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## WORKER'S COMPENSATION CORNER

### Summary Termination of Benefits: An Analysis of the Baksalary Case

Hon. Irvin Stander\*

The United States District Court for the Eastern District of Pennsylvania approved a Consent Decree on July 30, 1984, resolving the major remedial issues in Baksalary, et al v. Smith, et al., 591 F. Supp. 179 (E.D. Pa. 1984).

This case was a class action attacking Section 413(a) of the Pennsylvania Workmen's Compensation Act whereby a recipient's benefits could be terminated in certain situations without prior notice or hearing. The same Court had previously held, on February 1, 1984, that Section 413(a) of the Act was unconstitutional as a deprivation of recipient's property rights without due process of law, at 579 F. Supp. 218.

This article reviews the Baksalary decision, the status of its implementation, and the progress of the appeals filed therefrom.

#### Statutory Provisions and Earlier Cases

Prior to the extensive amendments of the Pennsylvania Workmen's Compensation Law in 1972, Section 413 of the Act (77 P.S. Sec. 774) provided that the filing of a Petition to Terminate or Modify compensation by the employer acted as a supersedeas suspending payments of compensation, in whole or in part, as specified in the petition. Of course, this stoppage was not final, but was subject to the later decision on the merits of the case made by the Referee.

This provision in the Pennsylvania Act was challenged in the Federal courts in Silas v. Smith (361 F. Supp. 1187, E.D. Pa. 1973), and a three-judge constitutional court filed its decision in 1973 holding that there was no violation of due process and no "state action" was involved. In its decision, the Court characterized workers' compensation arrangements as one of private contract in which periodic payments can be terminated pending resolution of the underlying dispute. The act under attack in Silas was optional and elective in nature, since workers' compensation did not become mandatory in Pennsylvania until 1974.

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According to the author, the case under review will affect at least twenty-one states which have automatic termination procedures in their Worker's Compensation Laws.

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The sweeping amendments adopted in Pennsylvania in 1972 modified the termination procedures in the Act. The new Section 413(a) (Act of 3/29/72, P.L. 152, 77 P.S. 774, 1982 Supp.) provided that an automatic supersedeas could be invoked in two situations: (1) when the petition alleged that the employee returned to work without any loss of earnings; or (2) when the petition alleged that the employee has recovered, and the petition was accompanied by a physician's affidavit of recovery based on an examination made within 15 days of the filing of the petition.

In all other situations, no automatic stoppage was allowed, but the petition could be designated as a Request for Supersedeas to be heard promptly by the Referee, and decided by him on an Interlocutory basis pending hearings on the merits.

While the 1972 provision would prevent stoppage of benefits in a partial-recovery situation, it still allowed stoppage on the physician-supported allegation of recovery, or allegation of return to work.

An attempt in the state courts to invalidate this supersedeas procedure as lacking in due process was unsuccessful. In Henderson v. WCAB (452 A.2d 277, 1982), the Commonwealth Court held that the termination procedure did not involve state action, and was not a violation of due process, citing Silas v. Smith for support.

#### Special Federal Court Invalidates Automatic Stoppages

In 1976, another Federal attack on the supersedeas provision was commenced. A claimant with the unlikely — but appropriate — name of Baksalary, and several others, filed an action attacking the automatic stoppage provision for lack of due process under Section 1983 of the Civil Rights Act (Baksalary, et al v. Smith, et al, 579 F. Supp. 218, E.D. Pa. 1984). A Federal judge ordered the convening of a three-judge constitutional court because of the challenge on a State statute; and in 1978 the Baksalary case was declared a class action suit under the Federal Rules of Civil Procedure. In a class action suit, notice to the non-named members of the class is not required.

A five-year period of discovery ensued, resulting in a comprehensive stipulation of facts in which the parties detailed the provisions of the Pennsylvania Act and the nature of its termination proceedings. Defendant's motion for dismissal was then argued and a decision on the motion was deferred.

On February 1, 1984, the three-judge Federal court filed its decision invalidating Section 413(a) of the Act, and declaring it to be an unconstitutional deprivation of property without due process. The majority opinion was written by Judge Pollak, with a concurring opinion by Circuit Court Judge Adams. All three judges, Adams, Pollak and District Court Judge Green, joined in the majority and concurring opinions.

