IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Yelonda Andrews,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 903 C.D. 2011
	:	
Workers' Compensation Appeal Board (Pennsylvania Department of Transportation and Compservices, Inc.),	:	Submitted: September 2, 2011
	:	
Respondents	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: December 30, 2011**

Yelonda Andrews (Claimant) petitions for review of an Order of the Workers' Compensation Appeal Board (Board) affirming the Workers' Compensation Judge's (WCJ) decision and order granting Claimant's Claim Petition and awarding her temporary total disability benefits pursuant to the Workers' Compensation Act (Act)[1] for the period April 13, 2009 through

[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 - 1041.4; 2501-2708.

November 1, 2009, and terminating Claimant's benefits effective November 2, 2009. Claimant argues that: (1) her benefits should have been suspended, not terminated; (2) the WCJ erred by requiring her to prove that her disability had continued instead of requiring the Department of Transportation (Employer) to prove that her disability had ceased; and (3) the Board erred by not requiring Employer to pay a *pro rata* share of her attorney's fees for the credit Employer took against her workers' compensation benefits for unemployment compensation benefits that she received.[2]

Claimant "was hired by Employer on November 3, 1997," and she became a Clerk Typist 2 in October 2007. (WCJ Decision, Findings of Fact (FOF) ¶ 5.) On June 4, 2009, Claimant filed a Claim Petition alleging that she suffered a work-related injury on October 23, 2008, in the nature of "chemical exposure affecting her lungs, throat and nose, trouble breathing, headaches, and aggravation of a pre-existing lung condition." (FOF ¶ 1.) Claimant alleged further that she became totally disabled due to this work-related injury on April 13, 2009. (FOF ¶ 1.) Employer filed a timely answer denying the material allegations contained therein, (FOF ¶ 2), and hearings before the WCJ ensued.

[2] Claimant also raises the issue in her Statement of Questions Involved of whether Employer violated the Act by failing to issue a notice of compensation payable. However, Claimant did not raise this issue on appeal to the Board or in her Petition for Review filed with this Court; therefore, it is waived. See Pa. R.A.P. 1551(a) ("No question shall be heard or considered by the court which was not raised before the government unit . . . ."); Pa. R.A.P. 1513(d) ("An appellate jurisdiction petition for review shall contain . . . a general statement of the objections to the order or other determination . . . . The statement of objections will be deemed to include every subsidiary question fairly comprised therein.").

In support of the Claim Petition, Claimant testified on her own behalf and presented documentary evidence consisting, *inter alia*, of: (1) the medical records from Ear Nose & Throat Associates of Johnstown, Inc. (ENT Associates); (2) the medical records from Warner Family Medicine; (3) the medical report of Allison Harbart, M.D., a physician with ENT Associates; (4) the medical report of David P. Skoner, M.D., Director of the Division of Allergy, Asthma & Immunology of the West Penn Allegheny Health System; and (5) the medical report of Gregory J. Fino, M.D., a board certified pulmonologist.[3] (FOF ¶¶ 4, 9.) In opposition to the Claim Petition, Employer submitted, *inter alia,* an independent medical evaluation by Dr. Fino and the Unemployment Compensation Referee's decision and order finding Claimant eligible for "unemployment compensation benefits effective May 10, 2009, to begin after a one week waiting period" at the weekly benefit rate of $289.00. (FOF ¶¶ 9, 18.)

Claimant's job duties at the time of her claimed work-related injury were consistent with that of a clerk typist in an office environment. (FOF ¶ 5.) Claimant testified that she was exposed to a "chemical solvent or solvents used by a contractor during [the October 13, 2008] removal of floor tile in the [E]mployer's office where she worked." (FOF ¶ 6.) Claimant testified that the newly installed tiles were later removed on Thursday, October 23, 2008, because the tiles had become loose, and that the office floor did not have tile for about two weeks thereafter. (FOF ¶ 6.) The tiles were removed a second time during February or March of 2009. (FOF ¶ 6.)

