Petitioner, John Q. Public, is a filing clerk at the county administrative and injures his right hand on July 27, 2017, while lifting heavy files. While the objective tests demonstrate significant pre-existing and progressive arthritis, Respondent does accept the claim. He undergoes appropriate treatment including multiple surgeries to his right hand. He remains on temporary disability benefits until he is discharged from care on June 1, 2018 but is unable to return to work due to his significant and permanent lifting restrictions. He subsequently files for an Accidental Disability Pension but he is awarded an Ordinary Disability Pension, with an effective date of January 1, 2019.

His attorney writes to the Division of Pensions for the Pension Application and a breakdown of the disability pension. His pension amounted to $1,195.47 per month. The pension portion of the monthly benefit amounted to $632.57 per month and the annuity portion was $562.90 per month. The only medical cause listed in the application was the injury to the right hand.

The workers' compensation claim subsequently settles in 2019 for 45% of the right hand, before the passing of the Hand and Foot Bill. Assume the Judge allows a medical fee for one orthopedic expert of $600, split equally between the parties and a standard 60/40 counsel fee split.

1. Calculate the award considering any offsets for the Ordinary Disability Pension.
2. If instead, the disability application provides Petitioner applied for the disability pension due to his right hand as well as his pre-existing lupus and an unrelated congenital back condition for which he provides extensive medical treating records. How would this change the calculus of the Ordinary Disability Offset?
3. If instead, Petitioner is a police officer who injured his right hand from a physical altercation with a suspect. Assume he receives the same partial total workers' compensation award but receives an Accidental Disability Pension solely for post-traumatic stress disorder caused by the incident without consideration for the physical injury. Can Petitioner make the same argument regarding the pension offset as he could in Question 2?

Petitioner, John Deer, worked at County building as a boiler operator. He had worked in that capacity for over 25 years and loved his job. On March 9, 2010, he was turning a boiler valve when he felt intense pain in his right shoulder.

The claim was accepted, and Respondent authorized medical treatment. John subsequently underwent surgery to his right shoulder to repair

extensive rotator cuff and labral tears. Unfortunately, he was never able to return to work.

Mr. Deer had extensive pre-existing conditions including a prior cervical fusion surgery in 2006, right ankle fracture surgery in 2007, prostate cancer surgery as well as COPD commencing in 2003. Petitioner's experts opine that he is totally and permanently disabled, and Respondent's expert opines he has sustained 17 ½% of partial disability from the last compensable accident.

At the settlement conference, it is agreed that Petitioner is totally and permanently disabled as of November 28, 2010, with the Second Injury Fund agreeing to contribute 50% towards his total disability.

Petitioner's average weekly wage was $1,154.00 per week giving rise to a Total Disability Rate of $794.00 per week.

Petitioner successfully applied for Social Security Disability Benefits. The date of entitlement for SSD was September 1, 2010. His 80% of ACE was $4,060.00 per month and his initial entitlement was $1,915.80 per month with no auxiliaries.

Petitioner was born on February 17, 1952.

Petitioner also successfully applied for an Accidental Disability Pension. The effective date of the pension was May 1, 2011. His pension amounted to $2,396.82 per month. The pension portion of the monthly benefit amounted to $1,746.32 per month and the annuity portion was $650.49 per month.

The Judge of Compensation graciously provides you with the following allowances in advance of the hearing. The Judge's philosophy is that the fee should be a hybrid. The orthopedic and neurological experts are to receive $600 each with the fee split between the parties. Petitioner's share of the counsel fee is $3,956. You are to be reimbursed $208.00 for trial preparation costs.

The Order for Total Disability Benefits is entered on August 13, 2013.

1. What is the date on which the Second Injury Fund commences paying benefits?

2. On what date do benefits commence under N.J.S.A. 34:15-12(b)?

3. What is Petitioner's Social Security offset rate?

4. When does the Social Security Disability offset rate commence and when does it cease?

5. What is the offset to the Division of Pensions?

6. Assuming Pensions is to be reimbursed as of the date of the Total Award, how much does Petitioner need to reimburse the Division of Pensions?

7. What will Petitioner receive in net workers' compensation benefits following the reimbursement to Pensions as of the date the total permanent disability award is entered?

8. What will Petitioner receive from his pension going forward monthly, accounting for the offset?

9. How much will Petitioner receive weekly combined between his pension and total disability benefits before he turns 62?

10. How much will Mr. Deer receive weekly between his pension and total disability benefits after he turns 62? Keep in mind, he may at this point a reduction in his social security disability benefits if Social Security elects to take an offset until he reaches full retirement age.

11. Assume the boiler was deemed to be faulty and the cause for Petitioner's injury bringing forth a product liability claim against the manufacturer, which resulted in a settlement of $750,000.00 after the repayment of any med-temp lien. How does this affect the offsets for both Social Security and the Division of Pensions? Assume for this question, the attorney fee on the entire amount of the products liability claim is 33 1/3%.

JAMES LETTS, Petitioner-Appellant,
v.
BOARD OF TRUSTEES, POLICE AND FIREMEN'S RETIREMENT SYSTEM, Respondent-Respondent.

DOCKET NO. A-2250-16T3

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

Submitted September 12, 2018
September 26, 2018

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

Before Judges Sumners and Mitterhoff.

On appeal from the Board of Trustees, Police and Firemen's Retirement System, Docket No. 3-10-51329.

Gaylord Popp, LLC, attorneys for appellant (Samuel M. Gaylord, on the brief).

Gurbir S. Grewal, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Danielle P. Schimmel, Deputy Attorney General, on the brief).

PER CURIAM

Page 2

This appeal asks us to determine whether the Board of Trustees, Police and Firemen's Retirement System (the Board) correctly applied N.J.S.A. 43:16A-15.2 in its final agency decision that reduced James Letts' accidental disability retirement (ADR) benefits by the amount of workers' compensation settlement proceeds he received after the effective date of his retirement. Although Letts had distinct qualifying injuries for the ADR and workers' compensation settlement, we conclude the statute requires an offset because the injuries arose from the same incident.

In August 2013, Letts was shot twice while performing his duties as a Trenton police officer. About two weeks later, he filed a workers' compensation claim for injuries to his right shoulder and abdomen from the shooting. Over a year later, while his workers' compensation claim was pending, Letts applied for ADR from the Police and Fireman's Retirement System (PFRS) claiming total and permanent disability due to post-traumatic stress disorder he also sustained from the shooting.

In July 2015, Letts settled his workers' compensation claim for 165 weeks at $260.04, totaling $42,906.00, due to permanent partial injuries of the right shoulder and abdomen. Two months later, the Board approved Letts' application for ADR benefits effective August 1, 2015, due to his post-traumatic stress

Page 3

disorder. In the Board's September 2015 letter advising him of the approval, Letts was informed that his retirement benefits[1] could be subject to a reduction of the amount workers' compensation payments he received after the effective date of his retirement. Consequently, ten months later, the Board advised Letts in a June 2016 letter, that under N.J.S.A. 43:16A-15.2, the total amount of his ADR benefits would be reduced by $28,703.51, the amount of the worker's compensation settlement payments he received after his retirement was approved.[2]

Letts requested the Board reconsider its position. Citing Rosales v. State Dep't of the Judiciary, 373 N.J. Super. 29 (App. Div. 2004), Letts argued there should not be an offset of his retirement benefits with his worker's compensation settlement under N.J.S.A. 43:16A-15.2 because the post-traumatic stress disorder for which his ADR was based upon occurred after he returned to work

fastcase

Page 4

from his workers' compensation leave for different injuries to his right shoulder and abdomen.

On October 18, 2016, following the previous days' hearing in which it heard Letts' arguments and considered his submissions, the Board wrote to Letts' counsel advising that it decided not to change the initial determination that Letts' ADR benefits were subject to an offset by his workers' compensation settlement under N.J.S.A. 43:16A-15.2. In doing so, the Board rejected Letts' argument that his separate injuries for the workers' compensation settlement - right shoulder and abdomen - and the ADR - post-traumatic stress disorder - precluded an offset under the statute because they both arose from the same shooting incident. The Board also pointed out that Letts was made aware of the potential offset when it advised him that his ADR was approved.

