IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Elizabeth Yespelkis, Petitioner	:	
v.	:	No. 2338 C.D. 2009
Workers' Compensation Appeal Board (Pulmonology Associates Incorporated and AmeriHealth Casualty), Respondents	:	Submitted: September 10, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: October 29, 2010**

The sole issue in this procedurally complicated appeal is whether the workers' compensation authorities erred in failing to award unreasonable contest attorney fees in favor of Elizabeth Yespelkis (Claimant). The Workers' Compensation Appeal Board (Board) and a Workers' Compensation Judge (WCJ) determined that Pulmonology Associates Incorporated (Employer) had a reasonable basis to file its modification/suspension petition. They also determined that Employer properly withdrew its petition shortly after it learned of a change in Claimant's medical condition. Thus, after two remands, the Board and the WCJ declined to award attorney fees. Upon review, we affirm.

This case has a lengthy and complicated procedural history.[1] Relevant here, in January 2003, Claimant sustained a work injury for which she began receiving workers' compensation benefits.

In September 2004, Employer filed a petition to modify/suspend Claimant's benefits. Based on a physician's examination and a labor market survey, Employer asserted work was available to Claimant within her physical restrictions and vocational ability. Claimant filed an answer alleging she remained totally disabled. Claimant also requested attorney fees.

About a month later, a WCJ held a hearing on Employer's supersedeas request. At that time, Employer submitted a medical report by Dr. Andrew Sattel, a board-certified orthopedic surgeon. Based on his physical examination and a review of Claimant's medical records, Dr. Sattel opined Claimant was capable of performing sedentary work with certain restrictions. Employer also presented an earning power assessment and labor market survey prepared by a certified vocational expert, which identified available positions within Claimant's medical restrictions. Ultimately, the WCJ denied Employer's supersedeas request. A subsequent hearing was set for June 2005.

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[1] In Yespelkis v. Workers' Compensation Appeal Board (Pulmonology Associates Inc.) (Yespelkis I), 986 A.2d 194 (Pa. Cmwlth. 2009), which involved the same parties, we recounted a significant portion of that history. The issue in that prior appeal was whether Employer engaged in a reasonable contest when it filed a penalty petition against claimant seeking to enforce a prior WCJ order regarding Employer's subrogation lien. The WCJ determined Employer's contest was reasonable and, therefore, denied Claimant's request for unreasonable contest attorney fees. On appeal, however, we remanded for reconsideration of the order denying unreasonable contest fees as the record did not support the WCJ's conclusion that Employer presented a reasonable contest. The unreasonable contest fee issue in Yespelkis I is distinct from the unreasonable contest fee issue in this case.

Thereafter, in mid-April 2005, Claimant's counsel sent a letter to Employer's counsel enclosing a letter to the WCJ along with a motion to dismiss Employer's petition for failure to prosecute. In addition, Claimant's counsel advised Employer's counsel that Claimant underwent "surgery on her right upper extremity within the past couple weeks …." Reproduced Record (R.R.) at 118a.

About three weeks later, Employer sent a letter to the WCJ asking him to mark the modification/suspension petition as withdrawn at Employer's request "due to [C]laimant's recent surgery." R.R. at 122a. Ten days later, the WCJ issued an order stating that Employer's petition was withdrawn. The WCJ's order also indicated Claimant's counsel was "entitled to a counsel fee of 20% … chargeable to Claimant's share." R.R. at 13a.

Apparently, after receiving a copy of Employer's letter to the WCJ requesting withdrawal of its petition, but before receiving the WCJ's order marking it withdrawn, Claimant's counsel sent the WCJ a letter stating that, although Claimant did not oppose withdrawal of Employer's petition, Claimant intended to seek litigation costs and attorney fees. After receiving the WCJ's order, Claimant's counsel sent the WCJ a letter requesting the WCJ vacate his order marking the petition withdrawn and reopen the record for evidence regarding requests for attorney fees and litigation costs. Ultimately, the WCJ declined to vacate his order.

