P.E.R.C. NO. 2012-6

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TURNPIKE AUTHORITY,

Petitioner,

-and- Docket No. SN-2010-103

IFPTE LOCAL 196,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the New Jersey Turnpike Authority for a restraint of binding arbitration of a grievance filed by IFPTE Local 196. The grievance asserts that the Authority violated a contractual article entitling employees injured on the job to supplementary workers' compensation benefits. The Commission holds that the subject of the grievance is within the exclusive jurisdiction of the Division of Workers' Compensation.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Genova, Burns & Giantomasi, attorneys (Brian W. Kronick, on the brief)

For the Respondent, Mets Schiro & McGovern, LLP, attorneys (Leonard C. Schiro, of counsel)

DECISION

On June 4, 2010, the New Jersey Turnpike Authority ("Authority") petitioned for a scope of negotiations determination. The Authority seeks a restraint of binding arbitration of a grievance filed by the International Federation of Professional and Technical Engineers, Local 196 ("Local 196"). That grievance asserts that the Authority violated a contractual article entitling employees injured on the job to supplementary workers' compensation benefits.

The parties have filed briefs and exhibits. The Authority has also filed a certification of Harris Galary, an Assistant Director of its Human Resources Department, Safety and Benefits. These facts appear.

Local 196 represents a negotiations unit of Authority employees holding certain titles, including toll collector. The parties entered a collective negotiations agreement effective from July 1, 2007 through June 30, 2011. The contractual grievance procedures end in binding arbitration.

Article XI of the contract is entitled Benefits. Section E of that article is entitled Worker's Compensation. The body of that section begins with the heading of Supplementary Worker's Compensation and then provides:

> Supplementary Workers Compensation benefits equal to at least the employee's full net take-home pay for a regular forty hour week at the time of injury will be paid on a current basis without interruption of salary. The period of such payment shall be based upon an employee's length of permanent service with the Authority as indicated in the schedule below:

Length of Service Calendar Year	Number of Weeks at Full Net Take-Home Pay
1st year or fraction thereof	4 weeks at full pay
2nd, 3rd and 4th year	13 weeks at full pay
5th, 6th, 7th, 8th and 9th year	26 Weeks at full pay
10th, 11th, 12th, 13th and 14th year	39 weeks at full pay
15th year and up	52 weeks at full pay

> The benefits under this policy shall be payable for work absences due to occupationally incurred injuries or illness, authorized by the Authority's Medical Director. Any employee reporting for an examination by the Authority doctor (or Authority referred doctor), due to

> occupationally incurred injuries or illness, shall be paid 31¢ per mile or the prevailing IRS rate (whichever is higher) for a distance measured by the distance between the employee's work place and the medical office and return.
>
> Benefits payable under this plan are separate and distinct from those described in the accident and sick benefits.
>
> The Authority will notify the Union of the name of employee filing a Worker's Compensation Claim.

The grievant is a toll collector who has been employed by the Authority since 1981. She was on duty on September 9, 2009 when the events giving rise to the grievance arose.

She saw a disabled vehicle in her toll lane. Her supervisor asked her to open up another lane as soon as possible. According to the grievant, her supervisor was not pleased with the time it took her to do so; he thus opened a new lane, began patron transactions, and yelled at her. The grievant alleges that these actions caused her emotional distress, chest pains, and shortness of breath.

The supervisor called an ambulance. The grievant was taken to the hospital, treated and released. The next day, September 10, she visited her primary care physician who advised her not to return to work until September 14.

On September 11, the grievant reported to the Authority's Medical Department. A doctor evaluated her and reviewed her medical file. According to Galary, the doctor decided that the

grievant's condition was not work-related. He thus referred her to her primary medical doctor. However, the report that was filled out identified her injury as a "work-related accident." Galary maintains that this was a clerical error. Once the Authority learned of that error, it issued a revised report.

The grievant submitted a claim to the Authority seeking workers' compensation benefits. By letter dated September 24, 2009, Inservco, the Authority's workers' compensation carrier, notified her that it had investigated her claim and determined that her injury was not compensable. The letter stated that Inservco would pay for her initial hospital expenses, but directed her to her private health carrier for further treatment.

On October 2, 2009, Local 196 filed a grievance. The grievance asserted that the Authority violated the parties' contract, including but not limited to Section E of Article XI, when it unjustly denied the grievant workers' compensation and sought to make her whole.

Charles Creamer, the Authority's Manager of Labor Relations, conducted a hearing. On November 17, 2009, he denied the employee's claim that she was entitled to receive workers' compensation for three missed work days - September 9, 10, and 11. Creamer deferred to the determination of the Authority's Medical Department that the injury was not work-related.

On December 2, 2009, Local 196 demanded arbitration. The demand identified this grievance to be arbitrated: "Whether the employer violated the collective bargaining agreement including but not limited to Article XI, Section E and past practice in denying workers' compensation time to [the] grievant." An arbitrator was appointed, but the parties agreed to adjourn the arbitration so the Authority could file the instant petition.

The Authority asserts that this grievance is not legally arbitrable because the New Jersey Workers' Compensation Act, N.J.S.A. 34:15-1 et seq., grants the Division of Workers' Compensation exclusive jurisdiction over all claims for workers' compensation benefits. It further argues that any claim under Article XI for supplemental workers' compensation benefits is dependent on there being a prior determination by the Division of Workers' Compensation that a worker was entitled to a certain level of statutory benefits.