The Board later denied Letts' request for reconsideration of its decision, or in the alternative a hearing before the Office of Administrative Law, and rendered a final agency decision denying Letts' appeal on January 10, 2017. The Board essentially reiterated the reasoning it expressed in its October 18 letter that N.J.S.A. 43:16A-15.2 requires an offset of his ADR in the amount of the workers' compensation settlement payments received after the effective date of his retirement. The Board added, "the basis [of] the statute is to prevent double

Page 5

recovery for the same incident. Permitting . . . Letts to waive the offset would be contrary to the statutory intent."

Before us, Letts reiterates the arguments he presented to the Board. He contends the Board erred in its application of N.J.S.A. 43:16A-15.2 because the statute does not provide for an offset where the workers' compensation injuries differ from the injury for which the ADR was approved. He, therefore, maintains that there is no double recovery for the same disability as the Board determined.

Consequently, we are asked to weigh-in on the Board's interpretation of N.J.S.A. 43:16A-15.2, which provides in pertinent part:

> b. An application for retirement benefits may be approved by the board of trustees while the member, applying for such benefits, is in receipt of periodic benefits under the Workers' Compensation Law. If a retirant receiving an accidental disability retirement allowance becomes a recipient of periodic benefits under the workers' compensation law after the date of retirement, the pension portion of the retirement allowance payable to the retirant shall be reduced, during the period of the payment of the periodic benefits, dollar-for-dollar in the amount of the periodic benefits received after the date of retirement, subject to the provisions of [N.J.S.A. 43:16A-12-4].

The statute does not specifically state that for the offset to apply, the retirant's injuries upon which the ADR benefits and the workers' compensation benefits

Page 6

are based, must be the same, or even occur from the same incident. Nevertheless, the Board's interpretation makes complete sense.

It is well settled that a primary purpose of statutory interpretation is to "seek to effectuate the 'fundamental purpose for which the legislation was enacted.'" Twp. of Pennsauken v. Schad, 160 N.J. 156, 170 (1999) (quoting N.J. Builders, Owners & Managers Ass'n v. Blair, 60 N.J. 330, 338 (1972)). Moreover, we "afford substantial deference to an agency's interpretation of a statute that the agency is

charged with enforcing." Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 196 (2007). "Such deference has been specifically extended to state agencies that administer pension statutes[,]" because "'a state agency brings experience and specialized knowledge to its task of administering and regulating a legislative enactment within its field of expertise.'" Piatt v. Police & Firemen's Ret. Sys., 443 N.J. Super. 80, 99 (App. Div. 2015) (quoting In re Election Law Enf't Comm'n Advisory Op. No. 01-2008, 201 N.J. 254, 262 (2010)).

N.J.S.A. 43:16A-15.2 was enacted to prevent the "simultaneous receipt of compensation benefits and disability benefits." Cty. of Mercer v. State, Dept. of Treasury, Div. of Pensions Bd. of Trs., 193 N.J. Super. 229, 235 (App. Div. 1984). Recognizing this statutory intent, the Board properly determined that

Page 7

application of the statute's setoff provision to prevent simultaneous receipt of the ADR benefits and workers' compensation benefits from the same incident - regardless that there were injuries to different body parts involved in the respective approvals - furthers the legislative goal to bar double recovery.

Furthermore, Letts' reliance upon Rosales is misplaced. There, we recognized that through N.J.S.A. 43:16A-15.2, PFRS, was modified "in 1971 to provide for an actuarial offset of both accidental and ordinary disability pensions when one received Workers' Compensation benefits for the same injury as the pension." Rosales, 373 N.J. Super. at 39 (citing Leoni v. Twp. of Hamilton, 134 N.J. Super. 231, 235 (App. Div. 1975)).[3] However, the acknowledgement in Rosales that under N.J.S.A. 43:16A-15.2, benefits from an ADR and a workers' compensation claim for the same injury should be offset, does not logically extend to support Letts' contention that we should now interpret the statute to preclude offsetting those respective benefits where they are based upon different injuries but they arise from the same incident. To do so would allow a retirant to parse out his injury claims in an ADR application and a workers'

Page 8

compensation claim to enjoy double recovery, clashing with the clear intent of N.J.S.A. 43:16A-15.2. Hence, we discern no error in the Board's interpretation of the statute because its decision was not arbitrary, capricious, or unreasonable, and did not violate legislative policies. Lavezzi v. State, 219 N.J. 163, 171 (2014); Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

Footnotes:

1. His monthly allowance of $5,181.55 was comprised of $4,198.61 for his pension and $982.94 for an annuity.

2. The Board advised Letts that $16,258.77 of the current amount owed would be recouped through monthly reductions of $1,126.83 in his retirement benefits until the amount was paid, and for the past amount due of $12,444.74, unless he made a lump sum payment within thirty days, or there would be monthly deductions of $405.47 from his retirements until the amount was paid.

3. We further pointed out in Rosales that: "The pension rules were amended . . . in 1994 to change offsets of accidental disability pensions from an actuarial offset to a dollar for dollar basis when there is a Workers' Compensation award. However, the Division of Pensions no longer sought to take an offset of ordinary disability pensions, N.J.A.C. 17:1-4.32." Id. at 40.

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860 A.2d 929
373 N.J. Super. 29

Tami ROSALES, Petitioner-Respondent,
v.
STATE of New Jersey DEPARTMENT OF THE JUDICIARY, Respondent-Appellant,
v.
The Second Injury Fund, Respondent-Respondent.

Superior Court of New Jersey, Appellate Division.

Argued September 15, 2004.

Decided November 8, 2004.

[860 A.2d 930]

Michael O'Brien, Deputy Attorney General argued the cause for appellant (Peter C. Harvey, Attorney General, attorney; Michael J. Haas, Assistant Attorney General, of counsel; Mr. O'Brien on the brief).

Frank S. Salzer, Toms River, argued the cause for respondent Tami Rosales (Mr. Salzer, of counsel and on the brief; Thomas W. Polaski, on the brief).

Respondent The Second Injury Fund has not filed a brief.

Before Judges KING, NEWMAN and HOLSTON, Jr.

The opinion of the court was delivered by

NEWMAN, J.A.D.

This appeal presents the issue of whether Workers' Compensation benefits should be offset by an ordinary disability retirement based upon the same disability. We are satisfied that the long-standing public policy prohibiting dual recoveries for the same disability require an offset. We are further convinced that the Workers' Compensation judge's findings of total disability are well-supported by the credible evidence in the record, but that the judge mistakenly delayed petitioner's payment of attorneys' fees and costs. We affirm in part and reverse and remand in part to make the necessary financial adjustments.

I.

Petitioner Tami M. Rosales (petitioner) was born on November 25, 1963. Her education includes an associate degree and credits toward a bachelor degree. She was hired by the County of Ocean as a clerk-typist in 1989. In 1991, petitioner developed severe pain in her right dominant hand. Following testing, she received a right carpel tunnel release in 1991. Dr. Martin Riss, petitioner's medical expert, found that after the first surgery, petitioner had a disability of forty percent of the right hand and twenty percent of the left hand. Dr. Gary Pess, a board certified hand surgeon, performed a second right carpel tunnel release and an ulnar nerve release on July 21, 1993. In 1994, petitioner had a left carpal tunnel release. Dr. Pess diagnosed petitioner with de Querevain tenosynovitis of the left wrist. Dr. Riss examined petitioner in 1994, and opined that her disability had increased to sixty-five percent of the right hand and forty-five percent of the left hand. Petitioner's complaints included pain and numbness in both hands, stiff fingers, restricted wrist movement, weak grasp, and an inability to open her right

[860 A.2d 931]

hand completely. Her symptoms were aggravated by inclement weather. The symptoms continued to progress, and in June 1995, electrodiagnostic studies confirmed the continued presence of pressure on the right carpal tunnel.

On July 24, 1995, petitioner received her first Workers' Compensation award pursuant to claim number XX-XXXXXX. Judgment was entered against the County of Ocean providing for twenty-five percent of partial total disability for residual effects of "bilateral carpel tunnel syndrome with de Quervain's syndrome and ulnar nerve

fastcase

disability" stemming from occupational exposure from 1989 through 1991. In 1995, the county courts came under the jurisdiction of the State, and petitioner became a State employee, although her position and work responsibilities remained the same.