Claimant appealed to the Board, asserting the WCJ prematurely issued a final decision without first allowing the parties to present evidence on the issues

of attorney fees and litigation costs. Claimant further argued Employer's contest was unreasonable as a matter of law.

Ultimately, the Board determined the record lacked sufficient evidence for it to determine whether Employer's contest was reasonable. Thus, the Board vacated the WCJ's order and remanded for a determination of whether Claimant was entitled to attorney fees and litigation costs.

After remand proceedings, the WCJ issued a decision in which he determined Employer had a reasonable basis to prosecute its modification/suspension petition, and acted reasonably in promptly withdrawing its petition upon learning of the change in condition occasioned by Claimant's surgery. As a result, the WCJ declined to award unreasonable contest attorney fees. The WCJ did not, however, address Claimant's request for litigation costs. Again, Claimant appealed to the Board.

On appeal, the Board issued a decision in which it agreed with the WCJ that Employer presented a reasonable contest; therefore, Claimant was not entitled to unreasonable contest fees. However, the Board also determined the WCJ failed to address the issue of litigation costs. Thus, the Board affirmed the denial of unreasonable contest fees, and remanded to the WCJ for the sole purpose of determining whether litigation costs were recoverable. Claimant filed an appeal to this Court, which we quashed as interlocutory because of the remand component of the Board's order.

On remand, the WCJ determined Claimant incurred reasonable litigation costs of $2,814.10, and ordered Employer to reimburse those costs. Claimant appealed to the Board, again challenging the denial of unreasonable contest fees. The Board declined to disturb its prior determination affirming the WCJ's denial of Claimant's request for unreasonable contest fees. Claimant now appeals to this Court.

On appeal,[2] Claimant asserts Employer bore the burden of proving it presented a reasonable contest. She argues that because Employer did not present any evidence to support its modification/suspension petition it could not sustain this burden. Thus, Claimant contends Employer's contest was unreasonable as a matter of law. Claimant further argues Employer's unreasonable contest covered two distinct periods: the initial modification/suspension proceeding before the WCJ, and the period in which the ensuing appeals and remands occurred. Claimant asks that we address these time periods separately.

As to the first period, Claimant contends Employer's prosecution of its modification petition, filed in September 2004, was unreasonable because Employer did not take any depositions or present any evidence in its case-in-chief in order to sustain its burden of establishing a reasonable contest. Claimant further maintains that Employer's stated reason for withdrawing its modification petition was that in April 2005 it learned of Claimant's recent surgery, and that Employer

[2] Our review is limited to determining whether the WCJ's findings of fact were supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Minicozzi v. Workers' Comp. Appeal Bd. (Indus. Metal Plating, Inc.), 873 A.2d 25 (Pa. Cmwlth. 2005).

determined that at that time it would be counter-productive to continue to litigate its modification petition. As a result, Employer's "excuse" for withdrawing its petition did not exist as of the deadline for Employer's evidence; therefore, its contest was unreasonable as a matter of law. Claimant contends Employer's *ex parte* withdrawal of its petition after it failed to present any supporting evidence renders this case analogous to Pieretti v. Workmen's Compensation Appeal Board (Denny's Inc.), 581 A.2d 990 (Pa. Cmwlth. 1990), in which this Court awarded unreasonable contest attorney fees.

Employer responds that the WCJ's determination of reasonable contest is supported by substantial evidence. Specifically, Employer argues its prompt withdrawal of the petition after learning Claimant underwent surgery constituted a change in circumstances beyond Employer's control that provided a reasonable basis for Employer to withdraw the petition. See Arbogast & Bastian v. Workmen's Comp. Appeal Bd. (Moyer), 599 A.2d 275 (Pa. Cmwlth. 1991).

