status, and claimant would need to be aware of the relevancy of his pension benefit receipt, and its effect upon the amount of worker compensation benefits payable.

**QUERY NO. 2:** May the employer/insurer utilize LIBC760, “Employee Verification of Employment, Self-Employment or Change in Physical Condition,” to compel claimant’s disclosure of any information regarding his/her pension benefit status?

Similar to LIBC750, this form asks the question (again at No. 5), “Is there other information you are aware of that is relevant in determining your entitlement to, or amount of compensation?”

The instructions on LIBC760 state that the completed form must be returned in thirty (30) days of receipt. If the form is not completed and returned within thirty days, it may result in a suspension of worker compensation benefits. A specific form was promulgated, to allow the suspension of worker compensation benefits for failure to return form LIBC760.

This form appears at LIBC762 and is appropriately titled “Notice of Suspension for Failure to Return Form LIBC760”.

**QUERY NO. 3:** Is it proper use of LIBC760 to request pension information?

Note: LIBC756, “Employee Report of Benefits” does not contain the same language regarding the “unilateral” suspension of benefits via an LIBC form for the failure of claimant to complete and timely return the LIBC form. However, the LIBC756 Form does include an admonition that failure to report the receipt or changes to any benefits listed may subject

that person to prosecution under Article XI of the Workers' Compensation Act, relating to insurance fraud.

**[1] RECOMMENDATIONS FOR PROPER HANDLING:**

We advise our employers and insurance clients to submit to the worker compensation claimant a "packet" of the LIBC forms, including LIBC756, "Employee's Report of Benefits; LIBC750, "Report of Wages and Physical Condition", and LIBC760, "Employee Verification of Employment, Self-Employment or Change in Physical Condition".

The language of LIBC760, states that claimant may be required to complete and return that form every six months. Regulation 123.3 includes this same language, and the requirement that employee's file this form within 30 days of receipt of any benefits specified in §204 (a).

**[2] PRACTICE POINTER:**

Worker compensation insurers and third party administrators should acquaint themselves with the pension plans and benefit eligibility requirements for each employer, with open worker compensation cases, with ongoing payments of total or partial disability benefits.

Create a file for the information for pension benefit application. We recommend identification of the proper employer contact for communication regarding pension benefits, including the filing or processing of pension benefit requests.

**58.06 PROPER USE OF LIBC 756, "EMPLOYEE REPORT OF BENEFITS"**

[1] We recommend that the worker compensation insurer or third party administrator provide each claimant receiving wage loss benefits, with the LIBC756 Form, at six-month intervals.

[2] We recommend providing the LIBC756 Form, with an explanatory letter, via regular mail, to the address where claimant receives his/her benefits. If claimant does not respond to the request via regular mail, we recommend the utilization of Certified Mail.

[3] If claimant does not respond to the request for information via LIBC756 Form, we recommend the filing of a Petition for Review, with a the Bureau of Workers' Compensation, **if there is corroborating information which suggests that the employee may be receiving pension benefits. (ie, the employer tells you!)**

[4] We recommend the filing of a concurrent Petition for Suspension of wage loss benefits, until claimant complies with the §204 request.

### **58.07 PROCEDURE FOR ASSERTING PENSION CREDIT -AS PER THE BUREAU REGULATIONS**

The regulations promulgated by the Bureau of Workers' Compensation after the Act 57 Amendments are not very lengthy or detailed. Section 123.3 envisions that the employee "shall" report to the insurer, amounts received in...pension benefits on Form LIBC756, "Employee's Report of Benefits". This reporting requirement includes "amounts withdrawn or otherwise utilized from pension benefits which are rolled over into an IRA or other similarly restricted account, while at the same time the employee is receiving worker compensation benefits.

[1] **NOTE:** LIBC 756 **does not** advise claimants that they must report this benefit information within 30 days of receipt of any benefits specified, as per the regulations.

[2] **NOTE:** The "reporting" requirement applies to pension benefits amounts withdrawn or otherwise utilized which are rolled over into an IRA or similarly restricted account, while at the same time employe is receiving workers' compensation benefits.

See: regulation 123.3 (a).

[3] **NOTE:** "Pension benefits which are rolled over into an IRA or other similarly restricted account **may not offset** worker compensation benefits, so long as the employee does not withdraw or otherwise use the pension benefits from the restricted account while simultaneously receiving worker compensation benefits from the liable employer." See: §123.9 (c).

[4] **NOTE:** The employee is required to forward the completed LIBC756 Form to the insurer within thirty (30) days of the employee's receipt of any benefits specified, or within thirty days of any change in the receipt of benefits specified. The regulations state that the LIBC 756 shall be completed and forwarded to the insurer "at least every six months". Regulation 123.3.

**58.08 RESPONSE of EMPLOYER, INSURER or THIRD PARTY ADMINISTRATOR**

[1] After receipt of the completed LIBC756 Form, the employer/insurer/third party administrator may commence the calculation and assertion of a pension credit and offset against worker compensation benefits payable. Importantly, the insurer “shall” notify the employee that the worker compensation benefits will be offset, at least **twenty days** prior to taking the offset. Regulations specify utilization of the LIBC761, “Notice of Worker Benefit Offset” form.

[2] **REGULATIONS** The Chapter 123 regulations direct the insurer completion of the LIBC761 Form. The information provided to the employee must contain:

- (1) The amount of the offset.
- (2) The type of offset “pension” for our purposes.
- (3) If the offset was calculated with supporting documentation.
- (4) When the offset commences.
- (5) The amount of any recoupment if applicable.