Local 196 argues that the grievance seeks supplementary contractual benefits rather than regular statutory workers' compensation benefits and that claims seeking the restoration of sick leave days are legally arbitrable. It further argues that it can arbitrate the issue of whether the Authority's Medical Director in fact authorized payment of workers' compensation, as it contends, or whether the initial report's statement that the

employee suffered a work-related injury was simply a clerical error, as the Authority contends.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), states:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.
>
> [Id. at 154]

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have.

State of New Jersey v. Local 195, IFPTE, 88 N.J. 393, 404-405 (1982), sets the standards for determining whether a dispute is within the scope of negotiations. The only negotiability question in this case is whether the New Jersey Workers Compensation Act preempts arbitration of this dispute by vesting exclusive jurisdiction over Ziglear's claim in the Workers' Compensation Division.

Pursuant to N.J.S.A. 34:15-12, employees temporarily disabled by a work-related injury are entitled to be paid workers' compensation benefits of 70% of the employee's weekly

wages received at the time of injury, subject to a maximum compensation of 75% of the average weekly wages earned by all employees covered by the unemployment compensation law and to a minimum of 20% of such average weekly wages a week. The Division of Workers' Compensation has exclusive original jurisdiction to determine whether an employee has suffered a work-related injury entitling that employee to statutory benefits. N.J.S.A. 34:15-49. Accordingly, a dispute seeking statutory benefits under the workers' compensation laws cannot be submitted to binding arbitration for resolution. North Hudson Reg. Fire and Rescue, P.E.R.C. No. 2004-17, 29 NJPER 428, 449-450 (¶146 2003). In addition, employees accidentally injured on the job cannot seek monetary damages through arbitration or court proceedings; when the Legislature imposed strict liability on employers for their work-related accidents, it insulated employers from liability for tort-based remedies. Willingboro Tp. Bd. of Ed., P.E.R.C. No. 90-27, 15 NJPER 604 (¶20249 1989).

We have held, however, that the parties may negotiate clauses such as Article XI, Section E granting contractual benefits in excess of the statutory benefits accorded by N.J.S.A. 34:15-12. See City of East Orange, P.E.R.C. No. 2000-14, 25 NJPER 405 (¶30176 1999); Morris Cty., P.E.R.C. No. 79-2, 4 NJPER 304 (¶4153 1978), aff'd NJPER Supp. 2d 67 (¶49 App. Div. 1979). We have further held that parties may negotiate clauses providing

for safe workplaces and for paid disability leaves and may arbitrate grievances claiming that such clauses have been violated and that contractual sick leave days should be restored to employees injured on the job. Paterson State-Operated School Dist., P.E.R.C. No. 2002-75, 28 NJPER 259 (¶33099 2002); New Jersey State Judiciary, P.E.R.C. No. 2001-16, 26 NJPER 431 (¶31169 2000); Burlington Cty., P.E.R.C. No. 98-86, 24 NJPER 74 (¶29041 1997); Burlington Cty., P.E.R.C. No. 97-84, 23 NJPER 122 (¶28058 1997), aff'd 24 NJPER 200 (¶29092 App. Div. 1998); City of Camden, P.E.R.C. No. 96-33, 21 NJPER 399 (¶26244 1995).

Applying this legal analysis to the unique and confined circumstances presented by this case, we restrain binding arbitration of the claim that the Authority violated Article XI, Section E. As the grievance and the arbitration demand demonstrate, this case centers on an allegedly unjust denial of workers' compensation payments, not, as in the cases cited by Local 196, on an alleged violation of a clause guaranteeing workplace safety or a paid leave of absence and warranting other remedies besides workers' compensation benefits.[1/] As argued by the Authority, any claim for supplementary workers' compensation

1/ In this regard, Article XI, Section E specifies that benefits payable as supplemental worker's compensation are separate and distinct from benefits described in the accident and sick benefit plan and that the Authority must notify Local 196 of the name of any employee filing a workers' compensation claim.

benefits under this article is necessarily dependent on a prior determination that the employee was entitled to receive a specified amount of statutory benefits under the workers' compensation laws. There is simply no way to know what amount of pay an employee would be contractually entitled to receive under Article XI to equal "full net take-home pay" without first knowing what the employee is statutorily entitled to receive under the workers' compensation laws. That required prior determination is within the exclusive jurisdiction of the Division of Workers' Compensation and cannot be arbitrated.

Local 196 asserts that even if we do not find the precedent it cites to be controlling, we should still decline to restrain arbitration given the parties' dispute over whether the Authority's doctor actually determined that the grievant had suffered a work-related injury or simply made a clerical mistake in filling out the form reporting her physical examination. But that dispute goes to whether she had in fact suffered an injury initially covered by the workers' compensation laws, thus setting up a claim to supplemental coverage under Article XI, Section E. Resolving that dispute through arbitration would not rectify the problem of trying to apportion statutory and contractual benefits without a prior workers' compensation award determining the statutory benefits.

We recognize that we have declined in some cases to speculate about whether an arbitration award would necessarily violate the workers' compensation laws and have reasoned that an employer could invoke post-arbitration review under N.J.S.A. 2A: 24-8 if an arbitrator upheld a grievance and ordered a remedy that conflicted with those laws. See, e.g., Paterson State-Operated School Dist.; Burlington Cty., P.E.R.C. No. 97-84. But those cases involved other types of contractual claims and remedies, ones not dependent upon a determination that an employee was entitled to receive workers' compensation benefits in the first place. In this case, we perceive no contractual claims or remedies that can be severed from the dispute under Article XI, Section E that can be arbitrated.

ORDER

The request of the New Jersey Turnpike Authority for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Krengel and Wall voted in favor of this decision. Commissioners Jones and Voos voted against this decision. Commissioner Eskilson recused himself.

ISSUED: August 11, 2011

Trenton, New Jersey