On September 20, 1995, petitioner filed claim number XX-XXXXXX against the State Treasury Department, Bureau of Risk Management (Risk Management), alleging that her continued occupational exposure with the State caused her hands and arms to develop increased disability. On October 18, 1995, petitioner underwent a revision of the right carpal tunnel release that she received in 1991 by receiving a right finger trigger release of her right thumb. She remained out of work until January 22, 1996, and then returned on light duty. Petitioner was examined by Dr. Riss on April 8, 1996, and her complaints included continued pain in her right wrist and thumb, loss of grip in her right hand, pins and needles in her fingers, tenderness in her right arm, use of a brace on her right wrist, and returning pain in her left hand as a result of overuse. Dr. Riss was of the opinion that she was totally disabled.

Petitioner was diagnosed with right cubital tunnel syndrome, and on August 14, 1996, Dr. Pess performed an ulnar nerve transposition.

On October 9, 1996, petitioner was examined by the State's medical expert, Dr. A. Gregory McClure. Petitioner voiced the same complaints to Dr. McClure that had been provided to Dr. Riss. Based on a review of the medical history, operative reports and examination, Dr. McClure determined that petitioner had a seven and one-half percent disability in her right arm.

On January 15, 1998, petitioner was again examined by Dr. Riss, who was of the opinion that the new surgeries resulted in a disability of forty-five percent of the right arm and thirty-five percent of the right hand, which reflected an improvement from his prior estimate of sixty-five percent in the right hand. He still held the view that she was totally disabled.

On April 15, 1998, Workers' Compensation Judge Apy entered a judgment for petitioner for forty-five percent of partial total disability on claim number XX-XXXXXX for "residuals of nerve impingement and de Quervaens Syndrome with bilateral carpel tunnel release followed by right ulnar nerve release, right median nerve and trigger thumb release and flexor tenosynovectony with status post anterior transposition and nuerolysis right ulnar nerve at right elbow." Risk Management received credit for the July 25, 1995 judgment entered against the County of Ocean for twenty-five percent of partial total disability.

Petitioner testified that after her receipt of the April 1998 award, her job was changed to a light duty position as a receptionist for the Superior Court. Her responsibilities included working at a reception counter tending to individuals requiring servicing from the courts. She frequently made photocopies, worked on a computer and answered and transferred calls from a main switchboard which had

[860 A.2d 932]

three telephone lines. She was relieved of retrieving tightly packed files since that activity worsened her symptoms. She no longer had to open the mail, but still sorted and documented it. Shortly before she stopped working, at her request, she was provided with a telephone head set to facilitate multi-tasking. She often required assistance from her co-workers and needed frequent breaks.

Petitioner returned to Dr. Pess on October 13, 1998, complaining of numbness from the side of her neck radiating down her shoulder and pain in her arms, hands and fingers. She continued in his care and was sent for an EMG and nerve conduction studies on March 2, 1999, which disclosed left ulnar neuropathy at the elbow site. On March 4, 1999, petitioner filed an application for review of the April 1998 award, seeking additional compensation on the basis that her condition had worsened. Risk Management denied the application. On that same date, petitioner filed claim number XX-XXXXXX for

fastcase

the consequences of her occupational exposure from April 1998 until the filing of that claim. Risk Management denied that claim as well.

On April 6, 1999, an EMG and nerve conduction study of the right upper extremity showed a right median nerve disorder at the wrist. Compared to the June 1995 study, there was a mild worsening of the carpel tunnel syndrome, but some improvement of the right ulnar nerve neuropathy. On May 25, 1999, Dr. Pess administered injections of Xylocaine and Celestone to petitioner's right hand, which resulted in minimal relief. On July 1, 1999, an x-ray of petitioner's right shoulder revealed "possible calcific tendonitis of the greater tuberosity." An MRI of the cervical spine was performed on July 8, 1999, which revealed no abnormalities. On September 14, 1999, petitioner received another injection of Xylocaine and Celestone to her right hand.

On September 28, 1999, she was again examined by Dr. McClure. He found a full range of motion of both arms, and no objective findings to support the complaints of petitioner, who he considered a symptom magnifier. He found there was no change in the disability of the right arm from his previous estimate of seven and one-half percent. However, as a result of the nerve conduction studies, he found a five percent disability of the left arm. He opined that she could return to work, but that she should be restricted from "highly repetitive or highly forceful work" and could not perform beyond a light duty position.

In an October 5, 1999 report, Dr. Pess stated that petitioner would be unable to perform her work duties due to pain in her wrist and elbow. He was of the opinion that her condition would never improve to a degree where she would be able to perform her work duties, and that her injuries were caused by occupational exposure due to repetitive motion.

On October 5, 1999, petitioner filed an application for an ordinary disability pension. On October 13, 1999, she filed a verified petition in which she alleged that she was entitled to benefits under the Second Injury Fund (SIF), to commence when her Workers' Compensation benefits expired. SIF is a Special Compensation Fund that makes benefit payments to workers already partially disabled who subsequently experience a work related injury which when combined, render them totally disabled.

Petitioner worked until November 1999 when she reached ten years of employment and had the minimum time needed to qualify for an ordinary disability pension. The ordinary disability pension was made effective on December 1, 1999, and she

[860 A.2d 933]

received forty percent of her average wage, or $673.49 per month (on November 1, 2001, all ordinary disability pensions were increased to 43.6% of the final wage). Her contributions of $6440.61 yielded an annuity of $79.34 per month, and the Public Employee Retirement System's funded portion was $594.56 per month. Petitioner also filed for Social Security disability, which was initially denied, but granted in July 2001 with payments made retroactive to May 1, 2000.

On January 10, 2000, Dr. Riss examined petitioner for the final time. He again opined that petitioner was totally disabled due to her impairment of mobility and loss of grip strength. He found that her total disability had existed since 1996, and had worsened over time. He found that the loss of function in her left hand was the same as he found in 1998, except for minor changes in supination and flexion; the right hand had minor changes in supination and extension. The only change in the loss of function in the right and left arms was a minor change on supination.

On January 24, 2002 Workers' Compensation Judge Moncher rendered an initial decision regarding petitioner's three claims: the application for review and modification of the April 15, 1998 award, claim number XX-XXXXXX for her occupational exposure from April 1998 to

fastcase

March 4, 1999 and the petition for benefits under the SIF. Testimony by petitioner, Dr. Riss and Dr. McClure was provided over the course of several months. The trial was held pursuant to the SIF bifurcation rule *N.J.A.C.* 12:235-5.1(e) (recodified from *N.J.A.C.* 12:235-7.2 and amended by 34 *N.J.R.* 364(d) effective October 21, 2002). That rule provides for an initial trial with only petitioner and the employer's attorney on the issues of compensability and total disability, while the issue of SIF liability is determined later with the participation of a Deputy Attorney General (DAG) representing the fund. *Ibid.*

During the trial, petitioner testified that while her job made her symptoms worse, she continued to work to support herself and her child. She further testified that she did not want any additional surgeries because she felt the surgeries only worsened her condition. Additionally, she stated that she had not pursued new employment since every job that she was qualified for involved use of her hands. She indicated that she engages in limited housework with the assistance of her son, and is not able to maintain her house as she once did.