[3] **PRACTICE NOTE:** The regulations specify that when an insurer’s entitlement to the offset changes, the insurer shall notify the employee of the change at least twenty (20) days prior to any adjustment.

Form LIBC761 is to be utilized for this purpose.

The employee may challenge the offset filing a Petition to Review LIBC 378 with the Department of Labor and Industry. See: §123.4 (e).

**58.09 GENERAL REQUIREMENTS FOR OFFSET OF PENSION BENEFITS.**

The worker compensation wage loss benefits otherwise payable to the employee will have the offset by the **net amount** the employee receives in pension benefits. The

worker compensation benefits are only offset **to the extent funded by the employer directly liable for payment of the worker compensation benefits.**

### **[1] NET AMOUNT OF BENEFIT**

Practice Pointer: The term “net” amount is defined by the regulations. The term “net” is defined to mean “the amount of unemployment compensation, Social Security (Old-Age), severance, or pension benefits received by the employee, **after** required deductions for local, state and federal taxes and amounts deducted under the Federal Insurance Contributions Act (FICA) (26 USCA §§3101-3126). Regulation §123.2. The calculation of pension benefit for the assertion of a credit against worker compensation wage loss benefits must utilize the “net” amount of the pension benefits received by the employee and paid by the employer liable for the work comp benefits. See: Regulation §123.8 (a).

### **[a] CASE LAW**

In *Philadelphia Gas Works vs. WCAB (Amodei)*, 964 A.2d 963 (Pa. Cmwlth. 2009), the Commonwealth Court affirmed that the legislative intent was to use the net amount as the only method to be utilized for purposes of a pension benefit offset, in the absence of a specific direction to utilize the gross amount. The “gross method” for calculation of a credit for unemployment compensation benefits as reported in *Steinmetz*<sup>1</sup> and *Ferrero*<sup>2</sup> was distinguished, particularly in light of the affirmative direction contained in Regulation §123.8 (a).

### **[2] PENSION BENEFIT – ACTUALLY RECEIVED**

The worker compensation benefit offset allowable for employee pension benefits may be asserted based upon pension benefits actually received, not merely benefits to which the employee may be entitled. (See: Regulation §123.8 (c)). The worker compensation benefits may be offset by pension benefits received from a defined – benefit and/or a defined – contribution plan. These terms are defined by the regulations at §123.2.

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<sup>1</sup> *Steinmetz vs. WCAB (Cooper Power Systems)*, 858 A.2d 182 (Pa. Cmwlth. 2004).

<sup>2</sup> *Ferrero vs. WCAB (CH&D Enterprises)*, 706 A.2d 1278 (Pa. Cmwlth. 1998).

### **[3] DEFINITIONS OF PENSION PLAN TYPES**

A defined benefit plan is stated to be “a pension plan in which the benefit level is established that the commencement of the plan and actuarial calculations determine the varying contributions necessary to fund a benefit at the employee’s retirement”.

A defined contribution plan is explained to be: “a pension plan which provides for an individual account for each participant and for benefits based **solely** upon the amount of accumulated contributions and earnings in the participants account. At the time of retirement, the accumulated contributions and earnings determine the amount of the participant’s benefit, either in the form of a lump sum distribution or annuity”.

### **[4] ALLOCATION OF INVESTMENT INCOME**

The regulations specify that when calculating the offset amount for pension benefits, the investment income attributable to the employer’s contribution to the pension plan, shall be included on a pro rate basis. See: Regulation §123.8 (d).

### **[5] CALCULATION OF OFFSET FOR PENSION BENEFITS**

Offset of worker compensation benefits for the amounts received from pension benefits “shall” be achieved on a weekly basis. If the employee receives a monthly pension benefit, the net amount contributed by the employer (directly liable for the payment of worker compensation benefits), of the employee shall be divided by 4.34. This calculation yields the weekly offset figure. See: Regulation §123.9 (a).

Similarly, when the employee receives a pension benefit in the form of a lump sum payment, the actuarial equivalent of the lump sum, with respect to the annuity options available at the time of the employee’s receipt, shall be used as the basis for calculating the offset to the worker compensation benefit. As above, a monthly benefit shall be divided by 4.34, to obtain the weekly offset figure. See: Regulation §123.9 (b).

### **[6] NO OFFSET FOR “ROLLOVER” BENEFITS.**

Pension benefits which are rolled over into an IRA or similarly restricted account may not offset worker compensation benefits, so long as the employee does not withdraw or otherwise utilize the benefits from the restricted account, while simultaneously receiving worker compensation benefits from the liable employer.

If the employee withdraws or otherwise utilizes these pension benefits from the IRA (or other similarly restricted account), when the IRA or account is funded **in whole or in part** by the liable employer's contributions, the insurer is entitled to an offset to worker compensation benefits.

If the employee receives a monthly payment from the restricted account, the insurer shall receive an offset equal to the offset the insurer would have received by calculating the weekly pension benefit, as referenced in subsection (a) above.

If the employee utilizes an amount from the restricted account which is greater than the actuarial equivalent of the lump sum, with respect to the annuity options available at the time of the employee's receipt, the insurer shall receive an offset against future worker compensation benefits in an amount **equal** to the amount of the pension benefit withdrawn or otherwise utilized by the employee. The amount withdrawn shall be divided by the weekly worker compensation benefit rate. The result shall be the number of weeks (and fraction thereof) that the insurer may offset against future worker compensation benefit payments.