Pursuant to Section 440(a) of the Workers' Compensation Act,[3] in any contested case where an insurer contests liability in whole or in part, a WCJ shall award counsel fees to an employee in whose favor the matter has been finally adjudicated unless the employer provides a reasonable basis for the contest. "Section 440 … is intended to deter unreasonable contests of workers' claims and to ensure that successful claimants receive compensation undiminished by costs of litigation." Eidell v. Workmen's Comp. Appeal Bd. (Dana Corp.), 624 A.2d 824, 826 (Pa. Cmwlth. 1993) (citation omitted).

[3] Act of June 2, 1915, P.L. 736, as amended, added by the Act of February 8, 1972, P.L. 25, 77 P.S. §996.

The issue of whether an employer's contest is reasonable is a legal conclusion based on the WCJ's findings of fact. Yespelkis v. Workers' Comp. Appeal Bd. (Pulmonology Assocs. Inc.) (Yespelkis I), 986 A.2d 194 (Pa. Cmwlth. 2009). The reasonableness of an employer's contest depends on whether the contest was prompted to resolve a genuinely disputed issue or merely to harass the claimant. Id.

There are several cases that address whether an award of unreasonable contest fees is proper where an employer files a petition to reduce or terminate benefits and subsequently withdraws that petition, including Pieretti, relied on by Claimant, and Arbogast, relied on by Employer.

In Pieretti, the employer filed a petition seeking to suspend or terminate benefits. A referee scheduled several hearings, most of which were continued. Thereafter, the record closed without the presentation of any evidence by the employer to support its petition. Prior to the entry of the referee's decision, but after the close of the record, the employer requested that its petition be withdrawn. The referee granted the withdrawal request. The claimant appealed to the Board, asserting the referee erred in failing to award unreasonable contest fees. The Board disagreed. On further appeal, however, this Court reversed. We determined the claimant was entitled to an award of unreasonable contest fees, explaining:

> In our view, [the] [e]mployer's withdrawal of its petition here constitutes an admission that its contest was unreasonable, rendering a remand unnecessary. In any event, where, as here, an employer persists in maintaining a suspension or termination petition absent evidence to support the remedy sought, the employer's

> contest is unreasonable as a matter of law for purposes of awarding counsel fees under Section 440 of the Act, 77 P.S. §996.

Id. at 994 (citations omitted).

About a year later, we decided Arbogast, relied on by Employer here. In that case, the employer filed a petition alleging a claimant could perform light or sedentary work based on its physician's opinion. Later, during the pendency of its petition, the employer's physician reexamined the claimant and changed his opinion, indicating the claimant could not return to light work. At the next hearing, the employer withdrew its petition. This Court held the employer's prompt withdrawal of its petition upon learning of its physician's change in opinion was proper; therefore, employer was not liable for unreasonable contest fees. We distinguished Pieretti because the employer in Arbogast withdrew its petition based on a change in its physician's opinion, a circumstance beyond the employer's control.

Thereafter, in Eidell, we again considered whether an award of unreasonable contest fees was appropriate where an employer files a petition that is subsequently withdrawn or dismissed. In that case, the employer filed a modification petition alleging that a claimant could perform light duty work. During the proceedings, however, the employer did not present evidence on the disputed issue of job availability. Instead, it repeatedly sought continuances on the ground its vocational expert was unavailable to testify. At a final hearing, the employer sought another continuance when its vocational expert did not appear; however, the referee denied the continuance request and closed the record. The referee subsequently dismissed the employer's petition because the employer did

not present evidence on job availability. Additionally, the referee awarded unreasonable contest fees.