[3] Since Claimant's claim for workers' compensation benefits was limited to less than 52 weeks of disability, the parties were permitted to submit reports of the health care providers and medical records into evidence regarding the cause and extent of disability. Section 422(c) of the Act, added by Section 6 of the Act of June 26, 1919, P.L. 642, as amended, 77 P.S. § 835.

Claimant testified that the initial tile installation did not affect her but that "she had a severe reaction to the strong odors which came from the chemicals and solvents used during the tile removal process." (FOF ¶ 7.) Claimant testified that she and others were moved to the building's basement to work during the two weeks in October 2008 that the office area was not tiled due to the chemical odors. (FOF ¶ 7.) Claimant testified that, while her co-workers returned to the office area after the tiles were reinstalled, "she continued to work in the basement because her symptoms recurred when she attempted to work in the office area." (FOF ¶ 7.) Claimant continued to work in the basement until April 13, 2009, when she was informed that she had to return to the office area. (FOF ¶ 7.) Claimant testified that she had to leave the office area on April 13, 2009, after approximately one hour, because she became sick, unable to breathe, experienced trouble with her voice, and had a burning feeling in her chest. (FOF ¶ 7.)

Each of the four physicians whose reports were submitted into evidence accepted Claimant's "complaints as caused by her environmental exposure during the course of her employment by [Employer], beginning with her exposure to chemicals and solvents during tile removal." (FOF ¶ 10.) None of the physicians "stated a specific medical diagnosis or a specific causal relationship." (FOF ¶ 10.) "No evidence was submitted or referenced as to the existence of hazardous levels of chemicals and solvents in [Employer's] office facility."[4] (FOF ¶ 12.)

[4] Claimant attempted to submit into evidence an environmental study of the office area performed on October 28, 2008 showing "some non-hazardous levels which could adversely affect sensitized individuals" and "material safety data sheets for chemicals, solvents and adhesives used at [Employer's] office facility." (FOF ¶ 12.) However, the WCJ sustained Employer's objections to both the environmental study and material safety data sheets based on hearsay. (FOF ¶ 12.) These materials were not considered by the four physicians. (FOF ¶ 12.)

The WCJ found that Claimant's claim for benefits was limited to the period of April 13, 2009 through November 1, 2009, because she did not work during this time. (FOF ¶ 8.) Claimant returned to work at her time of injury job on November 2, 2009, without a loss of earnings and without any restrictions other than the use of an air purifier, which Employer installed on October 28, 2009, in the office area at the suggestion of Dr. Skoner and his physician's assistant. (FOF ¶ 8.)

The WCJ found Claimant's testimony credible regarding her physical reaction to the fumes and odors from chemicals and solvents used for the tile removal until she returned to work on November 2, 2009. (FOF ¶ 14.) Based on Claimant's testimony, the medical records, and the opinions of the four physicians as set forth in their reports, the WCJ found that Claimant sustained a work-related injury in the nature of "an adverse reaction to fumes and odors from chemicals and solvents" on October 23, 2008. (FOF ¶ 14.) The WCJ found that Claimant was totally disabled due to her injury from April 13, 2009 through November 1, 2009. The WCJ found that Claimant's injury "caused a restriction as to her work location from October 24, 2008 through April 12, 2009"; however, Claimant did not lose wages during this period because Employer accommodated her restriction by providing an alternate work location. (FOF ¶ 14.) With respect to full recovery, the WCJ found as follows:

> 15. [Claimant] was fully recovered from her work injury when she returned to full duty work in her pre-injury work location on November 2, 2009. In making this finding[,] I considered the lack of a medical diagnosis or specific medical explanation for her complaints and I considered that the injury related chemicals and solvents had not been used in [Claimant's] office location for at least six months. I concluded that [Claimant's] testimony on December 3, 2009 that she lost her voice during the previous week when an office manager turned off the air purifier for a couple of minutes to look for its serial number is

> not credible evidence as to the existence of offensive fumes and odors or of her work injury at that time.