#### **58.10 CALCULATION OF MULTIPLE EMPLOYER PENSION FUND OFFSETS.**

The regulations actually define for us the term "multi-employer pension plan". This term is defined as "a plan to which more than one employer is required to contribute and is maintained under one or more collective bargaining agreements, between one or more employee organizations, and more than one employer". See: Regulation §123.2.

Consistent with the statutory language, when the pension benefit is payable from a multi-employer pension plan, only the amount which was contributed by the employer directly liable for the payment of workers' compensation benefits, shall be used in calculating the offset to worker compensation benefits. See: Regulation §123.10.

The regulations specify several calculations regarding the apportionment of an annuity, a monthly payment, or a lump sum payment. See: Regulation §123.10 (b) (c) and (d).

#### **58.11 CALCULATION OF THE PENSION OFFSET FOR BENEFITS ALREADY RECEIVED.**

In many cases, the insurer will belatedly receive information that the employee has received benefits from a pension, concurrent with the receipt of worker compensation wage loss benefits. Simply stated, the net amount received by the employee will be calculated consistent with the regulations, and the amount received will be divided by the weekly worker compensation rate. The result shall be the number of weeks (and fraction thereof) to which the insurer is entitled to an offset against future payments of worker compensation benefits.

This section cross-references the utilization of the LIBC756 Form, and the requirements of notice to claimant and claimant counsel, if known, at least twenty days prior to the offset. Consistent with these regulations, the employee may challenge the offset by filing of a Petition to Review, with the Department of Labor and Industry. See: Regulation §123.5.

**[1] PRACTICE NOTE:** The recoupment of benefits previously received may result in the “**suspension**” of worker compensation benefits. The employee’s remedy under the Regulations is to file a Petition for Review of the offset, with the Department of Labor and Industry, and litigate this issue before a workers’ compensation judge. However, note, in the meantime, the recoupment, as calculated by the insurer, will be self-executing and claimant would not receive any benefits during this time frame, unless or until altered by an order of a worker compensation judge.

**[2] QUERY:** In select instances, and primarily for “humanitarian” reasons, insurers may agree to recoup the credit by utilizing a smaller credit figure for a longer duration, until past “over payment” is recouped.

**[3] QUERY:** Is this beneficent conduct authorized by the regulations?

## **58.12 LITIGATION STRATEGY – THE EMPLOYER’S PERSPECTIVE.**

The statutory and regulatory framework envisions that the employer, insurer or third party administrator will solicit information from claimant regarding pension benefit status. Upon receipt of that information the insurer will calculate the amount of pension benefit, which will be asserted as a credit against worker compensation wage loss benefits payable. As referenced in the Regulations, if the employee disagrees with the calculation, the employee must file a Petition for Review with the Department of Labor and Industry, Bureau of Workers’ Compensation.

In the litigation of the review of the appropriateness, accuracy or calculation of the pension credit figure, **the insurer will have the burden of proof** to establish the entitlement to a credit asserted.

A good deal of litigation has developed when reviewing the accuracy of the pension credit where the claimant receives benefits pursuant to a “defined benefit plan”. As suggested in the regulations, this type of pension plan is funded, based upon rather complex funding assumptions and methods. The defined benefit plan, defines the benefit the employee will receive, rather than the contribution that must be allocated.

Traditional defined benefit plans may define a percentage (1% per year of service), or a dollar amount (\$10.00 per year of service) that is payable at a specific retirement date (age 65). A theoretical account balance is defined under the plan, and the employer is responsible for funding the projected theoretical account balance. These plans can be age weighted and service related whereby the older longer service employee will receive a higher contribution credit. For our purposes, the primary consideration is to accurately calculate the amount of contribution by the employer directly liable for the payment of worker compensation benefits.

The defined contribution plan is much easier to calculate. In this type of pension plan, the amount of contribution is “defined” or specified. There is an individual accounting for each participant. The amount of accumulated contributions and earnings is readily ascertainable. Typically, the defined contribution plan does not result in litigation of the accuracy or amount of pension credit.

### **58.13 PENSION CREDIT – TO THE EXTENT FUNDED BY THE EMPLOYER DIRECTLY LIABLE.**

In a single employer plan, a question may arise as to the amount of employer contribution versus any employee contributions. The Regulations address the calculation and attribution of any investment income. The investment income is allocated based upon the source of the contribution. See §123.8 (d). As the relative amount of employer versus employee contributions may vary from year-to-year, a detailed analysis must be prepared to determine the pro rate amount of contribution and the corresponding pro rata amount of investment income attributed to each share. If the employer and employee contributions have not been separately documented in pension reports, it may be necessary to secure expert testimony to establish the proper offset calculation.

#### **[1] Case Law**

Where the employer was directly responsible for the first \$250,000 of workers’ compensation benefits, pursuant to the terms of its insurance policy, the employer may

be entitled to a credit for pension benefit payments. The case was remanded for additional findings regarding the employer's responsibility for "self-insurance" of the workers' compensation benefits paid to claimant.

See: Welliver McGuire v. WCAB (Padgett) ( Pa. Cmwlth. 2003).