Citing Matthews v. Eldridge (424 U.S. 319, 1976), the three-judge court held that since the Pennsylvania Act allows supersedeas of benefits

immediately upon the filing of Defendant's petition, without any prior notice of stoppage or any opportunity for the Claimant to be heard, Defendant's actions constituted a deprivation of the Claimant's constitutionally protected property interest. This was especially true since any later decision on the merits of Defendant's Petition for Termination consumed more than a year after stoppage, causing the Claimant to lose significant income during a period when his ability to replace this loss through borrowing was sharply diminished. The basis for this holding was the prior determination by the U.S. Supreme Court in the Matthews case (dealing with social security disability benefits) that the "interest of an individual in continued receipt of benefits is a statutorily created property right protected by the Constitution."

The Baksalary court also found that the necessary element of "state action" was present since Plaintiff's deprivation exists under the "Color of state law." This is so because the stoppage provision is a state-created right or privilege which required the filing of a Petition with the Bureau, together with a Physician's Affidavit of Recovery; or an allegation of Claimant's return to work without any loss of wages. It was also pointed out that employer's improper stoppage of benefits without the necessary documents would subject him to statutory penalties up to 20% of withheld payments.

In connection with the Court's holding that "state action" existed, the Court cited the 5-to-4 Supreme Court decision in Lugar v. Edmunsen Oil Co., 457 U.S. 922 (1982), where a court clerk's issuance of a Writ of Attachment based on an ex-parte petition was held to be "state action" since it was a special filing process directed by the state.

The opinion also declared that the deprivation of benefits was caused by a state "actor" based on the following facts:

- (a) The state, as an employer, could itself invoke the automatic stoppage provisions;
- (b) Self-insured public employers could use this procedure;
- (c) The state-operated workmen's compensation insurance fund also made use of the automatic stoppage method;
- (d) Even the private carriers and self-insured employers jointly participated in state action because they were required to file a petition with the state, and the petition had to be reviewed for formal compliance by the state authorities.

On the issue of "lack of due process" the Court relied on the following established factors:

- (a) No notice of the stoppage was required until after the suspension of benefits;
- (b) Restoration of benefits could only be accomplished by long delayed post facto rights gained after a trial on the merits of the case;

- (c) Prior to suspension of payments, Claimant had no right to present any countervailing evidence;
- (d) There was no independent check by the state authorities on the sufficiency or accuracy of the Physician's Affidavit of Recovery.
- (e) The automatic supersedeas procedure was not sufficiently reliable to protect Claimant against erroneous termination.

#### Court Reviews Earlier Cases On Automatic Stoppage

The Court then reviewed the decided cases on the subject of terminations made without notice or hearing, and cited these decisions:

- (a) Matthews v. Eldridge, (424 U.S. 319 (1976)), holds that some kind of hearing must be held prior to stoppage of payments in social security disability benefit cases. In Matthews, the beneficiary could present written evidence prior to the stoppage of benefits.
- (b) The Iowa Supreme Court invalidated summary terminations of compensation benefits in Auxier v. Woodward State Hospital School, 266 N.W. 2d 139 (1978); cert. denied, 429 U.S. 830 (1979).
- (c) In West Virginia, the Supreme Court of Appeals held that termination of compensation benefits must be preceded by written notice, an opportunity to present countervailing information, and an evidentiary hearing. See Mitchell v. State Work. Comp. Bureau, 256 S.E. 2d 1 (1979).
- (d) The Oregon Appellate Court decreed that there must be preliminary notice of cessation of benefits listing the evidence upon which it is based; and giving Claimant an opportunity to respond. See Carr v. SAIF Corp., 670 P.2d 1037, 1046 (Oregon CA, 1983).
- (e) In North Dakota (Steele v. North Dakota Work. Comp. Bureau, 273 N.W. 2d 692, 1978), the Court required notice of stoppage and a formal hearing if any material fact is in dispute.
- (f) Another state with a similar holding is Maine. See Merrifield v. Hannaford Co., 409 A. 2d 1313 (S. Ct. Maine, 1980).

