IN THE COMMONWEALTH COURT OF PENNSYLVANIA

William Sokalsky, Jr. and Walter D. Campbell, Esquire	:	
v.	:	
Bradley Graphic Solutions, Inc. and Erie Insurance Exchange d/b/a and a/k/a Erie Insurance Group a/k/a Erie Flagship City Insurance Company, Appellants	:	No. 1682 C.D. 2010
William Sokalsky, Jr. and Walter D. Campbell, Esquire, Appellants	:	
v.	:	
Bradley Graphic Solutions, Inc. and Erie Insurance Exchange d/b/a and a/k/a Erie Insurance Group a/k/a Erie Flagship City Insurance Company	:	No. 1683 C.D. 2010 Argued: May 10, 2011

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: July 1, 2011

Bradley Graphic Solutions, Inc. and Erie Insurance Exchange (collectively referred to as "Appellants") appeal the May 21, 2010 order of the Court of Common Pleas of Bucks County (trial court) denying their motion to open or strike the judgment filed by William Sokalsky (Claimant) and Claimant's counsel, Walter Campbell (Campbell), for failing to make any payments of compensation benefits

awarded to Claimant.[1] Claimant and Campbell filed a cross-appeal complaining of the trial court's failure to award attorney fees and costs in its May 21, 2010 order. The issues before this Court are: 1) whether the trial court erred as a matter of law in finding that it had jurisdiction over the judgment at issue, even though there were still issues pending before the Board; 2) whether the trial court erred in failing to find that Appellants had the right to rely on a credit awarded by the WCJ before commencing payment of benefits, and by holding that the amount of the credit was not on the record; 3) whether the trial court erred as a matter of law by finding that the $30,000.00 limitation under Section 428 of the Workers' Compensation Act (Act)[2] was not applicable to the present case; 4) whether the trial court erred as a matter of law by failing to hold that an attorney cannot be a party plaintiff in a request for entry of judgment; and 5) whether the trial court erred as a matter of law or abused its discretion in failing to make an assessment or award of attorney fees and costs pursuant to Section 2503 of the Judicial Code, 42 Pa.C.S. § 2503. For the reasons stated below, we affirm the order of the trial court to the extent that Claimant and Campbell's request for attorney fees is denied; otherwise, the order of the trial court is reversed.

On May 16, 2006, Claimant was awarded workers' compensation benefits by a Workers' Compensation Judge (WCJ). On May 24, 2006, the WCJ amended its order by increasing Claimant's average weekly wage amount. Appellants appealed the WCJ's decision to the Workers' Compensation Appeal

[1] This Court does not typically exercise jurisdiction over appeals from decisions on petitions to open judgments between private parties. *See* 42 Pa.C.S. §§ 742, 762. However, this appeal was originally filed in the Superior Court, which transferred the matter to this Court pursuant to Pa.R.A.P. 752 given that the underlying issues pertain to workers' compensation proceedings. We entertain this appeal and cross-appeal in the interest of judicial economy. *See, e.g., Campagna v. Brandon Knitwear, Inc.*, 797 A.2d 405 (Pa. Cmwlth. 2002).

[2] Act of June 2, 1915, P.L. 736, *as amended*, added by the Act of June 26, 1919, P.L. 642, 77 P.S. § 921.

Board (Board) and filed a petition for supersedeas. On June 27, 2006, supersedeas was granted as to attorney fees for unreasonable contest, but was otherwise denied, including as to Appellants' obligation to pay benefits during the appeal process. Appellants never paid any benefits to Claimant.