On January 2, 2002, Judge Moncher found that petitioner was totally and permanently disabled and was unlikely to ever improve. His award of benefits was as follows:

> I have found that petitioner is totally permanently disabled following manifestation of permanent disability from her last compensable injury and that she is most likely eligible for Second Injury Fund benefits. Therefore, pursuant to *N.J.A.C.* 12:235-7.2, *et seq.*, I am entering an interim order directing the respondent to begin payment of total permanent disability effective January 1, 2002 at the weekly benefit rate reduced for Social Security Benefits until further order of this tribunal. *See N.J.A.C.* 12:235-7.2.
>
> Petitioner's wage for the prior judgment against [S]tate was $305.23 yielding a total disability rate of $213.66 per week. Her wage for the 1999 claim was $470.27, yielding a total disability rate of $329.18 per week. As seen below her weekly benefits are capped by operation of the Social Security reverse offset until age 62, some 24 years hence. No matter which wage governs her award, her weekly benefit in Workers Compensation will be the same.
>
> [860 A.2d 934]
>
> Petitioner's 80% [average current earnings] as reported by the Social Security Administration was $1468 per month. Her initial award of Social Security Benefits, effective May 1, 2000 was $708 and she receives an auxiliary benefit of $354 per month for her son Andre, date of birth September 22, 1992. Subtracting the total family benefit of $1,062 from $1,468 yields a difference of $308 per month as the maximum compensation benefit payable at this time. *N.J.S.A.* 34:15-95.5. This number times 12, divided by 52 gives a weekly benefit of $93.69. When her son's social security ends, the weekly Workers' Compensation disability benefit shall increase to $175.39 until her 62nd birthday.

On January 29, 2002, the second hearing to determine SIF liability was held. The DAG, representing Risk Management and SIF, stated that no further facts on the liability issues would be presented. Judge Moncher found that Risk Management's liability began to accrue on December 1, 1999, after petitioner left the state payroll, and not on January 1, 2002 as he initially found in his opinion of January 2. He held that petitioner's Workers' Compensation benefits

fastcase

would still be subject to offset by her receipt of Social Security disability which began on May 1, 2000. Risk Management's liability would continue until August 29, 2004. He found there was SIF liability, which would be payable at the same rate as Risk Management's liability beginning on August 31, 2004.

At the second stage of the SIF hearing, Risk Management contended that petitioner should not be receiving Workers' Compensation benefits since she had received an ordinary disability pension from the Public Employees' Retirement System (PERS). On September 23, 2002, Judge Moncher rejected Risk Management's assertions that petitioner's benefits should be canceled because she was receiving an ordinary disability pension from PERS. Judge Moncher concluded that the clear intent of the pension statutes is to provide an offset of Workers' Compensation benefits for an accidental disability pension only.

Judge Moncher held that petitioner's attorney's costs and fees should be payable by both Risk Management and petitioner, with Risk Management paying a significantly larger portion. He also ruled that even though petitioner would be paid Workers' Compensation benefits on a total disability basis as of December 1, 1999, she would not begin to contribute toward her share of attorney's fees and costs until May 1, 2000, the date that she became eligible for Social Security disability. Pursuant to 42 *U.S.C.* § 424a, this delayed the offset that Risk Management would receive for petitioner's receipt of Social Security disability.

On appeal, Risk Management raises the following issues for our consideration:

POINT I

THE AWARD OF PERMANENT DISABILITY MUST BE OFFSET BY THE DISABILITY PORTION OF THE ORDINARY DISABILITY PENSION IN ORDER TO SATISFY THE LONGSTANDING AND STRONG PUBLIC POLICY WHICH PROHIBITS DUAL RECOVERIES FOR THE SAME INJURY.

POINT II

THE JUDGE OF COMPENSATION EXCEEDED HIS AUTHORITY WHEN HE RULED HE WAS NOT BOUND BY THE SUPREME COURT'S INTERPRETATION OF THE 1995 AMENDMENTS TO *N.J.S.A.* 34:14-43 NOR THE LEGISLATIVE AMENDMENTS IN 1997 AND 1999 BECAUSE THE LEGISLATURE, IN THE JUDGE'S OPINION,

[860 A.2d 935]

WAS UNAWARE OF ITS OWN ACTIONS AND NOT INTENTIONALLY BARRING DUAL RECOVERIES.

POINT III

THE DECISION OF THE JUDGE OF COMPENSATION MUST BE REVERSED BECAUSE THERE IS NOT SUFFICIENT CREDIBLE FACTUAL EVIDENCE IN THE RECORD TO CAUSALLY CONNECT THE PETITIONER'S CONDITION TO HER NEW OCCUPATIONAL EXPOSURE AND THE DETERMINATION OF TOTAL DISABILITY IS NOT BASED UPON SUFFICIENT OBJECTIVE MEDICAL EVIDENCE SINCE IT IS BASED UPON THE NET OPINION OF THE PETITIONER'S MEDICAL EXPERT.

POINT IV

THE JUDGE OF COMPENSATION ABUSED HIS DISCRETION BY REQUIRING A DELAY IN THE PAYMENT OF FEES AND COSTS

> UNTIL AFTER THE START OF THE SOCIAL SECURITY AWARD IN ORDER TO ENHANCE THE PETITIONER'S AWARD AT THE EXPENSE OF THE STATE OF NEW JERSEY.

II.

Risk Management contends that based on the strong public policy of this state to prohibit double recovery for the same injury, petitioner's Workers' Compensation benefits should be offset by her ordinary disability pension. We agree.

The longstanding public policy of *N.J.S.A.* 34:15-43 prohibits the dual recovery of both pension benefits and Workers' Compensation benefits for the same disability. *N.J.S.A.* 34:15-43 was first amended in 1931 to prohibit the receipt of Workers' Compensation benefits when one was awarded a disability pension. The statute was amended in 1948 to add the sentence which required an employer to continue to provide medical care for a work related injury even if one was receiving a disability pension.

From 1948 to 1996, *N.J.S.A.* 34:15-43 read in pertinent part:

> No former employee who has been retired on pension by reason of injury or disability shall be entitled under this section to compensation for such injury or disability; provided, however, that such employee, despite retirement, shall, nevertheless, be entitled to the medical, surgical and other treatment and hospital services as set forth in *R.S.* 34:15-15.

The public employee retirement systems contained very similar language concerning how they are affected by a Workers' Compensation award for the same injury. For instance, prior to the 1971 amendments the Police and Firemen's Retirement Fund, *N.J.S.A.* 43:16A-15.2b stated,

> No application for retirement benefits may be approved by the board of trustees while the member applying for such benefits, is in receipt of periodic benefits under the Workers' Compensation Law.

This created a dilemma for public employees who could retire immediately but would then be precluded from seeking Workers' Compensation benefits. In the alternative, a worker could collect Workers' Compensation benefits immediately but would be precluded from collecting a disability pension until the compensation benefits ran out. The employee often could not know in advance which award would be greater but would still be limited to the option initially selected.

Attempts by the Legislature to amend *N.J.S.A.* 34:15-43 to allow the recovery of both the full Workers' Compensation award and the disability pension met with

[860 A.2d 936]

gubernatorial veto. *See* S.391 (January 27, 1969); S.441 (January 26, 1970). The various pension systems did modify their statutes in 1971 to provide for an actuarial offset of both accidental and ordinary disability pensions when one received Workers' Compensation benefits for the same injury as the pension. *Leoni v. Township of Hamilton*, 134 *N.J.Super.* 231, 235-36, 339 *A.*2d 222 (App.Div.1975).

The Supreme Court in *Conklin v. City of East Orange*, 73 *N.J.* 198, 373 *A.*2d 996 (1977), resolved the effect that the 1971 pension amendments had on *N.J.S.A.* 34:15-43. That statute still barred recovery of Workers' Compensation benefits while one was in receipt of a disability pension. The Court ruled it did not matter which benefit was awarded first as long as there was an offset. The Court recognized "[t]he statutory purpose is to allow the employee the more advantageous of the respective benefits, but to require the off-set heretofore mentioned in order to avoid double recovery for the same disability." *Id.* at 205, 373 *A.*2d 996. While the

fastcase

Court's decision was at odds with the then language of *N.J.S.A.* 34:15-43, the Court found the failure to amend *N.J.S.A.* 34:15-43 "was inadvertent" and that the ruling would modify section 43 to meet the Legislature's implied intent to avoid dual recoveries. *Id.* at 204, 373 *A.*2d 996.

In 1977, the Legislature amended *N.J.S.A.* 34:15-29 to state

> The right of compensation granted by this chapter may be set off against disability pension benefits or payments but shall not be set off against employees' retirement pension benefits or payments.