On appeal, this Court agreed unreasonable contest fees were appropriate and remanded for further findings on that issue. In so doing, we provided a thorough review of the cases that address whether an award of unreasonable contest fees is proper where a petition filed by an employer is later withdrawn or dismissed. We synthesized the principles gleaned from these cases as follows:

> [M]erely looking to see if a petition has been withdrawn or dismissed is not enough; the totality of the circumstances must be considered. Majesky [v. Workmen's Comp. Appeal Bd. (Transit Am.), 595 A.2d 761 (Pa. Cmwlth. 1991)].
>
> Our prior discussion establishes the following points. When an employer files a petition seeking to either terminate or modify benefits it must have a factual basis for filing the petition. If medical evidence is required the employer must have that evidence at the time the petition is filed. If there is no such factual basis the employer is acting unreasonably in filing the petition. Kuney [v. Workmen's Comp. Appeal Bd. (Continental Data Sys.), 562 A.2d 931 (Pa. Cmwlth. 1991)]; Majesky. Because a contest is originally reasonable does not mean that legal conclusion cannot change. Arbogast. Because we decide questions concerning the reasonability of a contest on the totality of the circumstances, Majesky, facts which occur during the litigation process must be considered in a decision on whether to award attorney's fees. Arbogast; Spangler [v. Workmen's Comp. Appeal Bd. (Ford), 602 A.2d 446 (Pa. Cmwlth. 1992)]. At the risk of being assessed with an employee's counsel fees, the employer must at some time present evidence before the record is closed, Pieretti, Majesky, unless it can offer a valid reason for not presenting evidence. Arbogast.

Id. at 827, 828 (emphasis added).

Applying the principles from the cases above, we conclude the WCJ and the Board here properly denied Claimant's request for unreasonable contest fees for the first period in question (from Employer's filing of petition until the WCJ marked that petition withdrawn). With regard to whether Employer presented a reasonable contest, the WCJ found:

> 5. [Employer] indicates that the Claimant's medical condition had changed during the litigation of this [p]etition because she submitted to a surgical procedure and when this occurred it was determined that a withdrawal of the [p]etition was appropriate.
>
> 6. This Judge has determined that [Employer] had adequate evidence to support the allegations contained in the Modification/Suspension Petition filed and acted reasonably when it withdrew this [p]etition because of a change in Claimant's condition.

WCJ Op., 9/18/07, Findings of Fact Nos. 5, 6.

The record supports these findings. More specifically, Employer filed its modification/suspension petition in September 2004. R.R. at 4a-5a. About a month later, in connection with its supersedeas request, Employer submitted its physician's report and an earning power assessment/labor market survey, which were prepared in July and August 2004, respectively. Certified Record (C.R.) at Ex. D-1, Employer's Exs. E 1, E 2. The next hearing was scheduled for June 2005. R.R. at 120a. In April 2005, however, Claimant's counsel notified Employer's counsel that Claimant recently underwent surgery. R.R. at 118a. Less than three weeks later, Employer sent the WCJ a letter asking that its modification/suspension

petition be withdrawn based on Claimant's recent surgery. R.R. at 122a. Therefore, the WCJ's findings are adequately supported.

Further, based on an analysis of the totality of the circumstances, no error is apparent in the determinations that Employer presented a reasonable contest. Specifically, at the time Employer filed its modification/suspension petition it had its physician's medical opinion and proof of job availability. Thus, Employer filed its petition to resolve a genuinely disputed issue, Claimant's ability to return to modified work. Upon learning of Claimant's recent surgery, Employer promptly requested withdrawal of its petition prior to the next scheduled hearing. In short, Employer's request to withdraw its petition, which occurred before the close of the record, was prompted by a change in Claimant's medical condition, a circumstance beyond Employer's control. Under these circumstances, we agree with the WCJ and the Board that Employer's contest was reasonable.[4]

The facts here render this case analogous to Arbogast, in which the employer promptly withdrew its petition upon learning of a change in the

[4] Citing Ghany v. Department of Corrections, SCI-Graterford, 1993 WL 220279, a 1993 Board decision, Claimant also contends we should award unreasonable contest fees on the ground that Employer did not depose its medical expert within 90 days of the first hearing on Employer's modification/suspension petition as required by Section 131.63 of the Special Rules for Administrative Practice and Procedure before Workers' Compensation Judges (WCJ Rules), 34 Pa. Code §131.63.