#### **58.14 MULTI-EMPLOYER PENSION FUND CONTRIBUTION.**

As the worker compensation benefit offset is limited to the amount of contribution (and investment income), to the extent funded by the employer directly liable for the payment of worker compensation benefits, in the multiple employer plan, this contribution must be calculated. If pension reports do not separately document specific individual employer contributions and the investment income attributable to that contribution, then expert testimony may be necessary to establish the correctness of the pension offset calculation.

#### **58.15 THE DEFINED BENEFIT PLAN FORMAT IS UTILIZED BY MANY PENNSYLVANIA PUBLIC ENTITIES.**

As the pension credit is limited to the extent that the responsible employer has funded the pension, a calculation of the credit permitted in a defined benefit plan, with multiple funding sources, is not a simple arithmetic problem.

In a defined benefit plan, plan funding may be accomplished by a variety of methods:

“aggregate, entry age normal, frozen initial liability, unit credit, projected unit credit”.<sup>3</sup>

There are also key funding assumptions which include:

“mortality tables, pre/post retirement interest, salary scale, turnover, expenses, expected retirement age”.

The long-term contribution to a plan may depend upon the demographics of the group covered, influx or turnover of participants, asset performance and ratio of assets to present value of accrued benefits. Simply stated, this calculation requires expert testimony.

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<sup>3</sup> Information from discussions, Mark K. Dunbar, Enrolled Actuary, MAAA, MSTA, DPB&Z, Inc., Pittsburgh, Pennsylvania.

## **58.16 LITIGATION OF THE PENSION PLAN FUNDING CALCULATION.**

Section 204 (a) provides the employer/insurer or third party administrator with a credit against worker compensation benefits payable for wage loss benefits, to the extent the pension plan was funded by the employer directly liable for the payment of worker compensation benefits. The employer has the **burden of proof** to establish the amount of benefits from a pension plan funded by the employer. As noted above, in the defined contribution plan, this mathematical calculation may be readily available. In the defined benefit plan, the specific contribution figure for a specific individual may not be readily discernible. Therefore, a significant development was the approval of credible actuarial testimony and evidence as legally sufficient evidence to prove the extent to which an employer funded a defined benefit plan, which forms the basis for the calculation of the pension offset.

### **[1] Identification of Employer Contribution**

The Commonwealth Court addressed the employer calculation issue in several cases involving the Commonwealth of Pennsylvania Pension Plan. In *Hensal*<sup>4</sup>, the Court vacated and remanded for further findings where the workers' compensation judge had acknowledged the employer's evidence may be valid but concluded that the law required proof of actual contributions before a pension offset is permitted. The workers' compensation judge did not make credibility determinations on the witness' testimony. In *Cato*<sup>5</sup>, addressing similar legal issues, the workers' compensation judge found the employer actuary was credible.

The Court held that the employer's **actuarial expert testimony**, if accepted as credible, was legally sufficient to establish the extent to which the employer funded the claimant's defined benefit pension for purposes of an offset.<sup>6</sup>

As noted in the *Hensal* dissenting opinion, the actuarial testimony reflected that the pension offset was calculated by first determining the overall obligation of the system to an individual when he or she retires. This figure is derived from the single life annuity (2% x the years of service x the final average salary x the class of service multiplier) times the annuity factor (or life expectancy), to yield the calculated total obligation. This amount is discounted to present value, using the figure of 8.5%. A

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<sup>4</sup> *Pennsylvania State University/The PMA Insurance Group vs. WCAB (Hensal)*, 911 A.2d 225 (Pa. Cmwlth. 2006).

<sup>5</sup> *Department of Public Welfare/Western Center vs. WCAB (Cato)*, 911 A.2d 241 (Pa. Cmwlth. 2006). This was claimant's appeal from workers' compensation judge order granting pension offset.

<sup>6</sup> 911 A.2d at 232.

measure of accumulated employee contributions and interest thereon are subtracted. What is left is deemed to be the employer's contribution.<sup>7</sup>

The aforementioned calculation was described by the actuary as "reasonable and actuarially sound. One of the questions raised by the dissenting opinion is the assumption of the 8.5% figure to discount to present value.

#### **58.17 COMMENT:**

Reference to the above discussion highlights the numerous factors which are employed in the calculation of a pension offset in a defined benefit plan. Several of the figures are readily ascertainable, such as years of service. Other figures, such as the "discount to present value", may be considered more arbitrary. Admittedly, the annual rates of growth in investments will vary and the selection of any one average figure may lead to the argument that another average figure is "more appropriate". These appellate case decisions provide some insight into the areas to be explored when presenting expert evidence...or cross-examining your opponent's witness!

#### **58.18 MULTIPLE EMPLOYER CREDIT – EXPERT TESTIMONY.**

In *Consolidation Coal Co. vs. WCAB (Abani)*<sup>8</sup>, the workers' compensation judge decision rejected the claimant challenge to the calculation of a pension offset. The workers' compensation judge found the testimony of the employer's plan actuary to be credible. On appeal to the Commonwealth Court affirmed, *citing, Hensal*.

The plan actuary did not ignore the intention of Regulation §123.10. The actuary testified that her calculation was not giving "a literal interpretation" to subsection "a". She did not base her calculations on the actual amounts contributed by the employer as this was "not relevant" in a defined benefit plan, as all plan assets are available to all participants.

The service based methodology of the actuary was a reasonable manner of allocating the portions of claimant's pension attributed to the employer. 968 A.2d at 821-822.

