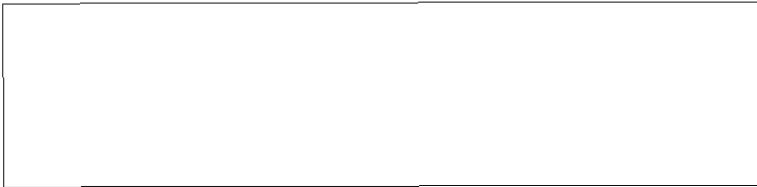


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Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

OCT 29 2003



Re: Appeal [redacted]
McLouth Steel Pension Plan With USWA LU 2659 ("Old Plan," Case # 038976)
McLouth Steel Products Corporation Pension Plan ("New Plan," Case # 173584)

Dear [redacted]

The Appeals Board has reviewed the appeal you filed on behalf of your client, [redacted] [redacted] of PBGC's August 20, 2002 revised determination of his New Plan benefit and August 21, 2002 revised determination of his Old Plan benefit. As explained below, we are denying this appeal.

Plan History

In 1982, the McLouth Steel Corporation ("Old McLouth") filed for bankruptcy and sold off its operating assets to a new company, eventually McLouth Steel Products Corporation ("New McLouth"). The Old Plan terminated, effective November 30, 1982, without sufficient assets to provide all benefits PBGC guarantees under the Employee Retirement Income Security Act (ERISA). New McLouth established the New Plan, which used credited service with *both* New and Old McLouth to compute a New Plan accrued benefit, which it then reduced by the benefit payable from the Old Plan based only on Old McLouth service. The New Plan terminated, effective August 13, 1996, also without sufficient assets. PBGC is trustee of both Plans.

Chronology of PBGC's Determinations and Your Appeal

PBGC's September 2, 1988 determination of [redacted] Old Plan benefit, which he did not appeal, said that he was entitled to \$626.00 per month, if paid as a lifetime annuity with no survivor benefit beginning on his Normal Retirement Date under that Plan (the first of the month following his 62nd birthday), or to a lower amount if paid earlier and/or in a different form. PBGC included a benefit statement with the information used to calculate his benefit.

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PBGC issued [redacted] New Plan benefit determination on June 19, 2001, which he did not appeal. PBGC's letter told him "the amount you currently receive is the correct amount of your benefit," and that his monthly benefit was currently subject to an offset based on his Workers' Compensation award. PBGC also said that, because his monthly Workers' Compensation payments are greater than the guaranteed monthly benefit payable from PBGC, he was not currently entitled to receive payment of his monthly pension from PBGC. The benefit statement PBGC included with its determination showed that, before taking into account Workers' Compensation, [redacted] was entitled to \$1,313.49 per month as a Joint and 50% Survivor Annuity from May 1, 1995 (his actual retirement at age 58) through May 1, 1999, and to \$800.17 per month thereafter.¹ Lastly, PBGC's letter said that, if he died before his eligible spouse, she was entitled to a separate Surviving Spouse Benefit of at least \$90 per month.

On July 23, 2002, your partner [redacted] wrote PBGC's Authorized Representative for the McLouth Plans to ask (1) what significance, if any, did Workers' Compensation have on [redacted] receipt of pension benefits under both McLouth Plans and (2) why [redacted] has not received pension benefits due him since his date of disability of June 1, 1992. [redacted] also said that [redacted] has been on Social Security Disability since 1992.

On August 13, 2002, [redacted] sent PBGC a copy of a Workers' Compensation Redemption Order he received on July 2, 2002. On August 20, 2002, PBGC issued a revised New Plan benefit determination that said, based on the information contained in the award, PBGC would activate his \$800.17 per month New Plan benefit, effective August 1, 2002. According to PBGC's files, on November 1, 2002, PBGC began paying [redacted] s monthly benefit of \$800.17, and sent him a check for \$2,415.05 to cover the August, September and October payments, plus interest.

On August 21, 2002, PBGC issued a revised Old Plan benefit determination that said, per plan practice, PBGC will consider the lump-sum payment [redacted] received under the Redemption Order to represent \$385.90 per month for 156 months (the assumption the Redemption Order used for his remaining life expectancy). PBGC's letter said that (1) beginning August 1, 2002 and lasting until July 1, 2015, his monthly Old Plan benefit would be offset by \$385.90 per month, and (2) beginning August 1, 2015, his Old Plan benefit would be restored to its full amount. PBGC also noted that, to begin receiving this benefit, [redacted] would need to complete and return PBGC's participant application for benefits. The files show that he has not yet done so and has not begun receiving his Old Plan benefit.