On August 14, 2008, Claimant and Campbell filed a complaint and Praecipe for Entry of Judgment in the amount of $214,814.60 pursuant to Section 428 of the Act. Appellants filed a Motion to Open or Strike Judgment entered against them on August 25, 2008. During the course of the proceedings before the trial court, the Board issued an order on October 19, 2009, vacating the WCJ's May 24, 2006 amended order as null and void, and reversing and remanding the WCJ's May 16, 2006 order in part.[3] Appellants argued that: 1) the trial court did not have jurisdiction to enter a judgment because the WCJ's order was reversed; 2) Appellants had a right of credit that justified non-payment; and 3) Campbell was improperly named as a party to the judgment. Claimant and Campbell refuted Appellants' arguments, and sought attorney fees and costs against Appellants for engaging in dilatory, arbitrary, vexatious, and bad faith conduct. The trial court issued an order and opinion on May 21, 2010 denying Appellants' petition to open judgment, but it made no ruling as to attorney fees and costs.[4] Appellants appealed the trial court's order, and Claimant and Campbell cross-appealed.[5]

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[3] The May 16, 2006 order was reversed "to the extent it determined that there was an unreasonable contest and awarded attorney's fees for unreasonable contest," and remanded "for specific findings of fact and conclusions of law and complete determinations on the issues detailed in the [October 19, 2009] Opinion." Reproduced Record at 977a.

[4] The trial court also issued a Pa.R.A.P. 1925(b) opinion upon Appellants' appeal of the May 21, 2010 order.

[5] "In reviewing a trial court's denial of a motion to strike or open judgment, this Court is limited to determining whether the trial court made errors of law or clearly abused its discretion." *Campagna v. Brandon Knitwear, Inc.*, 797 A.2d 405, 407 (Pa. Cmwlth. 2002). "[A] petition to open judgment is an appeal to the court's equitable powers. It is committed to the sound discretion of the court and will not be disturbed absent a manifest abuse of discretion." *City of Phila. Water*

Appellants argue that the trial court did not understand their position that since the "pure" workers' compensation issues had not been resolved, the judgment was premature and the trial court did not have jurisdiction. We disagree with Appellants' argument, but for the reasons stated below, we nonetheless reverse the trial court's order denying the motion to open or strike judgment.

In general, "a default judgment may be opened if the moving party has (1) promptly filed a petition to open the default judgment, (2) provided a reasonable excuse or explanation for failing to file a responsive pleading, and (3) pleaded a meritorious defense to the allegations contained in the complaint." *Myers v. Wells Fargo Bank, N.A.*, 986 A.2d 171, 175-76 (Pa. Super. 2009). There is no dispute that Appellants' petition to open judgment was timely, or that a responsive pleading was filed. Thus, Appellants must only show that they pleaded a meritorious defense.

"The requirement of a meritorious defense is only that a defense must be pleaded that if proved at trial would justify relief. The defense does not have to prove every element of its defense[;] however, it must set forth the defense in precise, specific and clear terms." *Seeger v. First Union Nat'l Bank*, 836 A.2d 163, 166 (Pa. Super. 2003), citing *Penn-Delco Sch. Dist. v. Bell Atl.-PA, Inc.*, 745 A.2d 14, 19 (Pa. Super. 1999).

> Section 428 of the Act, 77 P.S. § 921, governs how judgments are obtained for unpaid workers' compensation awards. Under this provision, when an employer has not paid benefits within 30 days of an award, a claimant is entitled to have the prothonotary issue a judgment for the entire amount owed. The judgment entered under this provision will only be lifted if the employer establishes that there was no order granting compensation, that 30 days had not passed since the order fixing payment, a supersedeas was granted, *Horner v. C.S. Myers & Sons, Inc.*, 721 A.2d

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Revenue Bureau v. Towanda Props., Inc., 976 A.2d 1244, 1247 (Pa. Cmwlth. 2009) (citation omitted).

> 394 (Pa. Cmwlth. 1998), or that the amount owed has been paid. *Sober v. Pennsylvania Manufacturers Association*, [276 A.2d 322 (Pa. Super. 1971)]. A claim that there was an error before the WCJ's award is not a basis for lifting the judgment. *Kurtz v. Allied Corp.*, [561 A.2d 1294 (Pa. Cmwlth. 1989)].

