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A Technical Note: A Pension is a Pension is a Pension

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I. A Pension is a Pension is a Pension

The title of this note is taken from the legal decision in *Rotolo Chevrolet v. Superior Court* (2003). That decision provided a specific answer to a question that is important in valuing the loss of pension benefits in both personal injury and wrongful termination litigation. Assume that the plaintiff has begun to receive either a disability or retirement pension because of the injury in a personal injury litigation or a termination of employment in a wrongful termination litigation. The term "pension" implies that the benefits will continue for the remainder of the plaintiff's life (and perhaps the plaintiff's spouse's life) as long as the plaintiff does not take future employment that would cause a termination of the pension. However, as the result of the injury or termination, the plaintiff has begun receiving this pension earlier than would have been the case without the injury or termination. If the plaintiff had been able to work to his or her intended retirement age instead of taking early retirement, the size of the pension benefit, regardless of whether it is called a disability benefit or a regular pension benefit, would have been significantly larger than the amount the plaintiff is currently receiving. Thus, the plaintiff is receiving disability or retirement benefits sooner than if the injury or termination had not taken place, but will have future losses of pension benefits relative to the amount currently being received. The specific question that was answered in the *Rotolo* decision was whether the pension benefits received before intended retirement should be treated as an offset or "more than offset" to the future reduction of pension benefits after retirement.

In the *Rotolo* case, the plaintiff claimed loss of $873,261 in regular retirement benefits and argued that disability benefits were a collateral source that could not be introduced as an offset. The defendant pointed out that the plaintiff could expect to receive $841,716 in disability retirement benefits so that the net loss was only $31,545. The defendant did not claim that disability benefits could be introduced as an offset to lost earnings, but only with respect to lost retirement benefits. The Rotolo Court said:

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> Rotolo does not argue that the disability pension benefits received are admissible against Staudt's claim for lost earnings due to his early retirement. With respect to his lost earnings, the pension benefits are clearly a collateral source and cannot reduce Staudt's damages. If Staudt provides evidence that he would have worked for five more years at an average salary of $60,000 per year, he will be entitled to damages in the total sum of $300,000 despite the fact that he his receiving pension benefits. Here, there is no dispute.

As noted above. . , the fact that a plaintiff may obtain a double recovery due to the application of the collateral source rule has not been deemed significant. The problem here is that if Rotolo is unable to introduce evidence of disability benefits, Staudt will wind up with triple compensation. He will obtain damages bases on lost income, additional damages based on his "regular" retirement benefits, and his actual disability retirement benefits.

> The rule does not require this inequitable result, and we find it inapplicable here. The trial court's error lay in accepting the proposition that Staudt's retirement benefits could be separated into two categories, and that he was accordingly entitled to claim "injury " to his "regular" benefits as to which his disability benefits were a "collateral source." In our view, the basis consequence of Rotolo's alleged tortious conduct was that Straudt could no longer work and had to retire. He therefore received retirement benefits which constitute a collateral source of compensation, and Rotolo may not offset these benefits against Staudt's lost earnings damages. But a pension is a pension is a pension, and Staudt is not entitled to characterize the disability payments he receives from his employer as a collateral source replacing regular pension payments that he would have received from his employer. Although the employer is the source "wholly independent of the tortfeasor" . . ., the fact that the employer provides two potential types of pension benefits does not make one type "collateral" to the other, which is already "collateral" to Staudt's lost earnings.

The *Rotolo* decision does not specifically discuss the timing of the disability benefits that Staudt was receiving or the retirement benefits Staudt would have received if the injury had not occurred, but it is clear that Staudt's disability benefits started in the aftermath of Staudt's injury and that he would not have retired until some later time. Based on the defendant's claim, one can presume that the present value of disability benefits continued

through the plaintiff's lifetime was $841,716 and that the present value of regular retirement benefits beginning at some later time was $873,261, so that the present value of the loss of pension to Staudt was $31,545. The decision does not indicate what discount rate was used in calculating present values or even whether the totals mentioned were discounted instead of being simply summed over time. It is worth noting that if the loss amounts mentioned in the were not discounted and a discount rate of 4% was used, the net loss of pension benefits would probably be converted into a net gain in pension benefits to Straudt. Since the disability benefits began sooner than without the injury, those benefits would be discounted less, while the retirement benefits would have begun later and thus discounted more. That would be an instance of "more than offset" loss of retirement benefits such that the present value of the pension benefits that began at the point of disability would be greater than the present value of future lost regular retirement benefits.

The *Rotolo* court was careful to make it clear that pension benefits would be considered a collateral source that could not be introduced as an offset to lost earnings. Thus, even if the defendant could show that an injury had caused a net gain in total pension benefits, that gain could not be used to offset lost earnings. The ruling that "a pension is a pension is a pension" was narrowly directed at how the loss of pension benefits should be calculated and not raising any challenge to the general proposition that neither disability pensions nor retirement pensions can be treated as an offset to lost earnings of an injured (or wrongfully terminated) worker. This carries the implication that if pension loss is "more than offset" by earlier disability or retirement benefits, no claim can be made for lost pension benefits. If there is a loss of pension benefits when taking the entire steam of pension benefits into account, the net loss of pension benefits can be claimed. However, if there is a "more than offset" net gain in pension benefits, that net gain cannot be treated as an offset to lost wage earnings. This set of implications is reasonable and clear once stated, but the only other legal decisions we are aware of that make this clear are decisions that cite *Rotolo* as authority. We are not aware of any legal decisions that deal with the same specific issue and reach a decision inconsistent with the *Rotolo* decision.