On September 27, 2002, you appealed PBGC's revised determinations on [redacted] behalf. According to your appeal, PBGC should not have coordinated [redacted] s pension by his Workers' Compensation settlement because it is not permissible to coordinate benefits when

¹ June 1, 1999 is [redacted] normal retirement date under the Old Plan. The Old Plan offset of \$513.32 equals his age-62 Old Plan benefit (\$626.00 as a lifetime annuity with no survivor benefit) multiplied by the Plan's factor for converting a lifetime annuity to a J&50%\$.

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the recipient is under age 65. You submitted a copy of a Michigan Supreme Court case, White v. McLouth Steel, which you believe is securely on point concerning the issue of coordination.

Additional Background Information

The files PBGC's auditors obtained from the prior New Plan Administrator show that (1) [redacted] "last day of work" was June 1, 1992; (2) he had been receiving Workers' Compensation since his last day worked; (3) he continued to accrue credited service under the New Plan from June 1, 1992 until April 30, 1995; (4) he retired, effective April 30, 1995, on "30-Year Retirement" under Plan section 2.3; and (5) on June 1, 1995, McLouth's Director of Personnel Services directed the New Plan's custodian bank to issue [redacted] a check for \$9,445.36 under the "Special Payment" provision for a 30-Year Retirement (Plan section 3.2). [redacted] did not, however, begin receiving his "Regular Pension" benefit under section 3.3, because the Plan Administrator offset his Regular Pension (equal at that time to \$1,313.49) by the Workers' Compensation payments he was then receiving (\$441.00 per week, or \$1,896.00 per month).

PBGC's files also include copies of:

- A *Notice of Favorable Decision* from the Social Security Administration's Office of Hearings and Appeals, dated June 15, 1993, which found that [redacted] had been disabled since June 1, 1992, that he was unable to perform past relevant work and that there are no jobs that exist in significant numbers which he can perform.
- A *Redemption Order* from the Michigan Department of Consumer & Industry Services, Bureau of Workers' Disability Compensation/Board of Magistrates, dated July 2, 2002, to "redeem the employer's entire workers' compensation liability for injuries sustained by the plaintiff on the following date(s) 4/26/92, 6/1/92, 1992 . . . and any and all other dates of injury while employed by McLouth Steel Products."

Pension Plan Provisions

Section 2.3 of the New Plan provides that a "30-Year Retirement" benefit is available to any participant who retires on or after November 1, 1989 and who "has not attained the age of 62 years and who shall have had at least 30 years of continuous service." The 30-Year benefit consists of a "special payment" that is paid immediately after retirement and a "regular pension amount" that begins the first full calendar month following the three calendar months for which the special payment covers.

According to section 2.5 ("Permanent Incapacity Retirement") of the New Plan, "any participant who shall have had at least 15 years of continuous service and who shall have become permanently incapacitated shall be eligible to retire on or after November 1, 1989, and shall upon his retirement (hereinafter "permanent incapacity retirement") be eligible for a pension. A

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participant shall be considered to be permanently incapacitated . . . only (a) if he has been totally disabled by bodily injury or disease so as to be prevented thereby from engaging in any employment of the type covered by the Basic Agreement, and (b) after such total disability shall have continued for a period of six consecutive months and, in the opinion of a qualified physician, it will be permanent and continuous during the remainder of his life."

Section 2.5 of the Old Plan provided a similar Permanent Incapacity benefit. However, for the reasons explained later in this decision, PBGC is not able to pay [redacted] that type of benefit for his service under the Old Plan. The Old Plan also provided a "Deferred Vested Pension" under Old Plan section 2.8 for participants with 10 or more years of continuous service, and [redacted] has met the requirements for that benefit.

Both the Old Plan and the New Plan offset a participant's Permanent Incapacity Retirement benefit for Workers' Compensation benefits payable after the participant reaches age 65 (section 3.10 of both Plan documents). For other types of retirement, the offset applies to any monthly benefit payable while a participant is receiving Workers' Compensation. For both plans, Section 3.10 also provides that:

If any such amount [of Workers' Compensation payments] is not determined with respect to a period of time, the Company shall apportion the amount to a period of time under procedures reasonably designed to result in deduction or charge comparable to that which would be made if the amount had been determined with respect to a period of time.