Clayton v. City of Phila., 910 A.2d 93, 97 (Pa. Cmwlth. 2006). The primary purpose behind the default judgment remedy provided for in Section 428 of the Act is "to provide recourse for a situation where an employer has been found liable to pay benefits to a claimant, but does not." *Campagna v. Brandon Knitwear, Inc*., 797 A.2d 405, 408 (Pa. Cmwlth. 2002). "Until a supersedeas is issued or the [workers' compensation] award . . . is reversed by either the Board or a court, an employer cannot challenge the propriety of the underlying award as a defense to the entering of judgment filed pursuant to Section 428 of the Act." *Clayton*, 910 A.2d at 98. The fact that an employer/insurer ultimately prevails on its appeal of the underlying compensation case does not excuse an earlier violation of the Act, i.e., non-payment of awarded benefits. *Horner*.

> [A]n employer violates the Act if it does not begin to make payments within thirty days of the date on which its obligation to pay arises. Moreover, it is well-settled that only the grant of a supersedeas will obviate an employer's obligation to pay compensation and that, absent a supersedeas, the employer carries the burden of paying workers' compensation benefits during the litigation period.

Graphic Packaging, Inc. v. Workers' Comp. Appeal Bd. (Zink), 929 A.2d 695, 700 (Pa. Cmwlth. 2007) (citation omitted).

Although the workers' compensation matter was remanded for further proceedings before the WCJ, the initial award of workers' compensation benefits was neither reversed, nor vacated.[6] Therefore, Appellants cannot challenge the judgment

[6] See note 3, *supra*.

on the basis of lack of jurisdiction during the pendency of appeal since the law is clear that an appeal of the underlying workers' compensation award does not stay payment of benefits. *Graphic Packaging, Inc.*; *Graves v. Workmen's Comp. Appeal Bd. (LaFrance Corp.),* 680 A.2d 49 (Pa. Cmwlth. 1996). On the other hand, the WCJ's May 24, 2006 order clearly grants Appellants credit against the award of benefits. However, there is no mention of the amount of credit to which Appellants are entitled, and there is no indication of the method to be used for applying the credit to Claimant's award. Appellants believe that they were entitled to apply the credit to the beginning of the payment obligation, which is their stated reason for not commencing payment within 30 days after the date the obligation arose.

Since the issue of the method for applying the credit, if resolved in favor of Appellants, could justify the delay of payment, Appellants had a meritorious defense to their failure to commence benefit payments. Further, the "issue is one that must be resolved by the compensation authorities since it involves a complex factual situation concerning claimant's changed status." *Angelaccio v. Kaiser Fleetwings, Inc.*, 190 A.2d 157, 159 (Pa. Super. 1963). Therefore, the trial court should have opened the judgment and stayed proceedings pending the outcome of the underlying workers' compensation proceedings.[7]

Appellants also argue that there is no provision in Section 428 of the Act for the injured party's attorney to be named as a party plaintiff. Section 428 of the Act only allows employees or their dependants to take a judgment against an employer or an insurer. We agree, but find the error of the trial court to be harmless.

[7] The issues concerning whether the trial court erred in failing to find that Appellants had the right to rely on a credit awarded by the WCJ before commencing payment of benefits, and by holding that the amount of the credit was not on the record, and whether the trial court erred as a matter of law by finding that the $30,000.00 limitation under Section 428 of the Act was not applicable to the present case, are moot in light of our determination as to this first issue.

The trial court considered the issue of whether Campbell could name himself as a party plaintiff waived because Appellants' complaint failed to include any argument or explanation in support of this issue. In the memorandum of law concerning its motion to open and/or strike default judgment, Appellants indicate that "[t]here is no provision in Section 428, 77 P.S. [§] 921, for the injured party's Attorney to be named as a party plaintiff. The Complaint of plaintiff Walter Campbell must therefore be dismissed." Reproduced Record (R.R.) at 32a. Appellants expanded their argument in their brief before this Court citing *Lerner v. Philadelphia Psychiatric Center*, 339 A.2d 910 (Pa. Cmwlth. 1975) as authority in support of their assertion that it is improper for an attorney to name himself as a party plaintiff. In *Lerner*, the administrator of the estate of a claimant to a workers' compensation award filed for default judgment after the claimant's death. This Court held: "Appellant, being neither the employee nor one of his dependents, had no authority to enter the judgment." *Id.*, 339 A.2d at 911.