#### **58.19 EMPLOYER MERGER - EMPLOYER TESTIMONY.**

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<sup>7</sup> 911 A.2d at 234.

<sup>8</sup> *Consolidation Coal Co. vs. WCAB (Abani)*, 968 A.2d 815 (Pa. Cmwlth. 2009).

Where the workers' compensation judge found employer's witnesses to be credible, the Commonwealth Court reversed the Workers' Compensation Appeal Board decision and reinstated the pension credit.

Employer merged with another corporation. Employer testimony from the Vice President of Human Resources reflected that actuaries determine the amount of employer pension contributions, based upon a "blended composite liability" of all of its hourly employees. 977 A.2d at 66.

The workers' compensation judge found that the pension benefits, which the claimant was currently receiving, were in fact fully funded by the employer and were not from a multi-employer pension plan. Therefore, the employer was entitled to a full offset for these payments. The workers' compensation judge concluded that the employer properly took an offset for the special payments or lump sum payments and for the monthly pension benefits currently received by claimant. See: *Allegheny Ludlum Corporation vs. WCAB (Bascovsky)*, 977 A.2d 61 (Pa. Cmwlth. 2009).

#### **58.20 PUBLIC ENTITY PENSION – LACK OF SUFFICIENT EVIDENCE**

As the employer has the burden of proof to establish entitlement to a pension offset, pursuant to §204 (a), the employer may take a credit for claimant's receipt of pension benefits in defined-benefit and defined-contribution plans, to the extent it funded those benefits. In *City of Philadelphia vs. WCAB (Andrews)*, 948 A.2d 221 (Pa. Cmwlth. 2008), the Commonwealth Court found that the insurance adjuster's testimony was insufficient to document that claimant's service-connected disability pension was in an amount greater than claimant's worker compensation benefits, and therefore, no worker compensation benefits were payable.

*Citing Hensal*, the Court noted that a defined-benefit plan is a pension plan, in which the benefit level is established at the commencement of the plan, and actuarial calculations determine the varying contributions necessary to fund the benefit at an employee's retirement. Where there is a defined-benefit plan, an employer cannot meet its burden of establishing the amount of its offset absent actuarial testimony. In the instant case, the workers' compensation judge found that the employer failed to present sufficient evidence to establish that it was entitled to any offset for pension benefits received by claimant. Attorney fees were awarded for an unreasonable contest, and penalties were assessed for failure to follow the pension offset procedures.

**58.21 PRACTICE POINTER:** The reported appellate decisions reflect the necessity of expert testimony to provide clear, credible and convincing evidence of an employer's contribution to a pension plan, in order to obtain a credit against worker compensation wage loss benefits, pursuant to §204 (a) of the Workers' Compensation Act. The reported decisions emphasize the burden of proof is upon the employer. The reported decisions also reflect the specificity of testimony and explanation, which may be necessary to meet the employer's burden of proof. Further guidance may be provided as the appellate decisions develop in this area.

### **58.22 EFFECT OF PENSION PLAN LANGUAGE UPON CREDIT**

The statutory language at Section 204 allows a credit for pension plan payments, which are funded by the employer responsible for payment of the workers' compensation benefits.

A private pension plan, which contains language that the plan does not allow for a reduction of plan benefits by the concurrent receipt of workers' compensation benefits, **does not** preclude the employer from reducing the workers' compensation benefits payable. In this circumstance, the employee receives the full pension plan payment, without reduction; However the workers' compensation benefit is reduced. See: SEPTA v. WCAB (Specca) (Pa. Cmwlt. 2003).

### **58.23 EFFECT OF EMPLOYER REPRESENTATIONS UPON CREDIT**

Where the pension plan representative of the employer mistakenly represents the effect of pension benefit receipt upon the workers' compensation benefit payment, the employer may be estopped from asserting the offset retroactively.

See: Gadonas v. WCAB (Boeing Defense & Space Group) (Pa. Cmwlt. 2007).

But contrast result with: Allegheny Ludlum Corp. v. WCAB (Carney) (Pa. Cmwlt. 2007) where the employer was not estopped from asserting the pension credit.

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## **CHAPTER 57 UNEMPLOYMENT COMPENSATION CREDIT**

### **57.01 OVERVIEW**

In 1993, the Act 44 Amendments to the Pennsylvania Workers' Compensation Act allowed a remedy to offset Workers' Compensation indemnity wage loss payments by the amount of Unemployment Benefits the disabled worker, actually received during concurrent time frames.

This amendment applied to any workers' compensation case with a date of injury on or after August 31, 1993.

Prior to Act 44, there was no credit for the receipt of unemployment compensation benefits, except in occupational disease cases.

### **57.02 STATUTORY LANGUAGE**

Section 204 (a) ... 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 provisions of sections 108 and 306 except for benefits payable under section 306 (c) or 307.

Section 204 (c) the employe is required to report regularly to the insurer the receipt of **unemployment compensation benefits**, wages received in employment or self-employment, benefits commonly characterized as "old age" benefits under the Social Security Act, severance benefits and pension benefits, which post-date the compensable injury under this act, subject to the fraud provisions of Article XI.

### **57.03 LIMITATIONS UPON ASSERTION OF THE UC CREDIT**

[1] This offset does not apply to death benefits paid pursuant to section 307

[2] This offset does not apply to "specific loss" or disfigurement benefits paid pursuant to section 306 (c).