The original bill, Assembly No. 1309, and the sponsor's statement sought to bar a set off against both service and disability pensions. *See Labor, Industry and Professions Committee Statement* to A.1309 (January 19, 1976). In its final form, the bill limited the final bill offsets to disability pensions. In *Young v. Western Electric Co.*, 96 *N.J.* 220, 475 *A.*2d 544 (1984), our Supreme Court noted the amendment recognized the Division of Workers' Compensation's jurisdiction to offset benefits from a disability pension and it reflected "an underlying theme of the Workers' Compensation law is that there should not be duplicative payments for the same disability." *Id.* at 231, 475 *A.*2d 544.

The pension rules were amended in the public pension systems in 1994 to change offsets of accidental disability pensions from an actuarial offset to a dollar for dollar basis when there is a Workers' Compensation award. However, the Division of Pensions no longer sought to take an offset of ordinary disability pensions, *N.J.A.C.* 17:1-4.32.

N.J.S.A. 34:15-43 was amended in 1995, eliminating language which barred any recovery of Workers' Compensation if one was already receiving a disability pension. The legislative statement to Assembly Bill No.1977 described the amendment as one "for consistency with court decisions and the pension systems' offset provisions, the amendments delete from the [W]orkers' [C]ompensation law a sentence which prohibits altogether the receipt of [W]orkers' [C]ompensation benefits by a retirant receiving a disability retirement allowance." *Assembly Appropriations Committee Statement* to A.1977 (December 8, 1994). A few weeks later, the statute was amended to add the second paragraph which granted Workers' Compensation coverage to emergency management personnel but also provided that any benefits would be offset by any collateral benefits. *L.* 1995 c. 383 (1996).

In *Bunk v. The Port Authority of New York & New Jersey*, 144 *N.J.* 176, 676 *A.*2d 118 (1996), the Supreme Court referring to

[860 A.2d 937]

the recent amendment considered the "amendments primarily to be a clarification of existing law, not a change in settled law." *Id.* at 194, 676 *A.*2d 118. The amendment was "not intended to rescind the longstanding equitable bar against double recovery." *Id.* at 192-93, 676 *A.*2d 118. The dominant policy and "central theme of recent Legislatures," as the Court observed, was "that there should not be a double recovery from two sources for the same injury." *Id.* at 189, 676 *A.*2d 118. The Court said "[t]hese amendments appear to be recognition of the gradual developments in case law that permitted employees to select the more advantageous of the benefits." *Id.* at 192, 676 *A.*2d 118.

N.J.S.A. 34:15-43 was next amended in 1999. Assembly Bill No. 2302 added additional types of volunteers to the second paragraph. The bill also returned to the statute the exact same pension bar language which was deleted in 1995. It is entirely possible that this may have been done inadvertently since the pension bar language was not underlined in the proposed bill; nevertheless, it was part of the final bill which was enacted and signed into law by the Governor.

The sponsor's statement to Assembly Bill No. 2302, which became one of the 1999 amendments, said the purpose of the amendment

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was to give the volunteers and other emergency management individuals mentioned in paragraph two of *N.J.S.A.* 34:15-43 the "same salary, pension rights and other benefits as if the injury or death had occurred in the jurisdiction where those persons are normally employed." *Assembly Law & Public Safety Committee Statement* to A.2302 (December 3, 1998). Paragraph two of *N.J.S.A.* 34:15-43 still stated the volunteer's benefits "shall not be paid to any claimant who has another single source of injury or death benefits...." This other source does not exclude disability pension benefits. If these volunteers' award can be offset, and they have the same "pension rights" as others, it is evidence that the offset or double recovery prohibition applies to all employees.

One of the basic concepts in our Workers' Compensation scheme can be found in *N.J.S.A.* 34:15-40, which bars double recoveries from Workers' Compensation and third party recoveries. *Ibid.* Nor does it matter if the recovery is as a result of medical or legal malpractice or if the source of the recovery is from private insurance such as uninsured or underinsured motorist protection. *Frazier v. New Jersey Manufacturers Insurance Company,* 276 *N.J.Super.* 84, 647 *A.*2d 472 (App.Div.1994), *aff'd* 142 *N.J.* 590, 667 *A.*2d 670 (1995). Even where liability claims against employers were due to their intentional misconduct, offsets were called for when the liability and Workers' Compensation awards overlapped. *Millison v. E.I. duPont de Nemours & Co.,* 101 *N.J.* 161, 187, 501 *A.*2d 505 (1985).

In *In Re Application of Howard Smith,* 57 *N.J.* 368, 273 *A.*2d 24 (1971), our Supreme Court, in approving the bar of Workers' Compensation when a retirant is receiving a pension, recognized that there is an implied legislative mandate against double recovery. The Court put it this way:

> But no matter how sympathetically the employee's interest are viewed, the judiciary cannot ignore the legislative intention which plainly emerges from the total statutory treatment of the subject. Such intention must be given sensible application in order to accomplish the indicated purpose and to avoid a bizarre result.
>
> [*Id.* at 380, 273 *A.*2d 24.]

[860 A.2d 938]

We analyzed in *Leoni v. Township of Hamilton, supra,* the interplay between *N.J.S.A.* 34:15-43 and the pension statutes after the pension statutes were amended to allow an actuarial offset of the pension from a Workers' Compensation award. There, we observed that *N.J.S.A.* 34:15-43 and the pension statutes were not amended at the same time but nonetheless the pension amendment must be read "*in pari materia*" with the Workers' Compensation Act to allow the offset. *Id.* at 236, 339 *A.*2d 222. We said:

> The construction which we have given to the statutes comports with the laudatory purpose of the Workmen's Compensation Act and the pension disability provisions and at the same time precludes the double recovery of benefits referred to in *Smith, supra* and *Russo,* [*v. Teachers' Pension and Annuity Fund,*] supra [62 *N.J.* 142, 299 *A.*2d 697 (1973)]. Indeed, in our view, it accords with the underlying philosophy of *Smith.*
>
> [*Id.* at 237, 339 *A.*2d 222.]

Conklin v. City of East Orange, supra, resolved the interplay between the Workers' Compensation and the pension statutes. The Court noted that the fact that *N.J.S.A.* 34:15-43 was not amended was "inadvertent" and the statute would be modified to be consistent with the Legislature's intent to prevent double

recoveries. *Id.* at 204, 373 *A.*2d 996. In no uncertain terms, the Court said the offset

> applies whether the retirement is for accidental disability or, as here, ordinary disability ... The statutory purpose is to allow the employee the more advantageous of the respective benefits, but to require the offset heretofore mentioned in order to avoid double recovery for the same disability.
>
> [*Id.* at 205, 373 *A.*2d 996 (citation omitted).]

N.J.S.A. 34:15-29 was amended after the *Conklin* decision to expressly grant Workers' Compensation judges the power to offset a Workers' Compensation award by a disability pension. The Court in *Young v. Western Electric Co., supra,* acknowledged that the amendment implicitly recognized the Division's jurisdiction to make offsets of disability pension benefits against compensation awards for partial permanent and total permanent disability and a policy supporting integration of compensation awards and pension plans. *See* 96 *N.J.* at 220, 475 *A.*2d 544. Rejecting the argument that *N.J.S.A.* 34:15-29 only applied to accidental disability plans or that only the pension could be reduced the Court stated,

> The amendment may be read literally to provide only that disability pension benefits can be reduced, but not the compensation award. Such a reading is counterproductive to the workers' compensation scheme; it would encourage employers to delay payment of disability pension benefits until the compensation awards had been determined. It is doubtful that the Legislature had any such intent. Rather an underlying theme of the workers' compensation law is that there should not be duplicative payments for the same disability.... The sense of the Act is that compensation awards, as well as disability pensions may be reduced depending on the timing and amounts of the respective payments. Our interpretation accords with the settled statutory interpretive guide that the letter should give "way to the obvious reason and spirit of the expression."
>
> [Id. at 230 to 231, 475 *A.*2d 544 (citation omitted).]