The parties in the Baksalary case were then asked to submit competing orders for the implementation of the Court's decision, which they proceeded to do. On March 15, 1984, the Court entered a Declaratory Judgment holding that the automatic supersedeas provision in Section 413(a) was unconstitutional and invalid. This order also denied the request of several named Defendants that the Court should direct the Commonwealth of Pennsylvania to adopt a procedural alternative to the automatic supersedeas procedure which would

have established a two-tier paper hearing process in connection with stoppage of benefits. The Court also scheduled oral arguments on the remaining proposals for relief.

#### Parties Agree To A Consent Decree

At this juncture, marathon settlement discussions were conducted by the named Plaintiffs and Defendants and an agreement for a Consent Decree was reached including these principal provisions in the Decree:

- (1) There would be a prospective injunction which enjoined all insurance carriers and self-insured employers from ever again using the automatic supersedeas provision in the Act; and the imposition of a duty on the Worker's Compensation Bureau to review all future termination petitions to determine compliance with the injunction.
- (2) There would be a series of restorative injunctions giving Claimants the following rights:

First: Where a supersedeas was based on a Doctor's Affidavit of Recovery, Claimant must receive a special supersedeas hearing within 60 days of approval of the decree, if benefits were terminated prior to February 1, 1984, and no decision on the merits had as yet been made; except where the Referee's evidentiary hearings on the merits had been completed.

Second: Where a supersedeas was based on allegations of return to work without loss in pay, and Claimant returns a questionnaire showing either loss of wages or compensable unpaid medical bills, Claimant must also receive a special supersedeas hearing.

Third: Special supersedeas hearings were to be conducted under the Referee's Rules of Procedure allowing the parties to introduce medical reports, affidavits, testimony or other relevant material. See 34 Pa. Code, Sections 131.31 through 131.34.

Fourth: The Referee must issue his interlocutory decision on the special supersedeas hearings within seven days from the hearing (that is — 67 days from final order approving Consent Decree) or compensation benefits must be resumed prospectively, unless Claimant's actions cause the delay; which fact must be certified in writing by the Referee.

Fifth: If the Referee denies the employer's request for supersedeas, compensation benefits must be resumed, in whole or in part, prospectively and/or retroactively, as may be ordered by the Referee.

Sixth: Where the evidentiary hearings on the merits have been completed, no special supersedeas hearing are required,

but the Referee must issue his decision on the merits of the case within 67 days from the final order approving the Consent Decree, or compensation benefits must be resumed prospectively, unless Claimant's action cause the delay; which fact must be certified in writing by the Referee.

Seventh: Where the automatic supersedeas was taken in petitions filed after the decision of February 1, 1984, Claimant's rights to relief would be specially decided by the Court, and not under the terms of the Consent Decree.

Eighth: Plaintiff's class action counsel will monitor compliance with the Decree, and the Bureau and insurers must furnish periodic reports to facilitate such monitoring.

Ninth: Plaintiff's class-action counsel will receive a reasonable counsel fee payable by the named and class Defendants on a proportionate basis. The maximum fee was set at \$300,000.00.

- (3) An important provision of the proposed Consent Decree stated that the Commonwealth and the Workers' Compensation Bureau cannot be held responsible for any delays; and are absolved from any monetary responsibility in failing to schedule or delaying the scheduling of any special supersedeas hearings for circumstances beyond its control.
- (4) The proposed Decree provided for a "Fairness Hearing" with the allowance of written objections and oral presentations in accordance with Federal Rules of Civil Procedure; and mandated the mailing of a comprehensive "Notice Package" to all named and identified class Plaintiffs; and all named and non-named Defendant insurance carriers and self-insured employers.

The Court, after argument, gave its provisional approval to the proposed Consent Decree on May 14, 1984; scheduled the Fairness Hearing for June 18, 1984; and listed the final date for submission of written objections as June 13, 1984. The Bureau then mailed out about 5,000 notice packages to all named and non-named parties in interest.

#### Fairness Hearing Considered Objections To Consent Decree

Written objections to the proposed Consent Decree were filed by several class Defendants and were presented at the Fairness Hearing held on June 18, 1984. These were the principal objections:

- (1) The proposed special supersedeas hearing procedure is too cumbersome; and that the 67-day period was too restrictive in time.
- (2) Automatic supersedeas stoppages filed between February 1, 1984

(date of decision) and March 15, 1984 (date of Declaratory Judgment) should be accorded the same remedial treatment as those taken prior to February 1, 1984; and should not be made the subject of special relief by the Court.