[3] This offset only applies to cases with an injury sustained on or after August 31, 1993. See: Lykins v. WCAB (New Castle Foundry) (Pa. 1998).

[4] As this credit applies to the amount "received" by claimant, there is no credit if the employee does not apply or does not receive UC benefits.

See: regulation 123.6 (b) for statutory support for this limitation

[5] As the credit is for the amount “received” the credit is for the “net” amount that is actually received by claimant after any withholding of taxes.

See: regulation 125.5 (b).

(a) See: also Philadelphia Gas Works v. WCAB (Amodei) (Pa. Cmwlth. 2009), An appellate decision which addressed a pension offset question, but interpreted the statutory language at section 204(a) and regulations to authorize a “**net**” offset or credit.

(b) This decision stands in contrast to the prior decision at Ferrero v. WCAB (CH&D Enterprises) (Pa. Cmwlth 1998) which ruled that the offset was for the “**gross**” amount of UC benefits awarded. The Ferrero decision was published about 2 weeks after the publication of the regulations, thus the regulations were not considered in that analysis and decision.

[6] The offset is applies only to the UC benefits which the employe receives **and** are attributable to the **same time period** in which an employe also receives workers’ compensation benefits.

See: regulation 123.6 (a).

[7] There is no offset available against **Trade Readjustment Act (TRA)** benefits which an employe receives and are attributed to the same time period.

See: Deitrich Industries v. WCAB (Shank) (Pa. Cmwlth. 1999).

#### **57.04 PROCEDURE FOR ASSERTION OF THE UC OFFSET**

The Regulations at 123.1, et. seq. provide instruction for the mechanism by which one properly asserts the UC offset against workers’ compensation benefits.

[1] Employees “shall” report to the insurer amounts received in UC, Pension, Severance or Social Security benefits via preparation of the LIBC 756 “Employee’s Report of Benefits” form.

Regulation 123.3 (a).

[2] The LIBC 756 form is to be completed by employee and returned to the insurer within 30 days of employee’s receipt of any of these specified benefits.

Regulation 123.3 (b).

[3] After receipt of the 756 form, the insurer may offset workers' compensation benefits via preparation and filing of LIBC 761 "Notice of Workers' Compensation Benefit Offset".

[4] **At least 20 days prior to taking the offset**, the insurer "shall" notify the employee that workers' compensation benefits will be offset.  
Regulation 123.4 (b).

[5] Employer shall provide a copy of the LIBC 761 form to; (a) the employee, (b) the employee's legal counsel, if known and (c) the Department of Labor and Industry.  
Regulation 123.4 (d)

[6] The employee may challenge the offset via the filing of a Petition to Review Offset LIBC 378 with the Bureau of Workers' Compensation.  
Regulation 123.4 (e)

#### **57.05 MANDATORY NATURE OF UC CREDIT**

The Employer cannot "inadvertently" waive the unemployment benefit credit, regardless of whether the employer has requested the offset. The WCJ is required by section 204 (a) to reduce an award of workers' compensation benefits, by the amount of unemployment compensation benefits received by the employee.

See: Costa v. WCAB (Carlise Corp.) (Pa. Cmwlth. 2008).

#### **57.06 EMPLOYEE REPAYMENT OF UC BENEFITS – REVERSAL OF CREDIT**

It is important to note, that in circumstances where the employee receives UC benefits and those benefits are asserted as an offset to workers' compensation benefit payments, when the **employee is required to repay** the UC benefits, based upon a UC determination of ineligibility, the insurer "shall" repay the employee for the amounts previously offset from the workers' compensation benefits.

The employee may request that the insurer remit repayment directly to the Bureau of Unemployment Compensation Benefits and Allowances (BUCBA).

See: regulation 123.6 (c) (1) and (2).

## **CHAPTER 59 SEVERANCE PAYMENT CREDITS**

### **59.00 SEVERANCE PAYMENT CREDIT AGAINST WORKERS' COMPENSATION BENEFITS**

#### **59.01 OVERVIEW**

The Act 57 Amendments authorized the Insurer/Employer to assert a credit against workers' compensation indemnity wage loss payments for the "severance" payments made to the disabled employee. Prior to this amendment, employers would argue that post-injury severance payments should be credited against their workers compensation obligations. The "general rule" that was typical of appellate court review, was the whether the payments were "in lieu" of workers' compensation benefit (ie, when the employee was not working), or did the employee receive payment based upon his/her years of service or as an exhaustible benefit. Often this discussion arose in the context of the statute of limitations upon filing a work comp claim.

#### **59.02 STATUTORY LANGUAGE**

Section 204 (a) ... 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).

Section 204 (c) The employe is required to report regularly to the insurer the receipt of unemployment compensation benefits, wages receive in employment or self-employment, benefits commonly characterized as "old age" benefits under the Social Security Act, **severance benefits** and pension benefits, which post-date the compensable injury under this act, subject to the fraud provisions of Article XI.

#### **59.03 LIMITATIONS UPON ASSERTION OF THE SEVERANCE CREDIT**

[1] The credit only applies to injuries occurring on or after June 24, 1996.

[2] The credit does not apply to “specific loss” or disfigurement benefits paid pursuant to section 306 (c).

[3] The employer must be directly liable for the workers’ compensation benefit payments.

[4] The offset does not apply to severance benefits to which an employee may be entitled, but not receiving. Regulation 123.11(a).