(FOF ¶ 15.)

The WCJ found further that Claimant was awarded unemployment compensation benefits effective May 10, 2009, for the claim week ending May 16, 2009, in the amount of $289.00 per week. (FOF ¶ 18.) The WCJ presumed that Claimant received unemployment compensation benefits until she returned to work on November 2, 2009, because there was no evidence as to the actual receipt of benefits. (FOF ¶ 18.) The WCJ found that Claimant's counsel did not attend the hearing on Claimant's claim for unemployment compensation benefits and concluded that Claimant's counsel was not entitled to a counsel fee related to Claimant's award of unemployment compensation benefits. (FOF ¶ 18; WCJ Decision, Conclusions of Law (COL) ¶ 4.)

Based on the evidence presented, the WCJ granted Claimant's Claim Petition and awarded temporary total disability benefits, with interest, from April 13, 2009 through November 1, 2009, at the weekly rate of $403.50. The WCJ permitted a credit toward Claimant's workers' compensation benefits for her receipt of unemployment compensation benefits effective May 10, 2009, in the amount of $289.00 per week. The WCJ terminated Claimant's benefits effective November 2, 2009, denied Claimant's request for an assessment of penalties against Employer for its failure to issue a notice of workers' compensation denial, and ordered that a counsel fee of twenty percent be deducted from the benefit and interest amounts

payable to Claimant. Claimant appealed the WCJ's decision and order and the Board affirmed. This Petition for Review followed.[5]

To sustain an award of benefits, a claimant has the burden to establish that she "suffered a work-related injury and that this injury resulted in" disability. Ruhl v. Workmen's Compensation Appeal Board (Mac-It Parts, Inc.), 611 A.2d 327, 329 (Pa. Cmwlth. 1992). During the pendency of the claim petition, the claimant must demonstrate "that the injury continues to cause disability." Ohm v. Workers' Compensation Appeal Board (Caloric Corporation), 663 A.2d 883, 886 (Pa. Cmwlth. 1995). "A WCJ is authorized, when considering a claim petition, to award compensation for a work-related injury, and, in addition, to terminate benefits as of the date the disability ceased, although a termination petition has not been filed, if the claimant has not carried her burden of proof to establish a continuing disability." Id.

Before this Court, Claimant argues that the WCJ erred by requiring her to prove that she had not recovered from a recognized work-related injury. Claimant contends that, because Employer had accepted her injury as work-related, the burden should have been placed on Employer to prove that her disability had ceased as of

[5] "This Court's scope of review is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether errors of law were made, or whether constitutional rights were violated." Peters Township School District v. Workers' Compensation Appeal Board (Anthony), 945 A.2d 805, 810 n.8 (Pa. Cmwlth. 2008). "Substantial evidence has been defined as such relevant evidence as a reasonable person might accept as adequate to support the conclusion." Wells-Moore v. Workmen's Compensation Appeal Board (McNeil Consumer Products Co.), 601 A.2d 879, 881 (Pa. Cmwlth. 1992). The appellate role is not to reweigh the evidence or review the credibility of witnesses, but to "determine whether, upon consideration of the evidence as a whole, the [WCJ's] findings have the requisite measure of support in the record." Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Board (Skirpan), 531 Pa. 287, 293, 612 A.2d 434, 437 (1992).

November 2, 2009. Based on two letters from Employer's counsel to the WCJ dated January 21, 2010 and April 13, 2010, Claimant argues that Employer conceded and/or stipulated that her injury was work-related and that she was disabled as a result. Claimant argues that, due to the foregoing stipulations by Employer's counsel, the proceedings had advanced to the stage of a termination petition; therefore, the WCJ should have required Employer to produce substantial medical evidence that Claimant's disability had ceased.