Our review of the record reveals Claimant did not raise the issue of Employer's alleged violation of this regulation before the WCJ. Further, the WCJ made no findings regarding Employer's compliance with this regulation. As such, this issue is waived. See Harvey v. Workers' Comp. Appeal Bd. (Monongahela Valley Hosp.), 983 A.2d 1254 (Pa. Cmwlth. 2009), appeal denied, ___ Pa. ___, 995 A.2d 355 (2010) (issues not raised before WCJ are waived). Moreover, Claimant's failure to properly preserve this issue below and allow the fact-finder to consider it distinguishes this case from the Board's decision in Ghany.

claimant's condition that was beyond employer's control and prior to the close of the record. Based on those facts, we declined to award unreasonable contest fees. We reach the same result here.

Further, the facts presented here render this case distinguishable from Pieretti, where the employer withdrew its petition after the close of the record without presenting any evidence in order to avoid an adverse decision. Thus, Claimant's reliance on Pieretti is misplaced.

Nevertheless, Claimant argues she is entitled to unreasonable contest fees for the second period in question (from May 2005 to present in which the appeals and remands occurred). Specifically, she contends Employer's contest of her appeal of the initial WCJ decision and all of its ensuing conduct was unreasonable. Claimant further maintains Employer acted unreasonably in opposing the remand that ultimately resulted in an award of litigation costs. Claimant asserts she is entitled to unreasonable contest fees for the time she spent litigating the appeals and remands.

Our Supreme Court holds that attorneys are only entitled to fees where their work is on behalf of the claimants' interests, not their own. See Weidner v. Workmen's Comp. Appeal Bd. (Firestone Tire & Rubber Co.), 497 Pa. 516, 442 A.2d 242 (1982). Thus, an attorney may not recover fees for his efforts in obtaining his own fee award. Id.; Arnold v. Workers' Comp. Appeal Bd. (Baker Indus.), 859 A.2d 866 (Pa. Cmwlth. 2004).

In Weidner, the Supreme Court held that where an employer engaged in an unreasonable contest by filing a termination petition, the claimant's counsel was entitled to contest fees for his time in securing a suspension of benefits, rather than a termination, but he could not recover additional fees for his efforts to obtain the fee award. The Court explained:

> [W]hile an attorney acting on a claimant's behalf is entitled to reimbursement when there has been an 'unreasonable contest,' an attorney acting on his own behalf is not. Counsel in this case, having made the economic judgment to pursue an award of counsel fees, is entitled to reasonable compensation from the employer for his time and effort spent in securing a suspension for his client. On this record, however, counsel's representation of the claimant's interests did not extend beyond the initial referee's hearing. Thereafter, his efforts were directed to his own benefit in securing his fee. Counsel may not, therefore, recover fees for his efforts on appeal from the initial referee's determination, solely in order to obtain a fee award.

Id. at 522-23, 442 A.2d at 245 (footnote omitted).

This Court interpreted and applied the Supreme Court's holding in Weidner in a variety of contexts, which we examine below. See Arnold; Brose v. Workers' Comp. Appeal Bd. (Keystone Optical Lab.), 710 A.2d 637 (Pa. Cmwlth. 1998); Allums v. Workmen's Comp. Appeal Bd. (Westinghouse Elec. Corp.), 532 A.2d 549 (Pa. Cmwlth. 1987).

First, in Allums, the employer filed a modification petition. A few days prior to a scheduled hearing, however, the employer withdrew its petition. The claimant requested unreasonable contest fees, which were granted. The employer appealed. The claimant's counsel defended the appeal and prevailed

when the Board upheld the fee award. The claimant's counsel also sought fees for the time and effort spent defending against the employer's appeal of the initial unreasonable contest fee award. This Court awarded those fees. We stated that, because the claimant's fee agreement with his counsel was not on a contingency basis, if the claimant's counsel did not defend the fee award on appeal, and the award was reversed, the money to pay the claimant's counsel would come out of the claimant's pocket. Thus, the claimant's counsel's work in defending the appeal of the initial fee award was in furtherance of the claimant's interests. As a result, we held an award of counsel fees for time spent opposing, the employer's appeal was appropriate.