[5] **“Gross vs “Net” Credit?** The statute and regulations refer to the amount employee receives, which in other offset/credit cases has been interpreted to mean the “net” amount received by employee.

#### **59.04 PROCEDURE FOR THE ASSERTION OF THE SEVERANCE CREDIT**

The procedure for the proper assertion of the severance offset appears in the regulations at the “Application of offset generally” section 123.4.

[1] Employees “shall” report to the insurer amounts received in UC, Pension, Severance or Social Security benefits via LIBC 756 “Employee’s Report of Benefits” form.

[2] The LIBC 756 form is to be completed and returned to the insurer within 30 days of employee’s receipt of any of these specified benefits.

[3] After receipt of the LIBC 756 form, the insurer may offset workers’ compensation benefits via preparation and filing of LIBC 761 “Notice of Workers’ Compensation Benefit Offset”.

[4] At least 20 days prior to taking the offset, the insurer “shall” notify the employee that workers’ compensation benefits will be offset.

[5] The employee may challenge the offset via the filing of a Petition to Review Offset LIBC 378 with the Bureau of Workers’ Compensation.

#### **59.05 PARTY ENTITLED TO CREDIT? “EMPLOYER” vs INSURER**

The statutory language at section 204 specifically mentions the “employer” as the party entitled to assert the credit for the severance payments made to the disabled employee. When an “insurer” asserted a credit, the issue was litigated to the Pennsylvania Supreme Court. In *Kramer v WCAB (Rite Aid Corp.)*, (Pa.2005). The Pennsylvania Supreme Court held that an **insured employer** was entitled to assert the severance credit, reasoning that the employer paid for the cost of its insurance coverage. The effect of this ruling was that this credit is not limited to self-insured employers. Employers purchasing workers’ compensation insurance have the same right to this credit.

#### **59.06 WHAT TYPE OF PAYMENT QUALIFIES AS A “SEVERANCE” PAYMENT?**

Benefits paid by the employer during a lay-off, furlough or temporary break in employment are **not** the type of payments which qualify for the severance credit.

Where it is anticipated the employee may return to work pursuant to a collective bargaining agreement, without loss of seniority and has “recall rights” for 4 years, this credit is not available. Where the employee did in fact return to work, the credit is not available.

See: *Kelly v. U.S. Airways Group*, (Pa. 2010).

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## **CHAPTER 60 SOCIAL SECURITY “OLD AGE” BENEFIT OFFSET**

### **60.01 HISTORICAL BACKGROUND**

Prior to the Act 57 Amendments to the Pennsylvania Workers’ Compensation Act in 1996, an employee could receive workers’ compensation “wage loss” benefits without reduction by his concurrent receipt of Social Security “Old Age” retirement benefits. Many Employers and Insurers believed the concurrent receipt of “wage loss” benefits and “retirement” benefits was incongruous. This status changed in 1996.

### **60.02 STATUTORY LANGUAGE**

... Fifty per centum of the benefits commonly characterized as “old age” benefits under the Social Security Act (49 Stat. 620, U.S.C. 301 et. seq.) “shall” also be credited against the amount of 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 employe “shall” provide the insurer with proper authorization to secure the amount which the employe is receiving under the Social Security Act.

### **60.03 LIMITATIONS UPON THE SOCIAL SECURITY OFFSET**

#### **[1] Limitations established in the statutory language:**

- a.** The offset does not apply to Social Security “**disability**” benefits.
- b.** The offset does not apply to Social Security “old age” benefits received **before** the work injury, which the employee continues to receive subsequent to the work-related injury.
- c.** The offset does not apply against section 306 (c) disfigurements or loss of use benefits.

- d. The offset is limited to 50% of the Social Security benefit.
- e. The offset only applies to injuries on or after June 24, 1996.
- f. The offset is calculated on the **net** Social Security benefit.

### **60.03 PROCEDURE FOR ASSERTION OF THE SOCIAL SECURITY OFFSET**

#### **[1] CALCULATION OF THE OFFSET**

The Social Security offset is calculated and applied on a weekly basis. To calculate the offset, the **net** monthly Social Security “old age” benefit is multiplied by .50 (50%).

As Social security benefits are paid on a monthly basis, the net monthly Social Security “old age” benefit needs to be “converted” to a weekly figure.

In calculating the social security offset, the net monthly Social Security benefit is multiplied by 4.34. See: regulation 123.7.

### **60.04 UTILIZATION OF THE WORKERS’ COMPENSATION PROCEDURES FOR IDENTIFICATION OF SOCIAL SECURITY OFFSET CASES.**

Employees will have different dates for eligibility for “old age” Social Security benefits, based upon their date of birth.

We can no longer look to the “65<sup>th</sup> birthday” as the “gold standard” for review of open workers’ compensation cases regarding the Social Security offset

The Regulations at 123.3 & 123.4 provide the instruction for the mechanism by which one properly asserts the Social Security offset.

[1] Employees “shall” report to the insurer amounts received in UC, Pension, Severance or **Social Security “old age” benefits** via preparation of the LIBC 756 “Employee’s Report of Benefits” form.  
Regulation 123.3 (a).

[2] the LIBC 756 form is to be completed and returned to the insurer within 30 days of employee's receipt of any of these specified benefits.  
Regulation 123.3 (b).

