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WORKERS' COMPENSATION PRACTICE CASE UPDATE

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ALTHOUGH UNEMPLOYMENT COMPENSATION BENEFITS ARE NOT INCLUDED IN THE CALCULATION OF AN AVERAGE WEEKLY WAGE, SUB-PAY IS TO BE INCLUDED

By Harry J. Klucher, Esq.

STATEMENT OF FACTS

In Joseph Bucceri v. WCAB (Freightcar America Corporation), the Claimant sustained a work related injury on June 4, 2002. The Claimant had been employed by this employer for a number of years and during that time there were periods of layoff. During those periods of layoff, he received not only unemployment compensation benefits, but also supplemental unemployment benefits (SUB). These benefits were provided by the employer pursuant to a collective bargaining agreement. The evidence submitted established that the amount of the SUB payments to be paid to the employees were based upon seniority and that the payments were taxable for Federal income tax purposes, but not taxable for Social Security purposes. The Claimant alleged that his SUB pay should be included in the average weekly wage calculation. The Workers' Compensation Judge (WCJ) issued a decision which included the SUB payments, but also even included the Claimant's unemployment compensation benefits and recalculated the Claimant's average weekly wage to be pay \$562.21 per week. The employer thereafter filed an appeal with the Workers' Compensation Appeal Board (WCAB).

REVIEW OF APPELLATE DECISIONS

The WCAB reversed the WCJ's decision to the extent that unemployment compensation benefits should not be included in the calculation of the average weekly wage. The WCAB also indicated that since SUB payments are intended to be paid when an employee is no longer working for an employer, these are likewise to be excluded from the calculation of the Claimant's average

weekly wage under Section 309 of the Act. The WCAB restored the calculation of the Claimant's average weekly wage to \$319.36 per week. The Claimant thereafter filed a Petition for Review to the Commonwealth Court. The Commonwealth Court reversed in part. The Commonwealth Court affirmed that the unemployment compensation benefits should not be included in the calculation of the average weekly wage under Section 309 of the Act. However, the Commonwealth Court reversed the WCAB and concluded that the SUB payments should be included in the calculation of the average weekly wage. In coming to this conclusion, the Court felt it noteworthy that the SUB payments the Claimant received under the collective bargaining agreement were paid out weekly for each week the Claimant was in a layoff to a cumulative maximum of 26 weeks if he was receiving unemployment compensation benefits or up to a cumulative maximum of either 52 or 78 weeks if he was not receiving unemployment compensation benefits based upon the number of years he worked for the employer. Thus, the Court determined that this was not a "fringe benefit" which is normally excluded from the average weekly wage calculation, but rather are entitlements earned through and exchanged for services performed by the employee.

COMMENTS

There are a number of cases which have indicated that where a Claimant remains "employed" by the employer, even though there may be periods of layoff, that you use the highest 3 out of 4 quarters in calculating the Claimant's average weekly wage. This case seems to be somewhat equitable to the extent that SUB pay will be included when paid during those quarters as it is defined as earnings and not fringe benefits. Employers actually benefit in trying to establish the Claimant's continued employment during periods of layoff, and therefore a reduced average weekly wage based upon the use of the highest 3 of 4 quarters. This case substantiates that the Claimant was paid SUB pay and therefore remained as an employee. Generally, however, these SUB pays are not a "high dollar amount".

If you would like a copy of Joseph Bucceri v. WCAB (Freighter America Corporation), No.2021 C.D. 2010, please do not hesitate to contact us.

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