Claimant's contentions with respect to Employer's alleged concessions or stipulations are not supported. The WCJ specifically found as follows:

> 13. During the litigation [Employer] proposed payment of total disability benefits to [Claimant], with credit taken for her unemployment compensation. It proposed to leave pending for decision only an issue as to whether her workers' compensation benefits should be suspended or terminated as of her return to work. This proposal was not accepted by [Claimant's] counsel, apparently because of issues as to the nature of [Claimant's] injury and as to whether her counsel is entitled to a counsel fee as to her unemployment compensation.

(FOF ¶ 13.) The entire text of Employer's counsel's January 21, 2010 and April 13, 2010 letters supports the WCJ's finding. In the January 21, 2010 letter, Employer's counsel advised the WCJ that he and Claimant's counsel were unable to come to a complete agreement in this matter; however, negotiations were still ongoing. (Letter from Employer's Counsel to WCJ (January 21, 2010), R.R. at 173a.) While Employer's counsel further advised the WCJ that he had the authority to agree to pay Claimant workers' compensation benefits for a closed period followed by a suspension, he also advised the WCJ that Employer would still like for the WCJ to decide the issue of whether Claimant's "claim should be closed off by a suspension

or a termination." (Letter from Employer's Counsel to WCJ (January 21, 2010), R.R. at 173a.) In the April 13, 2010 letter to the WCJ, Employer's counsel informed the WCJ that: (1) it was not contesting liability for the closed period of compensation beginning April 13, 2009 through May 9, 2009; (2) Employer tendered an agreement to Claimant's counsel to acknowledge Claimant's injury for a closed period followed by a suspension; (3) an agreement could not be reached as to all the issues; (4) Claimant has recovered from an episode of an aggravation of her respiratory symptoms experienced at work; (5) the evidence supports a termination instead of a suspension; and (6) Claimant bore the burden of establishing ongoing disability. (Letter from Employer's Counsel to WCJ (April 13, 2010), R.R. at 168a-71a.) Accordingly, the burden remained with Claimant to prove that her injury continued to cause disability throughout the pendency of the claim petition.

Next, Claimant argues that her workers' compensation benefits should have been suspended rather than terminated. Claimant contends that the WCJ did not have sufficient, competent evidence to determine that she had fully recovered. Claimant asserts that the WCJ supplanted the expert opinions of Claimant's treating physicians and Employer's independent medical examination physician with his own lay opinion that an unidentified allergen was no longer present in the workplace and that the WCJ's finding that there was a "lack of a medical diagnosis or specific medical explanation for [Claimant's] complaints," (FOF ¶ 15), is not supported by the record. Claimant contends that all of the medical experts' reports arrived at a specific medical diagnosis; specifically, that some allergen or irritant existed within Claimant's place of employment that caused her symptoms. Claimant asserts that the only question remaining was the identity of the specific substance causing Claimant's

harm. Claimant contends that, because the exact compound remains unknown, the WCJ's findings that the compound no longer existed after six months and that Claimant has fully recovered are not based on substantial, competent medical evidence.

Claimant argues further that all the medical experts believed that Claimant should not be relocated to her place of employment without some type of air purification and that Employer actually installed a HEPA air purifier in Claimant's office on October 28, 2009. Claimant contends that the WCJ had no evidence indicating that Claimant could return to work without an air purifier, which Claimant likens to an orthopedic appliance.[6] Claimant argues that the only supported finding the WCJ could make based on the evidence presented is that Claimant returned to work on November 2, 2009 with restrictions, and that she continued to suffer from her work-related injury. Claimant contends that this matter is analogous to this Court's decision in Schrader Bellows Pneumatics v. Workers' Compensation Appeal Board (Earle), 711 A.2d 578 (Pa. Cmwlth. 1998), wherein this Court held that disability continues when reentry to the work environment causes symptoms to recur that were absent when the injured worker was outside of the work place.