- (3) The proposed Consent Decree should be modified to differentiate between automatic supersedeas taken on the basis of physician's affidavits as against those taken on the basis of return to work without loss of earning power; in order to prevent dual payment of compensation benefits and salary.

After the Fairness Hearing, counsel for the named Plaintiffs and Defendants and counsel for a major objector, at the Court's suggestion, agreed to a clarifying amendment of the proposed decree to provide that a Claimant is not entitled to receive both compensation payments and salary during any period of time when Claimant has actually returned to work at wages equal to or greater than his or her pre-injury wages.

#### Court's Final Opinion And Order Filed July 30, 1984

The per curiam opinion of the Court reviewed the history of this litigation including the liability opinion of February 1, 1984; the various suggested orders for implementation; the Court's Memorandum and Order of March 15, 1984 containing its Declaratory Judgment, and its reactions to several of the suggested orders; the settlement negotiations leading to a proposed Consent Decree; the Court's preliminary approval of that proposal with the arrangement for a Fairness Hearing upon the mailing of comprehensive "Notice packages" to all named and non-named parties; and the Fairness Hearing procedure with a description of the various objections filed.

The Court then found that the proposed Consent Decree meets all of the standards set by the Federal courts, and declared that it represents a fair, adequate and reasonable compromise between "the possible extreme results in this case," both for the Plaintiffs and Defendants.

As to the objections made by various non-named parties, the Court came to the following conclusions:

- (1) As to the "return to work" situations, the Court states "we do not understand the Consent Decree as creating any entitlement to the concurrent receipt of wages and of compensation benefits. . . . No Claimant may properly receive both." The Court then adopted the clarifying amendment agreed to by the parties, as set forth above, reiterating that Sections 413(c) and 306(b) of the Act still remain in full force and effect.
- (2) With respect to the proposal that the time limits set for the Special Supersedeas Hearings and Decisions should be increased, the Court held that this objection had no merit, especially in view of the fact that the Bureau of Workers' Compensation had agreed that the time frames set in the proposed Consent Decree were feasible and could be met.



- (3) As to the objection fixing the allocation of Plaintiffs' counsel fee among the Defendants on a proportionate basis equal to their contributions to the Workmen's Compensation Administration Fund, the Court felt that this method of allocation was a fair and reasonable one.
- (4) Several non-named Plaintiffs whose termination cases had been completely concluded on the merits with a final Referee's decision objected because they claimed they should also receive relief from the automatic supersedeas asserted against them. The Court held that since these completed terminations were not included in the scope of this case, their objections could not be considered in the Backsalary litigation; especially since these Claimants have already received full hearings and a decision on the merits of their claims.
- (5) With respect to the objection that the remedies in the proposed decree should also apply to non-named Defendants who invoked the automatic supersedeas procedure between February 1, 1984 (the liability decision date) and March 15, 1984 (the date of the Declaratory Judgment), the Court reviewed the case law on retroactivity of constitutional holdings. Based on these decisions, the Court determined that its Declaratory Judgment of March 15, 1984 must be retroactively applied to all cases where automatic supersedeas was invoked after its liability decision of February 1, 1984.

In its accompanying Order, the Court formally approved the Consent Decree; declared the invocation of the automatic supersedeas provision after February 2, 1984 a deprivation of the involved Claimants' property without due process of law; and ordered such withheld payments to be made within 30 days after this Order, including interest and medical expenses. These payments must continue pending a decision by the Referee on the merits of the termination petition.

#### Implementation Of The Consent Decree

Promptly after the Court's Order of July 30, 1984, the Bureau of Workers' Compensation and its Referees prepared and mailed appropriate Notices for the Special Supersedeas Hearings in those cases identified as being subject to the terms of the Consent Decree.

The Referees then held such hearings and issued Interlocutory Orders granting or denying supersedeas in whole or in part upon consideration of the documents and other evidence presented at the hearings. The Special Supersedeas Hearings and their decisions were all completed within the 67-day period prescribed in the Consent Decree and its approval order.