Your Questions Concerning the Workers' Compensation Offset

When PBGC becomes the trustee of a terminated pension plan, PBGC pays benefits to the plan's participants according to the terms of the plan, subject to the requirements and guarantee limits of the Employee Retirement Income Security Act of 1974, as amended (ERISA). The Old Plan terminated on November 30, 1982, and the New Plan terminated on August 13, 1996. [redacted] entitlement to a benefit is based on the terms of those Plans and on ERISA.

The United States Supreme Court has held that pension plan provisions that allow for the offset of workers' compensation payments against pension benefits do not violate ERISA. *Alessi v. Raybestos-Manhattan*, 451 U.S. 504 (1981). Furthermore, the Supreme Court has concluded that states may not enact laws that would disallow such offsets from pension payments. *Id.* at 522-526 (New Jersey law purporting to prohibit Workers' Compensation benefits from being used to offset pension benefits is a law which "relates to pension plans" governed by ERISA and thus is preempted). See also ERISA § 514(a), 29 U.S.C. § 1144(a) (ERISA pre-emption of state laws).

Thus, your reliance upon Michigan laws and state court decisions that address the coordination of Workers' Compensation benefits is misplaced. PBGC is not permitted to rely upon such state laws and court decisions, but rather must make benefit decisions based upon

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pension plan terms and ERISA. Nevertheless, we have included the following discussion of Michigan Workers' Compensation law because it might be helpful to [redacted] in understanding his benefits.

Since the enactment of a 1981 statute, Michigan has allowed employers to decrease Workers' Compensation payments to those disabled employees who were eligible to receive wage-loss compensation from other employer-funded sources, including pensions. Mich.Comp.Laws. ("MCL") § 418.354. Under Workers' Compensation law, such a statutory offset is commonly referred to as "benefit coordination."

The 1981 Michigan law provided that disability benefits from pension plans may be treated differently from other pension benefits with respect to the offsets. If the individual was receiving a non-disability pension benefit, the Workers' Compensation benefit generally must be reduced by the amount of the pension. MCL. § 418.354(1)(d). On the other hand, disability pension benefits do not have to be offset against Workers' Compensation payments. MCL § 418.354(14). However, this exemption from coordination of benefits is not automatic; rather, if the pension plan is silent on the subject, the disability compensation benefits are subject to coordination. *Sterner v. McLouth Steel Products*, 211 Mich.App. 354, 536 N.W.2d 225 (Mich.App. 1995), motion to appeal denied, 451 Mich. 893, 549 N.W.2d 577 (1996), citing *Scott v. Jones & Laughlin Steel Corp.*, 202 Mich.App 408, 509 N.W.2d 841 (Mich.App. 1993). See also *Hempstead v. Detroit Lions, Inc.*, 2003 WL 133065 (Mich.App., Jan 03, 2003) (unpublished) ("statute requires some affirmative statement in a [pension] plan to be exempt from coordination").

New McLouth, in several litigated Workers' Compensation cases, took the position that disability pension benefits from the New McLouth Plan were subject to coordination. The company argued that section 3.10 of the Plan -- which provided that Workers' Compensation benefits "shall not be deducted from any such amount for permanent incapacity retirement payable prior to age 65" -- did not prohibit a reduction to Workers' Compensation payments. Thus, the company asserted that coordination of Workers' Compensation benefits is not barred by application of MCL § 418.314(14). The Michigan Court of Appeals in *Sterner* rejected New McLouth's position. However, New McLouth appears to have prevailed in later-decided cases that involve this issue. See, e.g., *Kleczewski v. McLouth Steel Products Corp.*, 635 N.W.2d 306, 465 Mich. 904 (Mich. Nov 16, 2001) (Michigan Supreme Court denial of appeal).²

In *White v. McLouth Steel Products*, 453 Mich. 522, 556 N.W.2d 478 (Mich. 1996), which you cite in your appeal letter, the Michigan Supreme Court made a number of rulings concerning the coordination of workers' compensation payments with lump sum pension benefits. The Supreme Court in *White* also held that New McLouth is not entitled to a reduce weekly

² The Michigan Supreme Court issued three other rulings on the same day that were identical to *Kleczewski*. The other cases were *Simpson v. McLouth Steel Products*, *McCarty v. McLouth Steel Products*, and *Herr v. McLouth Steel Products*.