Wright v. The Port Authority of New York & New Jersey, 263 *N.J.Super.* 6, 621 *A.*2d 941 (App.Div.), *certif. denied,* 133

[860 A.2d 939]

N.J. 442, 627 *A.*2d 1147 (1993), which resembles the present case, involved the Second Injury Fund and a claimant who was receiving a public accidental disability pension which did not provide for any offset due to a New Jersey Workers' Compensation award. The Second Injury Fund's Deputy moved for an offset of the Workers' Compensation award based upon *N.J.S.A.* 34:15-29 and *N.J.S.A.* 34:15-43. *Id.* at 9, 621 *A.*2d 941. The motion was denied and the Fund appealed. *Ibid.* Relying upon *Conklin* and *N.J.S.A.* 34:15-43, this court ruled that the employer could offset the Workers' Compensation award by the disability pension. *Id.* at 24, 621 *A.*2d 941. We pointed out that to do otherwise the claimant would receive almost two times his salary from a combination of Social Security disability, pension benefits and Workers' Compensation. *Id.* at 14, 621 *A.*2d 941.

Bunk v. Port Authority of New York & New Jersey, supra is, in our view, dispositive of the issue presented here. In *Bunk,* a public ordinary disability pension which did not provide for an offset of a Workers' Compensation award for the same injury was decided after *N.J.S.A.* 34:15-43 was amended in 1995 and the Court specifically addressed this amendment's impact upon offsets. *Id.* at 193, 676 *A.*2d 118. The Court found the

amendments were "not intended to rescind the longstanding equitable bar against double recovery." *Ibid.*

The Court stated that the offset would apply even though "[g]ranted, there is no provision in the PA pension requiring or allowing setoff, the question to us is one of legislative intent." *Id.* at 189, 676 *A.*2d 118.

More recently, *James v. Public Employees' Retirement System,* 164 *N.J.* 396, 753 *A.*2d 1061 (2000), citing *Bunk, supra* as controlling, said,

> Work-disabled employees are to be able to achieve the most advantageous combination of [W]orkers' [C]ompensation and pension benefits without offending our strong public policy against the award of double benefits for the same disability.
>
> [*Id.* at 410-11, 753 *A.*2d 1061.]

So too here. If there is no offset, petitioner could receive between her pension, Workers' Compensation award and Social Security disability benefits a total of 120% of her full salary. With cost of living increases and recent changes in the pension law, that benefit presently exceeds 120% of salary. Aside from the prohibition of a double recovery, the result here would be even more egregious because the retirant would actually receive more compensation retired than she would have received had she been able to continue working. Such a bizarre result puts a premium on not working which clearly undermines public policy. We, therefore, are convinced that *N.J.S.A.* 34:15-43 proscribes receipt of both a Workers' Compensation award and an ordinary disability retirement based on the same injury and resulting disability. The offset must be utilized.

> [We do not publish section III of our opinion because the guidelines for publication are not met. *R.* 1:36-2(d).]

IV.

Risk Management contends that Judge Moncher mistakenly exercised his discretion by finding that petitioner would not begin to pay attorney's fees and costs until May 1, 2000, the date she became eligible for Social Security disability, and not on December 1, 1999, the date she became eligible for Workers' Compensation benefits payable on a total disability basis. Judge Moncher ordered as follows:

> Permanent total disability shall begin on December 1, 1999 at $329.19 per week until April 30, 2000 without offset.
>
> [860 A.2d 940]
>
> Commencing May 1, 2000, she will continue to receive $329.18 per week until she has accrued sufficient monies to equal her share of counsel fees, allowances and costs. This postponement of the Social Security offset is required so that this reduction not exceed that allowed by 42 *U.S.C.* § 424a. *See N.J.S.A.* 34:15-95.5. After sufficient monies are accrued, her benefits payable by the [sic] Risk Management shall be at $93.69 until August 29, 1904[sic] or [20]04.

N.J.S.A. 34:15-64 authorizes the Judge of Compensation to assess attorney fees and costs. *N.J.S.A.* 34:15-26 directs that these assessments will be deducted from the weekly compensation benefits as they accrue. Attorney fees in Workers' Compensation cases are routinely paid from the initially accrued Workers' Compensation benefits. *N.J.S.A.* 34:15-16 requires that compensation for all classes of injuries are to run consecutively. We have not found statutory authority for the judge to delay the payment of attorney fees until six months after the permanent disability award commenced.

fastcase

The assessment of fees and costs was apparently delayed so that petitioner's full permanent disability rate would continue longer without any offset. This is based upon 42 *U.S.C.* § 424a which prohibits any reduction in an award while attorney fees and costs are being paid. Similarly, 20 *C.F.R.* § 404.408(d) prohibits any reduction in the award due to "medical, legal or related expenses in connection with the claim." These rules are designed to preclude a dual deduction from an award. A disability award is only reduced by funds actually received by the injured party and not from funds used to pay fees and costs.

These rules were not intended to enhance an award at the expense of the employer. If the Workers' Compensation award here was paid in the same manner as all other Workers' Compensation awards, the fees and costs would have already been paid in full prior to the effective date of the Social Security award. Therefore, the Social Security offset would have begun immediately without any further delay.

Since the payment was arbitrarily delayed until May 1, 2000, the State was required to pay 19-1/7 weeks at the full $329.19 rate rather than the offset rate of $93.69 between May 1, 2000 and September 12, 2000 as required by the court's order. The fee award should be adjusted so that the attorney fees and costs are paid from benefits that commenced to accrue on December 1, 1999, the date total disability began.

Affirmed in part; reversed and remanded in part for further proceedings consistent with this opinion.

fastcase

420 N.J.Super. 1
18 A.3d 220

James BARACIA, Petitioner- Appellant,
v.
BOARD OF TRUSTEES OF the STATE POLICE RETIREMENT SYSTEM, Respondent- Respondent.

Superior Court of New Jersey, Appellate Division.

Argued March 23, 2011.Decided May 13, 2011.

[18 A.3d 221]

Jonathan S. Fabricant, Lakewood, argued the cause for appellant (Bathgate, Wegener & Wolf, P.C., attorneys; Mr. Fabricant and Rui O. Santos, on the briefs).Kellie L. Pushko, Deputy Attorney General, argued the cause for respondent (Paula T. Dow, Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Don E. Catinello, Deputy Attorney General, on the brief).**Before Judges FUENTES, ASHRAFI and NEWMAN.**

The opinion of the court was delivered by

NEWMAN, J.A.D. (retired and temporarily assigned on recall).

[420 N.J.Super. 2] Petitioner James Baracia appeals from the final decision of the respondent Board of Trustees of the State Police Retirement System (the Board) issued on March 23, 2010. That decision held that *N.J.S.A.* 53:5A–38.1(b) required a dollar-for-dollar offset from petitioner's accidental disability retirement allowance of the [420 N.J.Super. 3] amount of $27,482.70, the net award petitioner received by order of the Workers Compensation Court dated June 9, 2009.

Petitioner contends that the net award does not qualify as a payment of compensation

[18 A.3d 222]

on account of petitioner's disabilities or injuries, but constitutes the employer's pro rata share of the attorney's fees it owed petitioner under *N.J.S.A.* 34:15–40(b). We agree with petitioner's position and reverse, requiring that the Board reimburse any monies previously deducted from petitioner's disability retirement allowance.

The facts are not in dispute. Petitioner was a New Jersey State trooper, who was seriously injured while on duty in an automobile accident. He was awarded workers' compensation benefits. He brought a third-party action, which resulted in a settlement of $355,000, less reimbursements for filing fees and other costs in the amount of $2,037.49, for a balance of $352,962.51. The attorney's fees totaled one-third of that amount in the sum of $117,654.05. The workers' compensation lien was in the amount of $68,844.08, which was satisfied from these proceeds, leaving an amount due petitioner of $166,464.38. Because of the third-party award, the employer obtained a reimbursement of its statutory workers' compensation lien and was relieved of its future workers' compensation liability.