[3] After receipt of the LIBC 756 form, the insurer may offset workers' compensation benefits via preparation and filing of LIBC 761 "Notice of Workers' Compensation Benefit Offset".  
Regulation 123.4 (a)

[4] **At least 20 days prior to taking the offset**, the insurer "shall" notify the employee that workers' compensation benefits will be offset.  
Regulation 123.4 (b).

[5] Employer shall provide a copy of the LIBC 761 form to: (a) the employee, (b) employee's legal counsel, if known and (c) the Department of Labor and Industry  
Regulation 123.4 (d).

[6] Employee may challenge the offset by filing a Petition to Review Offset LIBC 378 with the Bureau of Workers' Compensation.  
Regulation 123.4 (e).

## **60.05 SOCIAL SECURITY OFFSET – LIMITED BY CASE LAW**

### **[1] RECEIPT OF BENEFITS**

An employer is **not** entitled to a credit against workers' compensation benefit obligations, for social security benefits where the employee applied and was entitled to "old age" benefits **before** the work injury, although the first check was not received until after the work injury.

Pittsburgh Board of Education v. WCAB (Davis) (Pa. Cmwlth. 2005).

NOTE: This decision is consistent with a literal reading of the statutory language, perhaps not consistent with its intent.

### **[2] RETROSPECTIVE OFFSET MAY BE LIMITED**

The Commonwealth Court has held that Statutory language and Regulations do not support the assertion that there is an absolute right to retrospective credit, where employee received "old age" Social Security benefits after commencement of workers' compensation benefits.

See: Maxim Crane Works v. WCAB (**Solano**) (Pa.Cmwlth. 2007).

**(a) The Facts:** Claimant was injured in December 2000. In January 2003 he received Social Security benefits. In April 2003 employee and insurer entered into a

Compensation Agreement. In June of 2005 employee received the LIBC 756 form and completed the form to report receipt of his ongoing “old age” Social Security benefits. In August of 2005, the insurer, issued an LIBC 761 Notice of Workers’ Compensation Benefit Offset.

That notice informed employee that insurer would credit his workers’ compensation benefits based upon 50% of his Social Security benefit. Furthermore, the insurer would assert a credit for the Social Security benefits paid since January 2003. This “credit” would completely offset employee’s workers’ compensation benefit, such that his benefits would be “suspended” until the past credit was “re-couped”. Employee challenged this calculation.

**(b) The Ruling:** The Commonwealth Court held that the insurer’s right to credit commenced with the LIBC 756 notice to employee in June of 2005. The insurer **could not** assert a credit for past Social Security benefits, received concurrent with the workers’ compensation benefits since January 2003. The Court reasoned that insurer had “waited too long” to assert a credit against the past benefits. Employee’s legal argument based upon the doctrine of “latches” was adopted. The insurer failed to exercise due diligence in instituting any action and this was prejudicial to employee.

Insurer did not notify employee of his obligation to report social security benefits until 5 years after the work injury and over 2 years after employee began to receive workers’ compensation benefits.

Although employee owed a duty, in accord with the statute, to report receipt of “old age” Social Security benefits, the Court held that the regulations place the **initial duty** upon the insurer to notify employee of his reporting requirements and to provide the proper LIBC forms.

**[3] PRACTICE POINTER** This decision does not provide any specific guidance as to “how much delay in sending the LIBC form, is too much”.

The regulations provide some guidance, as insurers may request that an employee complete an LIBC 756 form “**at least every 6 months**”. See: Regulation 123.3 (b).

We believe the appellate courts will resort to their typical case-by-case review to establish the parameters of “due diligence. We recommend documentation of the “**first**” time LIBC documents are sent to the employee and each subsequent effort. We believe the court will look to see which party has acted in good faith, in its resolution of questions of “fairness” regarding benefit offsets and credits.

(Wow – this was a real prophetic comment!!! See below)

#### [4] RETROSPECTIVE OFFSET – PART 2

Where an insurer sent an employee the LIBC 756 form and employee subsequently received “old age” Social Security benefits, the insurer **may not assert a credit to the time of the first notice.**

In **Muir v. WCAB (Visteon Systems LLC)** (Pa. Cmwlth. October 1, 2010) the insurer’s right to assert a **retrospective credit was not approved.** Employee was injured in 2000. In August 2005 insurer requested employee to complete the LIBC 756 form. That form notified the insurer that she was receiving Social Security Disability benefits.

#### [ a ] ‘da facts, nuthin but ‘da facts

In June 2007 insurer requested employee to complete another LIBC 756 form. On this occasion, she disclosed that she began to receive “old age” Social Security benefits as of October 2006!

The insurer issued an LIBC761 Notice of Offset with an offset/credit calculated as of October 2006. Employee filed a Penalty (not Review) petition, relying upon the Solano decision.

Here, the insurer placed employee on notice of her reporting requirements as early as August of 2005. However, the WCAB and Commonwealth Court denied the retrospective credit based upon the “all encompassing” humanitarian purposes of the act excuse.

Employer argued that the “first” notice informed claimant of her reporting obligations.

True, but should employee be required to perform “herculean tasks” such as, copy the form or request as new form when there was a change in her circumstances?

NO. “it would be unrealistic to expect unsophisticated claimants to file a new LIBC 756 on their own every 6 months.

#### [b] THE RESULT :

the insurer **MUST** supply the employee with a **NEW** LIBC 756 form every 6 months “to remind and require” her to update the reporting of benefits subject to offset.

#### [c] PRACTICE POINTER:

Do Not place the LIBC forms under the employee’s work boots.