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workers' compensation payments based on the amounts paid by PBGC for benefits under the Old Plan. This ruling did not affect, however, New McLouth's coordination of workers' compensation payments with pension amounts provided by the New Plan. We also note that one of the rulings in *White*, which concerned the calculation of the offset to workers' compensation when a pension lump sum is rolled over into an IRA, was reversed by a subsequent decision. *Koontz v. Ameritech Services*, 466 Mich. 304, 645 N.W.2d 34 (Mich. 2002).

Discussion

As discussed above, [redacted] retired from New McLouth, effective April 30, 1995, on "30-Year Retirement" under Plan section 2.3. On or near June 1, 1995, New McLouth issued to [redacted] a check for \$9,445.36 under the "Special Payment" provision for a 30-Year Retirement (Plan section 3.2). Therefore, his New Plan benefit is determined under the 30-Year Retirement, rather than the Permanent Incapacity Retirement, plan provisions.

[redacted] also is entitled to a Deferred Vested Benefit from the Old Plan. While section 2.5 of the Old Plan provided for a Permanent Incapacity benefit, PBGC cannot pay that type of benefit because [redacted]'s permanent incapacity occurred *after* November 30, 1982, the date the Old Plan terminated. Under ERISA and PBGC regulations, PBGC cannot guarantee a disability benefit in the situation in which a participant does not meet the plan's definition of disability until after the Plan's termination date. See 29 Code of Federal Regulations (CFR) §§ 4022.3, .4(a)(3). Also, because the Old Plan terminated without sufficient assets to provide guaranteed benefits, PBGC is unable to pay benefits to Old Plan participants that are not guaranteed by PBGC.

For participants like [redacted] who are entitled to benefits under both McLouth Plans as well as to Workers' Compensation, PBGC's practice is to calculate initially the benefits under both plans in the absence of any workers' compensation offsets. PBGC next applies the workers' compensation offset amount first to the Old Plan benefit (under the rules for a Deferred Vested Retirement in [redacted] case) to the extent permitted by plan provisions. PBGC then applies any remaining workers' compensation offset amount to the New Plan benefit, again to the extent permitted by plan provisions.

Prior to the issuance of the Redemption Order that was effective August 1, 2002, [redacted] monthly Workers' Compensation payments exceeded the combined amount of his monthly pension benefits from both the Old and New Plans. As discussed above, under the relevant pension plan provisions, both his Deferred Vested Retirement benefit under the Old Plan and his 30-Year Retirement benefit under the New Plan were required to be reduced by his workers' compensation payments, starting with the commencement dates of his monthly benefits. Thus, PBGC correctly determined that [redacted] was owed no pension payments until August 1, 2002, other than the Special Payment he had received from New McLouth.

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In a decision on an earlier appeal on the same issue you raised (copy enclosed), the Appeals Board found that PBGC properly applied the Plan's Workers' Compensation offset provisions to a participant who, like [REDACTED] received a lump-sum redemption award in lieu of all future Workers' Compensation payments. Thus, using the method that New McLouth had used to apportion [REDACTED] redemption award over his remaining life expectancy, PBGC correctly determined that [REDACTED] Old Plan benefit would be offset by \$385.90 per month beginning August 1, 2002, and lasting until July 1, 2015. Beginning August 1, 2015, [REDACTED] [REDACTED] Old Plan benefit will be restored to its full amount of \$513.32 per month.

Also, for the time periods after the redemption order became effective, there is no remaining Workers' Compensation amount to be offset against [REDACTED] New Plan benefit. Therefore, PBGC correctly determined that [REDACTED] is entitled to a New Plan benefit of \$800.17 per month, effective August 1, 2002.

Decision

Having applied the law, the provisions of the Plan, and PBGC regulations and policies to the facts in this case, the Appeals Board found there was no basis for changing PBGC's revised benefit determinations for both the Old and New Plans. Pursuant to 29 C.F.R. § 4003.59, this is the final agency action regarding the issues raised in [REDACTED] appeal. He has exhausted his administrative remedies and may, if he wishes, seek judicial review of this decision.

If you or [REDACTED] have questions, please call PBGC's Customer Contact Center at 1-800-400-7242.

Sincerely,

Linda M. Mizzi
Member, Appeals Board

Enclosure

cc: [REDACTED]