II. Implications for FELA Cases

Rotolo is a decision of the California Court of Appeals and carries no precedential weight in litigation under the Federal Employers Liability Act (FELA), but the question it answers in a California context is particularly important in FELA litigation. The Federal Employers Liability Act was passed to deal with the fact that railroad workers often cross state lines in

their work so that a unique federal law was desirable to deal with injured railroad workers. Decisions involving federal maritime laws and FELA decisions are treated as if they were part of the same general corpus of law, but FELA cases regularly deal with a unique feature of the railroad industry. Railroad workers have pension rights administered by the Railroad Retirement Board rather than the Social Security Administration. The pension provisions under special federal laws create circumstances in which the questions answered by Rotolo are particularly important.

The pension rights of railroad workers include two "Tiers." Tier I uses exactly the same formula as Social Security, but has unique "deeming privileges" such that a worker is "deemed" to be at a younger age than he or she actually is for purposes of determining the amount of pension benefit. Tier II is much more like a private pension program in which there are no subsidies from the federal government and employers pay a much higher percentage of taxes than workers to support the Tier II portion of pension benefits. Tier I increase at the same rate as the CPI like Social Security, but Tier II benefits increase at an annual rate equal to 32.5 percent of the CPI. Under the provisions of the Railroad Retirement Board pension system, a railroad worker who has had 240 months of railroad credits (some amount of Tier I and Tier II taxes paid in 240 months) is entitled to an "occupational disability pension." To qualify for such a pension, a worker needs only to prove that he cannot continue working in his current occupation in the railroad industry. If the worker can establish that fact, the worker will receive a pension that is not diminished actuarially in spite of being at a much younger age than would be required for regular retirement. A railroad worker with 360 months of RRB credits can retire with full benefits at age 60 under what are called 30/60 provisions of the system. A railroad worker with 240 months of RRB credits can do so if he establishes that he is disabled enough that he cannot continue in his current profession. As a result, on-the-job back and knee injuries to workers with more than 240 months of RRB credits are frequently litigated.

Even though pension benefit are not adjusted actuarially (smaller benefits based on the fact that the benefits are taken sooner), the disability benefits an occupationally injured worker will receive are lower than the worker would have received if the worker had continued to work to age 60 and had 360 months of RRB credits. That is because benefits are calculated based on the number of years of credits the worker has actually achieved prior to injury. A worker who is occupationally injured at age 50 will have ten fewer years of RRB credits than if the worker had continued working to age 60. This will result in lower benefits as of age 60 so that there is a future loss of retirement benefits. However, it is not uncommon for a worker at age 50 who is occupationally disabled to receive a disability pension of from $25,000 to

$40,000 per year.

To show the significance of the *Rotolo* answer, assume that a worker at age 50 has been awarded a $30,000 occupational disability pension. By the time that worker has reached age 60, the worker will have received $300,000 in disability pension benefits, ignoring CPI growth and discounting. At age 60, his pre-injury pension benefits might have been $12,000 per year higher because of additional ten years of RRB credits. For a male worker, judging from the point of injury, that means that he might have another 20 years of benefits at $12,000 per year, with an unadjusted value of $12,000 x. 20 = $240,000. Thus, before discounting is considered, the worker has a net gain of $60,000 in pension benefits. After discounting is considered, the worker's net gain could be in excess of $100,000 in present value terms. Thus, the difference in what the plaintiff can claim in losses is the present value of $240,000 in future lost retirement benefits starting ten years in the future. Under Rotolo, there would be no loss because the present value of the early disability pension far more than swamps the future loss of pension benefits. If, however, the plaintiff can claim the discounted value of $240,000 in my example. (The actual present value would depend on an actual calculation, but is still likely to be a present value in the range of $100,000.)

We know of no reported FELA decision that provides an answer, one way or the other, to the question answered by *Rotolo* for personal injuries in the state of California.

Legal Citations of the *Rotolo* Decision

We provide below a citation to the *Rotolo* decision and a list of cases citing *Rotolo* on the point of this note. Since many of the decisions are unpublished they do not care significant weight, but we have found no contrary decisions.

Rotolo Chevrolet v. The Superior Court of the County of San Bernadino, 105 Cal.App.45h 242; 129 Cal. Rptr. 2d 283 (Cal.App. 2003).

Henson v. AT&T Corporation, 2004 Cal. Unpub. LEXIS 3849 (Cal. App. 2004)

Lovett v. City and County of San Francisco, 2004 Cal. Unpub. LEXIS 8615. (Cal. App. 2004)

Department of Fair Employment and Housing v. County of Riverside, 2006 Cal. App. Unpub. LEXIS 2422. (Cal. App. 2006).