As to those automatic supersedeas cases in which the evidentiary records had been completed, the Referees filed final decisions on the merits of the underlying Petitions for Termination within the same 67-day time limit set forth in the Court's Order of July 30, 1984.

According to the records of the Bureau of Workers' Compensation, the Referees issued 603 Special Supersedeas Orders, and 673 final decisions in the termination proceedings which were identified as being subject to the provisions of the Baksalary decision because they were commenced by automatic supersedeas stoppage of compensation.

#### The Court's Liability and "Fairness" Orders Have Been Appealed

The liability opinion of the three-judge District Court is reported at 579 F. Supp. 218 (E.D. Pa. 1984), and the Court's subsequent opinion approving a Classwide Consent Decree is reported at 591 Supp. 1279 (E.D. Pa. 1984). Within the allowable periods, several non-named Defendants in the original class action, being Allstate, Argonaut, Harleysville, Royal, Travelers and Wausau Insurance Companies and Sun Company, Inc., a self-insurer, filed appeals to the Court of Appeals of the Third Circuit on August 29, 1984; and to the United States Supreme Court (October Term, 1984, No. 84-768).

Initially, these appellants sought a stay of the Consent Decree from the District Court pending disposition of their appeals to the Third Court and the U.S. Supreme Court. By order filed on September 24, 1984, that request was denied.

In the Circuit Court, appellants moved, not for a stay of the Consent Decree, but rather for a stay of proceedings of that Court's action pending the disposition of the jurisdictional issue to be considered by the U.S. Supreme Court. Such a stay was ordered by the Circuit Court on October 29, 1984.

However, in the meantime, appellants also filed their brief on the merits in the Circuit Court, addressed solely to the constitutional holding of the District Court, but not raising any question about the propriety of the Court's approval of the Consent Decree. Plaintiffs then moved the Circuit Court to strike appellant's brief and dismiss their appeal. On November 26, 1984, the Circuit Court denied the motion to strike and referred the motion to dismiss to the merits panel of that Court. As of this writing that motion to dismiss is still pending.

#### Appellants Filed A Jurisdictional Statement

In the U.S. Supreme Court, appellants filed a Jurisdictional Statement, on or about November 15, 1984, in which they advanced the following arguments:

- (1) These appellants never had an opportunity to be heard on the merits of the constitutional determination 'which directly and dramatically affects each one of them adversely by a final order providing for individual injunctive prohibition, as well as liability for an apportioned share of Plaintiffs' attorney's fee.'
- (2) With respect to the issue of due process, they urged:

- (a) The risk of erroneous deprivation of Workmen's Compensation benefits "is at least subject to a degree of balancing by the risk of erroneous payments by the employer. . . ." so as to protect against unwarranted payments which would affect the local economic structure.
- (b) Workers' Compensation is not akin to a welfare payment, and the requirement for "some kind of hearing" is met by a considerable degree of "process" in the medical examination by a licensed physician, where the Claimant can voice and explain his complaints; the required physician's affidavit of full recovery and ability to resume his pre-injury duties without limitation; the formal petition for determination filed with the Bureau of Workers' Compensation within 15 days after the doctor's examination; and the subsequent assignment of the termination petition to a Referee for formal hearings on the merits and a determination.
- (c) The District Court initially sought to apply the "notice" and "opportunity-to-be-heard" requirement to cases where the stoppage of benefits was based on a Termination Petition alleging a "return to work with no loss of earnings," — cases where there could be no "deprivation of property" argument made.
- (d) The Pennsylvania Courts, in Henderson v. WCAB, 452 A.2d 277 (1982), held "that the suspension of an employee's Workmen's Compensation benefits by a private insurance carrier does not violate the employee's rights to due process."
- (3) With respect to the issue of "state action," they urged:
  - (a) The deprivation here is not caused by the exercise of some right created by the state since the present version of Section 413(a), including the so-called "automatic supersedeas provision," did not create any rights or benefits to the employer, but rather severely limited and restricted the suspension of benefits on an interim basis as contrasted with the earlier version of Section 413(a) which allowed unlimited supersedeas stoppage of benefits.
  - (b) The deprivation here is not effected by a state "actor" because there is not present any overt action by a state official to take or withhold property, but merely "passive administration" by the state in connection with the filing of the petition followed by the action on the part of the private insurance carriers or self-insurers in suspending payments. So far as the State's action against its own employees is concerned; or the use by State Workmen's Insurance Fund of the automatic stoppage provisions, these actions by the State or the State Fund are not "by virtue of their being state officials but

rather and only because they are in the position of traditional employers and/or insurance carriers."