Thereafter, in Brose, the employer filed, and later withdrew, a termination petition. A WCJ awarded unreasonable contest fees for the time and effort the claimant's counsel spent defending against the termination petition. However, the claimant's counsel also sought fees for the work he performed to recover the unreasonable contest fees. The WCJ and the Board declined to award counsel the fees incurred in pursing the original award of attorney fees. This Court affirmed, holding the claimant's counsel could not recover fees for the time spent pursuing the unreasonable contest fee award. We stated, with emphasis added:

> [I]t is clear from [Weidner] and [Allums] that, where there has been an unreasonable contest by an employer by filing and pursuing a termination petition, and where counsel fees have been awarded pursuant to Section 440 of the Act, the amount awarded by the WCJ should only reflect the time, effort and costs for the claimant's benefit in defending the termination petition and not the expenses incurred by the claimant's counsel in procuring his or her own fee.

Brose, 710 A.2d at 640.

Thereafter, in Arnold, the claimant filed a claim petition. The employer's physician did not examine the claimant until 15 months after the work incident and two months after the initial hearing. Ultimately, a WCJ granted the claimant's claim petition, but declined to award unreasonable contest fees. Claimant appealed to the Board, which reversed the denial of attorney fees on the ground that the employer's contest was unreasonable at the outset. On remand for a finding as to the appropriate attorney fees, the WCJ awarded unreasonable contest fees for a closed period. However, the WCJ did not award counsel fees for the work performed by the claimant's counsel in the appeal of the WCJ's initial decision denying unreasonable contest fees. The Board affirmed. On further appeal, however, this Court, speaking through Judge McGinley, reversed. We stated, (with emphasis added):

> Here … unlike Weidner, Claimant is not seeking an award of fees for his attorney's efforts in obtaining his own fee award. Rather, Claimant seeks fees incurred by his attorneys for the work they did in the prior appeal from the WCJ's denial of unreasonable contest attorney's fees; work done for the sole benefit of Claimant. That appeal, which resulted in an award of unreasonable contest fees imposed on Employer, did not benefit his attorney because the attorney was entitled in any event, under his contingency agreement with Claimant, to receive his fees from Claimant's compensation award. …
>
> [E]ven though the arrangement with Claimant's attorney was based on a contingent fee, Allums nevertheless applies. The WCJ originally awarded counsel fees out of Claimant's compensation, and not against Employer. On appeal, Claimant's attorney was successful in reversing the WCJ's failure to award Section 440 unreasonable contest fees which were to be paid directly by Employer, not from Claimant's compensation. This benefited the Claimant because a portion of counsel's fee was not to be subtracted from the funds due Claimant as compensation,

> but will be reimbursed to Claimant as a reasonable sum for Employer's unreasonable contest. …
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> In other words, the successful appeal prevented Claimant's benefits from being reduced by the amount of the attorney fees incurred from May 19, 1993, to August 16, 1994. Had Claimant's attorney not expended time on the first appeal, the Section 440 unreasonable contest fees would not have been awarded. As a result of counsel's efforts, the attorney's fees for legal work performed during that time period will now be paid directly by Employer instead of from Claimant's compensation. This results in a direct benefit to Claimant. Claimant's attorney did not benefit, because he would have been paid in any event from Claimant's compensation, under his fee agreement with Claimant. Because the work done by Claimant's counsel on appeal was for the benefit of Claimant, and not for the benefit of counsel, Employer must be directed to pay Claimant's attorneys fees … for the time spent on the appeal from the first WCJ's decision to deny unreasonable contest fees.

Id. at 872-74 (footnote omitted); see also Milton S. Hersey Med. Ctr. v. Workmen's Comp. Appeal Bd. (Mahar), 659 A.2d 1067 (Pa. Cmwlth. 1995) (awarding attorney fees for the claimant's counsel's time and effort in obtaining unreasonable contest fees where those efforts directly benefited the claimant; distinguishing Weidner).