Under *N.J.S.A.* 34:15–40(b), the employer was required to pay a pro rata share of petitioner's attorney's fees incurred in the prosecution of the third-party action. Here, the workers' compensation judge found the employer's pro rata share of attorney's fees was $27,482.70 and awarded petitioner that amount. In so concluding, the court stated that amount "does not constitute a payment of compensation, but in fact, a credit toward the payment of Petitioner's counsel fees." [1]

[420 N.J.Super. 4] In reducing petitioner's retirement allowance by $27,482.70, the Board relied upon the provisions of *N.J.S.A.* 53:5A–38.1(b). As a consequence, petitioner's monthly retirement allowance was $1,997.65 less than his monthly disability retirement payment of $5,320.10. This amount was to be deducted for 13.75 months until the sum of $27,482.780 was fully paid.

fastcase

On appeal, petitioner argues that the employer was required to pay its pro rata share of counsel fees incurred by the employee pursuant to *N.J.S.A.* 34:15–40(b) in a third-party tort action that resulted in a recovery in reimbursement of the workers' compensation lien and future benefits to the employer. Petitioner further maintains that *N.J.S.A.* 53:5A–38.1(b) does not permit a reduction in petitioner's accidental disability retirement allowance because the award to petitioner was not compensation or periodic benefits, but a credit for the employer's portion of the attorney's fee in the third-party recovery action. We agree with petitioner's contention.

N.J.S.A. 34:15–40(b) provides:

If the sum recovered by the employee or his dependents from the third person or his insurance carrier is equivalent to or greater than the liability of the employer or his insurance carrier under this statute, the employer or his insurance carrier shall be released from such liability and shall be entitled to be reimbursed, as hereinafter provided, for the medical expenses incurred and compensation payments theretofore paid to the injured employee or his dependents less employee's expenses of suit and attorney's fee as hereinafter defined.

N.J.S.A. 34:15–40(e) defines "expenses of suit" as an amount not to exceed $750 and "attorney's fees" as

[18 A.3d 223]

[such] fee ... not in excess of 33 1/3% of that part of the sum paid in release or in judgment to the injured employee or his dependents by such third person or his insurance carrier to which the employer or his insurance carrier shall be entitled in reimbursement under the provisions of this section, but on all sums in excess thereof, this percentage shall not be binding.

In *McDermott v. Standard Accident Insurance Co.*, 40 *N.J. Super.* 119, 122 *A.*2d 371 (App.Div.1956), we addressed the employer's carrier's obligation to pay the pro rata share of counsel fees incurred by plaintiff in the prosecution of the third-party civil action. *Id.* at 121, 122 *A.*2d 371. There, in holding in favor of the [420 N.J.Super. 5] plaintiff-employee, we clarified how to consider the employer's contribution:

Reducing the problem to its essentials, certain basic facts stand out in bold relief. The plaintiff was paid workmen's compensation by defendant. Later, he recovered in the third-party action a sum greater than the compensation and so became obligated by statute to reimburse defendant [therefore]. However, since he utilized the services of an attorney in achieving the settlement and as a consequence paid a fee of 33 1/3% [thereof], the reimbursement of defendant was subject to diminution by 33 1/3% representing the portion of the attorney's fee allocable to the amount of the compensation which by operation of law was required to be considered as within the common-law recovery. Since the deduction was not made *prima facie* plaintiff's action against defendant is maintainable.

[*Id.* at 124–25, 122 *A.*2d 371.]

Thus, the employer was statutorily obligated to pay a share of the employee's counsel fees because the legal services provided by the employee inured to the benefit of the employer by way of the latter's recovery of workers' compensation benefits paid or to be paid to the employee. As our Supreme Court found in *Owens v. C. & R. Waste Material*, 76 *N.J.* 584, 388 *A.*2d 977 (1978), computation of the employer's pro rata share of counsel fees is measured by the amount of worker's compensation liability the employer has been released of, "whether actually paid or not." *Id.* at 587, 388 *A.*2d 977.

The Board maintains that it was entitled to offset the payment of the $27,482.72 under the authority of *N.J.S.A.* 53:5A–38.1(b), which provides in pertinent part as follows:

An application for retirement benefits may be approved by the board of trustees while the member, applying for such benefits, is in receipt of periodic benefits under the Workers' Compensation Law. If a retirant receiving an accidental disability retirement allowance becomes a recipient of periodic benefits under the workers' compensation law after the date of retirement, the pension portion of the retirement allowance to the retirant shall be reduced, during the period of the payment of the periodic benefits, dollar-for-dollar in the amount of the periodic benefits received after the date of retirement, subject to the provisions of section 31 of P.L.1971, c. 181 (C.53:5A–15.3). The reduction provided for herein shall not affect the retirant's pension adjustment benefits or survivor benefits that may be payable upon the death of the retirant.

The Board argues that it was entitled to reduce the payment of these periodic benefits since petitioner was a retirant of an accidental disability retirement allowance.

[420 N.J.Super. 6] The Board is mistaken. The balance of $30,199.70, which as previously explained was reduced to $27,482.70, was not a periodic benefit as contemplated under

[18 A.3d 224]

N.J.S.A. 53:5A–38.1(b). In fact, the order entered by the workers' compensation judge approving the settlement noted that "[t]he balance due of $30,199.70 does not constitute a payment of compensation, but in fact, a credit toward the payment of petitioner's counsel fees." That part of the workers' compensation judge's order is totally in keeping with the provisions of *N.J.S.A.* 34:15–40(b) which requires the employer to pay its portion toward the attorney's fees incurred by petitioner in the third-party recovery action.

An analogous situation was presented in *Fiore v. Trident Construction Co.*, 251 *N.J.Super.* 101, 597 *A.*2d 85 (App.Div.1991). There, this court examined a similar issue involving the workers' compensation statute and federal social security disability benefits. *Id.* at 102, 597 *A.*2d 85. Speaking for this court, Judge Pressler framed the issue as follows:

When an employer is relieved of its obligation to pay workers' compensation benefits by reason of the injured employee's recovery of damages from a responsible third-party, *N.J.S.A.* 34:15–40(b) requires the employer to contribute to the expenses of suit and attorney's fees incurred by the employee in obtaining that recovery. The question raised by this appeal is whether the employer's contribution constitutes compensation payment against which it is entitled under, *N.J.S.A.* 34:15–95.5, to offset the employee's federal social security disability benefits. We hold that it does not.

[*Ibid.*]

As this court made clear in *Fiore*, "the attorney's fee contribution may be an incident of the [W]orkers' [C]ompensation [A]ct, but is not a monetary benefit provided by the Act to compensate an employee for his injury." *Id.* at 105, 597 *A.*2d 85. We held that neither the federal nor the State offsetting statutory scheme entitled the employer to reduce the attorney's fee payment by the amount of the social security disability benefit "[s]ince the employer's counsel-fee payment does not constitute a benefit on account of disability under New Jersey's workers' compensation[420 N.J.Super. 7] law ... [n]or is the counsel-fee payment 'compensation benefit' pursuant to *N.J.S.A.* 34:15–95.5." *Ibid.*

So too here. We are persuaded that the Board cannot offset petitioner's accidental disability retirement allowance under *N.J.S.A.* 53:5A–38.1(b) by the amount of the attorney's fee payment credit to petitioner because that payment does not constitute a compensation benefit under our workers' compensation law. The fact that petitioner may have received the attorney's fee payment from his employer in the form of a credit does not change the legal status and convert that payment into a periodic benefit subject to triggering the application of *N.J.S.A.* 53:5A–38.1(b).

We, therefore, reverse the Board's decision and reinstate the full payment of the accidental disability retirement allowance originally granted to petitioner and require the Board to reimburse petitioner for any monies previously deducted from that allowance.

Reversed and remanded to the Board for further action consistent with this opinion.

Notes:

1. Initially, the contribution toward the attorney's fee was $30,199.70, which was reduced to $27,482.70, reflecting a payment of $200 to Dr. Reiss, $102 transcript costs, and $2,415 of attorney's fees.

fastcase

Page 101

251 N.J.Super. 101
597 A.2d 85
Edward FIORE, Petitioner-Appellant,
v.
TRIDENT CONSTRUCTION COMPANY,
Respondent-Respondent.
No. A-1223-90T2
Superior Court of New Jersey,
Appellate Division.
Argued Sept. 24, 1991.
Decided Oct. 8, 1991.

[597 A.2d 86] Thomas R. Smith, for petitioner-appellant (Pellettieri, Rabstein and Altman, Princeton, attorneys).