It is undisputed that Claimant met her burden of establishing that she suffered a work-related injury and was totally disabled as a result for the period from April 13, 2009 through November 1, 2009. The WCJ specifically found that Claimant's injury

[6] Pursuant to Section 306(f.1)(1)(ii) of the Act, which governs surgical and medical services and supplies, an employer is required to pay for orthopedic appliances. 77 P.S. § 531(1)(ii).

was "an adverse reaction to fumes and odors from chemicals and solvents." (FOF ¶ 14.) The WCJ did not find that Claimant's injury was due to an unknown allergen or irritant. The WCJ further found that the chemicals and solvents had not been used in Claimant's work location for at least six months prior to her return to work on November 2, 2009. (FOF ¶ 15.) More importantly, the WCJ rejected, as not credible, Claimant's testimony regarding the existence of offensive fumes and odors in her work location or the existence of her work-related injury during the week prior to her testimony on December 3, 2009. (FOF ¶ 15.) Claimant offered no other evidence as to the recurrence of her work-related injury after she returned to work on November 2, 2009. Moreover, Claimant did not submit any competent evidence as to the existence of hazardous levels of chemicals, solvents, and other allergens or irritants in Employer's office facility after November 1, 2009.

Claimant relies heavily on Dr. Skoner's and Dr. Fino's recommendations that she should not return to work without an air purifier as the reason why her benefits should have been suspended rather than terminated. However, the WCJ did not specifically accept this restriction as credible. Dr. Fino's medical report clearly indicates that he only recommended that Claimant not return to work in her previous location "[b]ased entirely on her history" that Claimant began experiencing respiratory problems on October 23, 2008 when chemicals and solvents were used to remove loose tile from the floor. (Medical Report of Dr. Fino at 8, November 2, 2009, R.R. at 100a.) Nowhere in the medical records or reports do any of the physicians opine that, unless Claimant utilizes an air purifier, her symptoms and disability will recur due to the presence of chemicals or solvents in the air. The only restriction the WCJ found that was implemented as a result of Claimant's work-

related injury was the need to relocate her work area from October 24, 2008 through April 12, 2009; however, Claimant did not lose any wages during this time "because [Employer] accommodated her restriction by providing another work location." (FOF ¶ 14.) As stated above, the WCJ rejected Claimant's testimony that there were offensive fumes and odors in her work location after November 2, 2009, and also found that the chemicals and solvents which originally caused Claimant's work-related injury were not used in her work location for at least six months prior to her return to work. (FOF ¶ 15.)

Claimant also argues that the WCJ's findings that: (1) none of the reports of the medical experts submitted into evidence provided a medical diagnosis or specific explanation for Claimant's complaints; and (2) she had fully recovered, are not supported by sufficient, competent evidence. However, our review of the record reveals that these findings are supported. The history section of the medical records and reports does indicate that Claimant relayed to the physicians that she began experiencing respiratory problems when chemicals and solvents were used in her office area to remove the existing carpeting and install a tile floor. However, despite Claimant's history, none of the physicians were able to conclusively diagnose the cause of Claimant's complaints. For example, Dr. Harbart, who was unable to test Claimant's work area for solvents, consistently concluded between December 28, 2008 and October 2, 2009, that Claimant's symptoms were most likely due to molds and environmental allergies. (Medical Records, ENT Associates, R.R. at 112a-32a.) Dr. Skoner examined Claimant on April 29, 2009, and opined in his May 5, 2009 report that:

> Impressions include respiratory symptoms, possibly related to or aggravated by exposure to volatile organic compounds which appears to

> be initiated in the work environment. These symptoms may represent an exacerbation of pre-existing COPD and/or asthma. There is also a history of allergic rhinitis and possible Gastroesophageal [sic] Reflux Disease. Aside from volatile organic compounds there is a possibility that mold allergy could play a substantial role as well although it appears that mold was not detected in [Claimant's] work environment in which she spends most of her time.