- (4) The question of deprivation of "due process" by "state actions" has not previously been addressed by the Supreme Court in a Workmen's Compensation context, and should be reviewed by that Court because of its national implications.

Plaintiffs Filed A Motion To Dismiss Or Affirm

On or about December 15, 1984, the Plaintiffs filed in the U.S. Supreme Court a Motion to Dismiss the appeal, or in the alternative, to affirm the Lower Court's decision, in which they propounded the following arguments:

- (1) The Supreme Court lacks subject-matter jurisdiction over this appeal because the appellants failed to appropriately raise the constitutional issue in the District Court by motion for reconsideration of the liability decision or otherwise, leaving the only issue in the case the propriety of the Consent Decree, which can only be raised on their appeal to the Circuit Court of Appeals. Therefore, the Supreme Court appeal should be Dismissed.
- (2) The Supreme Court should, in the alternative, summarily affirm the judgment of the District Court since the questions presented by the appellants are so insubstantial as to not merit review because of the unchallenged findings of fact made below, and the District Court's application of the Supreme Court's established governing precedents.
- (3) Answering appellants' arguments on the "due process" issue, the Plaintiffs argue:
  - (a) Under Pennsylvania Law, Plaintiffs have a state-created property interest which cannot be deprived without due process of law.
  - (b) The 14th Amendment safeguards, by procedural protection, the security of interests a person has acquired in specific benefits.
  - (c) Workers' Compensation benefits are not a privilege which can be unilaterally withdrawn. They can only be terminated for cause.
  - (d) Such benefits cannot be terminated without prior notice and the opportunity for "some kind of hearing" in order to satisfy due process requirements.
- (4) On the issue of the existence of requisite "state action," the Plaintiffs argue:

- (a) The District Court's holding was logically mandated, given the state-created nature of the automatic supersedeas proceeding, and the direct participation by the state in the termination of Plaintiff's benefits.
- (b) The state provided the exclusive procedure by which benefits could be unilaterally terminated.
- (c) The state exercised the automatic supersedeas provision for its own employees, and through its agency, the State Workmen's Insurance Fund.
- (d) As to the exercise of this termination procedure by any private carrier or self-insured private employers; the District Court properly found that there was joint participation with the state as an "actor" in order to accomplish automatic termination of benefits since the petitions were required to "pass muster" by the state under the standards of the Act.
- (5) The appellant's argument that due process is satisfied by Claimant's medical examination by a Defendant's doctor ignores the requirement that a hearing be held by an impartial decision-maker.
- (6) The absence of prior notice of termination, the lack of any opportunity to challenge the termination until many months after it had taken effect; and the presence of the requisite state action in establishing and exercising the termination procedure, taken together, justify the judgment of the District Court in declaring the automatic supersedeas provision an unconstitutional deprivation of property without due process of law.

#### Supreme Court Rejects Baksalary Appeal

On January 14, 1985, the U. S. Supreme Court, in an 8-0 decision, rejected the appeal filed by Allstate, Argonaut, Harleysville, Royal, Travelers and Wausau Insurance Companies and Sun Co., Inc., a self-insurer, from the decision of a three-judge federal court invalidating the summary termination provisions of Section 413(a) of the Pennsylvania Workmen's Compensation Act.

Acting on the Plaintiffs' Motion to Dismiss the Appeal for lack of jurisdiction, or, in the alternative, to affirm the lower court summarily, the Supreme Court entered the following Order: "The appeal is dismissed for want of jurisdiction. Justice Brennan and Justice Stevens would affirm."

This Order effectively disposed of the Supreme Court appeal in this case, leaving open only the final disposition of the appeal filed to the Circuit Court of Appeals for the Third Circuit. That court granted a stay of proceedings of its action, pending the disposition of the jurisdictional issue in the U. S. Supreme Court.

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