

SUPERSEDEAS PRACTICE BEFORE THE WCAB

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Pennsylvania Workers' Compensation Appeal Board

I. **Availability.** Supersedeas is available before a Workers' Compensation Judge under Section 413(a) of the Workers' Compensation Act and from the Workers' Compensation Appeal Board on appeal from an order of a WCJ to the Board pursuant to Section 430(b) of the Act. See, *Travelers Ins. Co. v. Gunson*, 468 A.2d 529 (Pa. Cmwlth. 1983).

In appeals from decisions of the Board to Commonwealth Court, a supersedeas must first be requested from the Board under Rule 1762(a) of the Pennsylvania Rules of Appellate Procedure. That rule provides that "application for a stay or supersedeas of an order or other determination of any governmental unit pending review in an appellate court on petition for review shall ordinarily be made in the first instance to the governmental unit."

II. **Content of Petition.** A request for supersedeas shall be filed as a separate petition from the appeal and be accompanied by a copy of the decision of the WCJ or opinion of the Board from which the supersedeas is requested. See Rule 111.21 of the Rules of Practice before the Workers' Compensation Appeal Board. The time for filing a request for supersedeas with the Board is the same time as that for taking an appeal, i.e. twenty days after notice of the WCJ's adjudication. See Board Rule 111.22.

Do not rely on your Notice of Appeal (however thorough it may be) to serve as a petition for supersedeas. A line saying that "Supersedeas is requested pending appeal" buried among the various averments of error in the reasons for appeal may go unnoticed with the result that the document may not be treated as a request for supersedeas. Worse yet, it may not be treated as a valid request for supersedeas for purposes of supersedeas fund reimbursement in the event of a successful appeal. Always file a separate petition requesting supersedeas.

Additionally, the complete WCJ Decision and Order must be attached to the petition for supersedeas. At a minimum the Board has to see the judge's order in order to determine what relief to grant. The WCJ's issue two-sided copies of their decisions. Therefore, if you are photocopying or scanning the decision you have to make sure that all the pages have been reproduced. It is hard for the Board to follow your argument if you only attach pages 1,3,5,7,9 and 11 of the decision.

Under Board Rule 111.23, the responding party has ten (10) days to file an answer to the request for supersedeas. Answers are strongly encouraged since they provide the Board with guidance in ruling on the request. It is good practice to give a substantive reason as to why the WCJ's decision and order is correct and that supersedeas should be denied rather than an answer that merely "admits" or "denies" the averments in the supersedeas petition.

III. Standard for Granting Supersedeas. In the context of an appeal to the Board, a supersedeas is a "Stay" of the Workers' Compensation Judge's order. It follows the standard for an injunction as stated in the case of *Pa. PUC v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983). Those standards as to what is to be considered in deciding whether to grant a supersedeas are spelled out in Rule 111.21(a)(6) of the Rules of Practice Before the Workers' Compensation Appeal Board. They are as follows:

1. The petitioner makes a strong showing that it is likely to prevail on the merits.
2. The Petitioner shows that, without the requested relief, it will suffer irreparable injury.
3. The issuance of a stay will not substantially harm the interested parties in the proceeding.
4. The issuance of a stay will not adversely affect the public interest.

The biggest considerations in deciding whether to grant supersedeas on appeal to the Board are the likelihood of success on the merits and balancing the interests of the parties. In almost every case on appeal the matter has been fully tried to judgment on the merits in front of a Workers' Compensation Judge who has had the benefit of hearing all the testimony and reviewing the exhibits over a period of time. The Board is not in a position to re-weigh the credibility determinations of the WCJ or decide every issue below in the context of petition. Furthermore, on appeal, all inferences are drawn in favor of the verdict winner and this is also consistent with the humanitarian purposes of the Act. Therefore, do not expect to be able to try your entire case on appeal in a petition for supersedeas.

Requesting a supersedeas which is subsequently denied is a requirement for supersedeas fund reimbursement. However, an employer or insurer cannot receive fund reimbursement for monies paid out in penalties for a violation of the Act or an award of attorney's fees for unreasonable contest. Consequently, it is the policy of the Board to grant supersedeas as to attorney's fees and penalties in almost all cases in order to avoid prejudice to the defendant.

Therefore, if you are appealing a decision and order that contains an award of attorney's fees or penalties you should make that clear in your petition. Do not mention it as an afterthought after going on for ten pages about how the WCJ didn't find your expert credible. In fact, sometimes counsel will not even mention the award of fees and penalties in contesting the grant of a claim petition and the Board will only notice that attorney's fees and penalties were awarded when reviewing the WCJ's order. This raises the question of whether counsel did not wish to request supersedeas from the award of attorney's fees and penalties and whether the Board can grant supersedeas in such a case where it was not requested by a party?

IV. **Relief Requested.** As is the case in any appeal, you must be specific in the relief that you are requesting. The Board is willing to fashion a remedy pending appeal and this may resolve the issues in the underlying appeal leading to a stipulation of counsel. For example, if your basis for appeal and supersedeas is that the WCJ erred in the calculation of the average weekly wage or the compensation rate, please state what you propose the rate should be so that if it appears that you will likely succeed on the merits of the appeal, the Board can grant supersedeas in the form of an order specifying the correct amount to be paid while the appeal is pending.

V. **Other Considerations.** Likewise, an error of law that is apparent on the face of the petition will result in a supersedeas being granted. For example, supersedeas has been granted in cases where the WCJ granted a claim petition which alleged only a mental disability in the absence of an abnormal working condition.

In cases involving complex fact situations, cases of first impression or cases where there is the potential for prejudice the Board will often grant supersedeas to oral argument in order to hear the parties' positions or to "get everyone in the same room" in order to work through the issues. If you receive an order granting supersedeas to argument be prepared to address the supersedeas issues contained in the petition.

VII. **Reconsideration.** Finally, Section 426 of the Act provides the Board with broad powers to grant a rehearing of any "petition upon which the board has made an award or disallowance of compensation or other order or ruling." Therefore the Board will entertain petitions for reconsideration of supersedeas, however, the standard for reconsideration is "for good cause shown."