Applying these cases here, we conclude this is not a case like Allums or Arnold, where the claimants' counsel successfully recovered counsel fees. Rather, in this case Claimant's counsel did not prevail in his request for unreasonable contest fees in connection with Employer's modification/suspension petition. Therefore, Claimant's counsel is not entitled to counsel fees for the time

he spent unsuccessfully pursuing an award of unreasonable contest fees to which, as we discussed above, he was not entitled.[5]

Our conclusion is the same when we focus on litigation costs. Here, Claimant appealed the WCJ's first order granting Employer's request to withdraw its modification/suspension petition in an effort to obtain unreasonable contest fees and litigation costs. After two remands, Claimant successfully recovered litigation costs. However, the record does not reveal that this benefited the claimant. Instead, the record reveals that Claimant had a contingent fee agreement which does not clearly indicate that Claimant is ultimately responsible for litigation costs if they cannot be obtained from Employer. C.R., Ex. C-4. Rather, the vague contingent fee agreement seems to cap Claimant's liability at a 20% attorney fee. Id. Therefore, Claimant's counsel's pursuit of litigation costs was for his benefit, not for Claimant's benefit. As such, Claimant's counsel is not entitled to unreasonable contest attorney fees for the time spent trying to obtain costs.[6]

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[5] Claimant cites Thomas v. Workers' Compensation Appeal Board (Delaware County), 746 A.2d 1202 (Pa. Cmwlth. 2000) in support of her assertion that an award of counsel fees is appropriate for the time and effort her counsel expended litigating all the appeals in this matter. Thomas is distinguishable. There, we granted a claimant's penalty petition based on the employer's "persistent and substantial" violations of the Act in improperly withholding payment of compensation to the claimant. Id. at 1206. We also stated the employer's numerous violations of the Act, with no arguably valid rationale, led to the conclusion that the employer's contest of the penalty petition was unreasonable. Thus, we awarded fees for the claimant's counsel's efforts in enforcing the employer's compliance with the Act.

Clearly, Thomas is not controlling here. Aside from the obvious factual distinctions, Claimant here did not establish that Employer engaged in an unreasonable contest regarding its modification/suspension petition. Therefore, as explained more fully above, Claimant is not entitled to counsel fees for the time and effort spent pursuing the appeals here.

[6] Claimant further argues, despite sending the letter requesting withdrawal to the WCJ on May 2, 2005, and copying Claimant's counsel on the letter, Employer's prior counsel purposefully withheld mailing this letter to Claimant's counsel until May 11, 2005, as evidenced

(Footnote continued on next page…)

For the foregoing reasons, we affirm.

ROBERT SIMPSON, Judge

(continued…)

by a postmarked envelope. Claimant asserts the only reason the unreasonable contest fee and litigation cost issues were not properly considered by the WCJ initially was because Employer's counsel withheld mailing Claimant's counsel a copy of the letter requesting withdrawal until after the WCJ entered an order marking the petition withdrawn. Claimant argues almost five years of litigation ensued, which was triggered by the initial, improper and unethical conduct of Employer's prior counsel in withholding the letter. Claimant contends Employer did not establish a basis to withhold the letter or to contest all of the subsequent appeals necessitated by its actions.

Clearly, Claimant's arguments on this point are factual in nature. They therefore require development of a record to allow for findings of fact. Our review of the only transcript in the certified record, for a proceeding in August 2006 (after the Board's first remand order), reveals Claimant did not clearly identify this as an issue before the WCJ. Thus, it is not surprising the WCJ made no findings on this issue. Accordingly, this issue is waived. See Harvey.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Elizabeth Yespelkis, Petitioner	:	
v.	:	No. 2338 C.D. 2009
Workers' Compensation Appeal Board (Pulmonology Associates Incorporated and AmeriHealth Casualty), Respondents	:	

O R D E R

AND NOW, this 29th day of October, 2010, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

ROBERT SIMPSON, Judge