Page 102

Sandra E. Blutman, for respondent-respondent (Richard A. DeMichele, Mount Laurel, attorney).

Page 101

Before Judges PRESSLER, SKILLMAN and D'ANNUNZIO.

Page 102

The opinion of the court was delivered by

PRESSLER, P.J.A.D.

When an employer is relieved of its obligation to pay workers' compensation benefits by reason of the injured employee's recovery of damages from a responsible third-party, N.J.S.A. 34:15-40(b) requires the employer to contribute to the expenses of suit and attorneys' fees incurred by the employee in obtaining that recovery. The question raised by this appeal is whether the employer's contribution constitutes compensation payments against which it is entitled, under N.J.S.A. 34:15-95.5, to offset the employee's federal social security disability benefits. We hold that it does not. Consequently we reverse the judgment of the Division of Workers' Compensation which was based on that offset.

Petitioner Edward Fiore was totally disabled in May 1986 when he fell to the ground from a third-floor deck on a construction site on which he was employed as a carpenter by respondent Trident Construction Company. He instituted a negligence action against an allegedly responsible third-party from whom he recovered damages of approximately $896,000 subject to a counsel fee of 25.26%. By the time of the 1990 trial of his workers' compensation petition, respondent had stipulated to his 100% permanent disability and had paid him temporary disability payments in the total amount of $31,920.00 and permanent disability payments in the total amount of $6,216.80. There is no dispute as to the respondent's right to be reimbursed for these sums as well as for its medical payments out of the proceeds of petitioner's third-party recovery and to be relieved of any further compensation payment obligation. Nor is there any dispute as to respondent's obligation to pay a pro rata portion of petitioner's third-party action

Page 103

counsel fees. This is expressly provided for by N.J.S.A. 34:15-40(b), which stipulates that

If the sum recovered by the employee or his dependents from the third person or his insurance carrier is equivalent to or greater than the liability of the employer or his insurance carrier under this statute, the employer or his insurance carrier shall be released from such liability and shall be entitled to be reimbursed, as hereinafter provided, for the medical expenses incurred and compensation payments theretofore paid to the injured employee or his dependents less employee's expenses of suit and attorney's fee as hereinafter defined.

The primary dispute between the parties arises out of the set-off provision of N.J.S.A. 34:15-95.5, which states, in relevant part, that the compensation benefits received by an employee under N.J.S.A. 34:15-12(b) or 34:15-95 [1] "shall be

fastcase

reduced by an amount equal to the disability benefits payable under the Federal Old-Age, Survivors' and Disability Insurance Act [42 U.S.C.A. § 401 et seq.] ..." This provision complements the set-off provision of the Social Security Act which requires federal disability payments to be offset by state workers' compensation benefits unless, under state law, the state compensation benefits are required to be offset by federal disability payments. 42 U.S.C.A. § 424a(a)(2)(B). See, generally, Ries v. Harry Kane, Inc., 195 N.J.Super. 185, 478 A.2d 1195 (App.Div.1983).

Clearly then, the critical legal issue is whether, for purposes of both the federal [597 A.2d 87] and the state disability offset provisions, the employer's payment of a pro rata portion of the employee's third-party counsel fees constitutes a compensation benefit. The judge concluded that it does and also concluded that the amount of the employer's contribution is subject to periodic rather than lump sum payment. Accordingly, he ordered the employer's counsel fee payment to be made at the rate of $14.37 weekly until petitioner reaches the age of 62 and thereafter at the rate of $70.73 until "the third-party recovery credit is used up." The judge calculated this weekly amount by

Page 104

subtracting petitioner's weekly disability payment of $288.70 from his average cumulative earnings of $345.60 and multiplying the resultant $56.90 by 25.26%, the percentage of attorneys' fees on the third-party recovery.

Petitioner appeals, claiming first that he is entitled to a lump sum payment of respondent's pro rata share of counsel fees and second, that the lump sum payment is not subject to the social security disability payment set-off. Respondent concedes, and correctly so, that a lump sum payment should have been ordered. It contends, however, that the judge was correct in concluding that the social security payment offset was required. It therefore urges us to adopt the judge's calculation of a weekly obligation of $14.37 but to direct the lump sum payment of that amount multiplied by the 450 weeks of compensation benefits to which petitioner would have been entitled under N.J.S.A. 34:15-12(b), resulting in a total counsel fee obligation of $6,466.50 plus the maximum allowable expenses of suit of $200.00 authorized by N.J.S.A. 34:15-40(e) but inadvertently omitted by the judge from the award.

We conclude that petitioner is entitled to a lump sum award representing the employer's counsel fee contribution without the social-security set-off because we are convinced that that contribution does not constitute compensation payments within the intendment of either state or the federal legislation. We are satisfied that the issue is conclusively settled by reasoning of the Supreme Court in Owens v. C & R Waste Material, 76 N.J. 584, 388 A.2d 977 (1978). In concluding that the method of payment by the employer of its fee-contribution obligation is required to be lump sum rather than "in small amounts over a period of 450 weeks," id. at 588-9, 388 A.2d 977, Justice Sullivan reviewed the equitable principles upon which the statutory payment obligation is based. As he explained, "[t]he third-party recovery results in a contemporaneous extinguishment of a liability of the employer. That constitutes a present benefit redounding to the employer...." Id. at 588, 388 A.2d 977.

Page 105

But for the statutory reimbursement provision, the employer would receive that benefit without any cost to it and entirely at the expense of the employee, who would otherwise be exclusively responsible to pay all legal costs included in obtaining the third-party recovery. As a matter of fundamental fairness then, the statute imposes the contribution obligation on the employer as a quid pro quo for its release from the obligation to pay compensation benefits. Thus, as Justice, then Judge, Francis held in McDermott v. Standard Accident Ins. Co., 40 N.J.Super. 119, 129, 122 A.2d 371 (App.Div.1956), the attorney's fee contribution may be an incident of the workers' compensation act, but it is not a

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monetary benefit provided by the act to compensate an employee for his injury. Owens adopted this analysis, relying on McDermott for its unequivocal statement that "[t]he employer's payment of its share of the attorney's fee is not compensation.... Rather ... 'it is the employer's (or carrier's) contribution toward the legal expenses incurred in the third-party action from which it benefited.' " (Emphasis the Court's). 76 N.J. at 589, 388 A.2d 977.

We see nothing in the state or federal social security disability set-off scheme that would make the Owens rationale inapplicable here. The federal set-off is required in respect of "benefits on account of such individual's total or partial disability ... under ... a [state] workmen's compensation law ..." 42 U.S.C.A. § 424a(a)(2)(A). Since the employer's counsel-fee payment does not constitute a benefit on account of disability under New Jersey workers' compensation[597 A.2d 88] law, no set-off is required under that section. Nor is the counsel-fee payment a "compensation benefit" pursuant to N.J.S.A. 34:15-95.5.

In arguing to the contrary, respondent contends that the counsel-fee payment is a lump sum payment constituting, within the intendment of 42 U.S.C.A. § 424a(b) "a commutation of, or a substitute for, periodic payments." But the periodic payments encompassed by the set-off provision of subsection (b) are those described in subsection (a)(2) above quoted. And, as we have made clear, the counsel-fee payment is not a commutation

Page 106

of or substitute for scheduled periodic total or partial disability compensation payments. It is rather the consideration which the employer pays for being released of the obligation to make those compensation payments or any other payment in lieu thereof. Black v. Schweiker, 670 F.2d 108 (9th Cir.1981), cited by respondent, is inapposite. That case involved the proceeds of a lump sum settlement between employer and employee in lieu of periodic compensation where compensability of the injury was in question. That payment clearly met the "commutation of or substitution for" test. The payment here involved, just as patently, does not.

That portion of the judgment appealed from which adjudicates respondent's obligation for reimbursement of costs of suit and counsel fees is reversed. We remand for entry of a modified judgment providing for respondent's lump sum payment of its full pro rata share of counsel fees plus $200 as costs of suit.

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1 N.J.S.A. 34:15-12(b) prescribes the schedule of payments of total disability. N.J.S.A. 34:15-95 establishes the so-called second-injury fund, not here relevant.

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