(Medical Report of Dr. Skoner at 2, May 5, 2009, R.R. at 82a.) Dr. Fino examined Claimant on October 20, 2009, and opined, in his November 2, 2009 report, that he could not "find any definite pulmonary or upper respiratory disease at all" and that he explained to Claimant that he "could not specifically pinpoint a disease process to account for her symptoms." (Medical Report of Dr. Fino at 8, November 2, 2009, R.R. at 100a.) Accordingly, the WCJ's finding that there was a "lack of a medical diagnosis or specific medical explanation" for Claimant's complaints is supported by the record. (FOF ¶ 15.) It is for this reason that Claimant's reliance on Schrader is misplaced.

In Schrader, the employer filed petitions to terminate and suspend the claimant's workers' compensation benefits on the basis that the claimant's condition, diagnosed as contact dermatitis, had completely resolved and the claimant was able to return to work with no loss of earnings. Schrader, 711 A.2d at 579-80. The WCJ denied both petitions on the basis that the employer "failed to demonstrate that [the c]laimant was capable of returning to his pre-injury position or that other suitable employment was available to" the claimant. Id. at 580. On appeal the Board affirmed, concluding that "due to the overwhelming amount of evidence connecting Claimant's dermatitis to his work with Employer, it was clear that Claimant would experience recurrences of the dermatitis when he returned to work with Employer." Id. On appeal to this Court, we rejected the employer's contention that the claimant's

"predisposition to injury" was "not sufficient to render him totally disabled." Id. at 580-81. We pointed out that the claimant's medical expert "specifically stated that Claimant would not be able to perform his duties with Employer in any capacity at Employer's facility if he returned to work." Id. at 581. More importantly, we concluded that the claimant "did not suffer from a preexisting condition; rather, his injury was directly *caused* by his employment." Id. at 582 (emphasis in original). Accordingly, we affirmed the Board's order. Id.

In the present case, there is evidence that Claimant suffered from the pre-existing condition COPD, and, as found by the WCJ, none of the physicians were able to provide a specific medical explanation or diagnosis for Claimant's ongoing complaints. Moreover, unlike in Schrader, there was no medical evidence indicating that Claimant would be unable or unfit to return to her work duties. Therefore, we conclude that Schrader is not controlling in this matter. As Claimant failed to prove the existence of any disability related to her work injury after November 2, 2009, the WCJ properly terminated her benefits.

Next, Claimant argues Employer should be required to pay a *pro rata* share of attorney's fees for the credit it took against its workers' compensation obligations.[7] Relying upon Ford Aerospace v. Workmen's Compensation Appeal Board (Davis), 478 A.2d 507 (Pa. Cmwlth. 1984), Claimant argues that her counsel created a

[7] Claimant contends that she is not seeking an award of *pro rata* attorney's fees from Employer based upon her receipt of unemployment compensation benefits. Section 204(a) of the Act, 77 P.S. § 71(a), provides that "if the employe receives unemployment compensation benefits, such amount or amounts so received shall be credited as against the amount of the award made."

workers' compensation fund (fund) on her behalf and, under the law, counsel is entitled to an attorney's fee of twenty percent of the amount awarded, not the amount payable. Claimant summarizes her argument as follows: (1) Claimant's counsel's efforts resulted in the creation of a fund equal to $403.50 per week for the period April 13, 2009 through November 1, 2009; (2) by operation of the Act, a portion of this fund was paid to Claimant while another portion (the amount of unemployment compensation benefits received by Claimant) was retained by Employer; (3) to the extent this fund was retained by Employer, Employer received the benefits of counsel's efforts; and (4) to the extent Employer received the benefit of counsel's efforts, Employer should pay a *pro rata* share of attorney's fees to Claimant's counsel.