While it is true that Section 428 of the Act only allows employees or employees' dependants to file for default judgment, whether this issue was waived by Appellants or the trial court erred by not striking Campbell from the judgment, the error by the trial court in this regard is harmless. As the trial court noted in its Pa.R.A.P. 1925(b) opinion, what distinguishes the present case from *Lerner* is that in the case *sub judice* the employee is named, as allowed by Section 428 of the Act, and in *Lerner* there was no employee or dependant who could have filed for default judgment. Naming Claimant's attorney as a party plaintiff does not entitle Claimant and his attorney to more money than what was originally owed under the workers' compensation award, and the attorney does not need to be named as a party plaintiff in order for the courts to award attorney fees and costs. Therefore, the trial court's failure to strike Campbell's name as a party plaintiff is harmless error.

Finally, Claimant and Campbell argue that the trial court erred as a matter of law or abused its discretion in failing to make an assessment or award of attorney fees and costs pursuant to Section 2503 of the Judicial Code. Specifically, they argue that a review of the arguments advanced by Appellants reveals major deficiencies and obstacles militating in favor of the propriety of the action of the trial court. They further contend that the record shows that Appellants "dug their heels in" and decided not to pay the awarded benefits despite, or in clear disobedience and contempt of, the orders from the WCJ. Finally, they contend that the trial court's holding that they could recoup legal fees and costs through the workers' compensation process, is inaccurate and incorrect.

Section 2503(7) and (9) of the Judicial Code provides that the following parties are eligible for reasonable counsel fees:

> (7) Any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter.
>
> . . . .
>
> (9) Any participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.

42 Pa.C.S. § 2503(7), (9). "Generally speaking, 'obdurate' conduct may be defined in this context as stubbornly persistent in wrongdoing. Conduct is 'dilatory' where the record demonstrates that counsel displayed a lack of diligence that delayed proceedings unnecessarily and caused additional legal work." *In re Estate of Burger*, 852 A.2d 385, 391 (Pa. Super. 2004), *aff'd*, 587 Pa. 164, 898 A.2d 547 (2006) (citation and quotation marks omitted).

> Arbitrary conduct is that which is based on random or convenient selection or choice rather than based upon reason or nature. Litigation is vexatious when suit is filed

> without sufficient grounds in either law or fact and if the suit served the sole purpose of causing annoyance. A lawsuit is commenced in bad faith when it is filed for purposes of fraud, dishonesty or corruption.

Twp. of Lower Merion v. QED, Inc., 762 A.2d 779, 781-82 (Pa. Cmwlth. 2000).

Even if it would be determined that there are not legally sufficient grounds for filing this appeal, there is no evidence that Appellants filed this appeal for purposes of fraud, dishonesty, corruption, or solely to cause annoyance. Nor is there evidence that Appellants exhibited conduct that was stubbornly persistent in wrongdoing, demonstrates a lack of diligence that delayed proceedings or caused additional legal work, or is based on random or convenient selection or choice rather than on reason or nature. Therefore, the trial court did not err or abuse its discretion by declining to award attorney fees as requested by Claimant and Campbell.

For the reasons stated above, we affirm the portion of the trial court's order denying Claimant and Campbell's request for attorney fees. We reverse the portion of the order denying the motion to open or strike judgment. Finally, we remand this matter to the trial court to open the judgment and stay proceedings pending the outcome of the underlying workers' compensation proceedings.

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JOHNNY J. BUTLER, Judge

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O R D E R

AND NOW, this 1st day of July, 2011 the May 21, 2010 order of the Court of Common Pleas of Bucks County is affirmed to the extent that it denied the request for attorney fees. The order is otherwise reversed, and the matter is remanded to open judgment and stay proceedings pending the outcome of the underlying workers' compensation proceedings.

Jurisdiction relinquished.

JOHNNY J. BUTLER, Judge