As pointed out by the Board, there is nothing in the Act that authorizes the WCJ or the Board to require an employer to pay a *pro rata* share of a claimant's attorney's fees based on a credit granted to the employer for unemployment compensation benefits received by the claimant. (Board Op. at 7.) While Claimant does not specifically base her arguments on a subrogation theory, we agree with the Board that this matter does not involve a fee from obtaining money from a third party settlement or subrogation under Section 319 of the Act, 77 P.S. § 671.[8] (Board Op. at 7 n.3.) Therefore, the WCJ and Board properly refused to order Employer to pay a *pro rata* share of Claimant's counsel's fee of twenty percent. However, the WCJ erred by ordering that a counsel fee of twenty percent "be

[8] Section 319 of the Act governs the subrogation of an employer to the rights of an employee against third persons and the subrogation of an employer or insurer to the amount paid prior to an award.

deducted from the benefit and interest amounts *payable* to" Claimant, rather than the amount *awarded* to Claimant. (WCJ Decision at 5 (emphasis added).)

In Ford Aerospace, the claimant was awarded workers' compensation benefits for fifteen weeks at the rate of $181.33 per week less a credit of $1,922.40 to the employer for health and accident benefits previously paid to the claimant. Ford Aerospace, 478 A.2d at 508 n.4. The claimant was also awarded "counsel fees of twenty percent of the total benefits pro-rated between the credit the employer received for the prior insurance benefits and the balance of the [workers'] compensation award." Id. at 508. The Board affirmed the award and the employer appealed to this Court. Id. With respect to the issue of counsel fees, this Court held that the employer was not entitled to have attorney's fees calculated on the basis of the *net* compensation award. Id. at 509-10. In so holding, we stated that the claimant's "attorney created a [workers'] compensation fund on behalf of his client and under the law he is entitled to a counsel fee of twenty percent of the amount awarded." Id. at 510.

As stated in Ford Aerospace, the award of attorney's fees is governed by Section 442 of the Act,[9] 77 P.S. § 998, which provides that the WCJ must approve all counsel fees agreed upon by the claimant and his or her attorneys; however, the counsel fees cannot exceed twenty percent of the amount awarded. Ford Aerospace, 478 A.2d at 509. In this case, the WCJ approved, as reasonable, the contingent fee agreement between Claimant and her counsel "for 20 percent of past and future workers' compensation benefits recovered for [Claimant] by settlement or award."

[9] Added by the Act of February 8, 1972, P.L. 25, as amended.

(FOF ¶ 21.) The WCJ determined that Claimant's counsel did not represent her with respect to her claim for unemployment compensation benefits; therefore, counsel was not entitled to a counsel fee related to the award of these benefits to Claimant. (FOF ¶ 18; COL ¶ 4.) As such, the WCJ ordered that a counsel fee of twenty percent "be deducted from the benefit and interest amounts *payable* to" Claimant. (WCJ Decision at 5 (emphasis added).) This was error on the part of the WCJ.

It is well settled that the "amount awarded . . . includes all amounts awarded to a claimant in a [WCJ's] order" regardless of whether a credit is granted against the award. Ford Aerospace, 478 A.2d at 509 (citing Workmen's Compensation Appeal Board v. General Machine Products Co., 353 A.2d 911 (Pa. Cmwlth. 1976)). As Claimant argues, her counsel created the workers' compensation fund on her behalf and counsel is entitled to a fee of twenty percent of the amount awarded. The amount of workers' compensation benefits awarded to Claimant by the WCJ totaled $403.50 per week. (FOF ¶ 17.) Accordingly, regardless of the fact that Claimant's counsel did not represent her before the unemployment compensation authorities, the WCJ should have ordered that an attorney fee of twenty percent be deducted based on the total amount of workers' compensation benefits awarded, not on the benefit and interest amounts actually payable to Claimant by Employer.

The Board's order is affirmed as modified.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Yelonda Andrews,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 903 C.D. 2011
	:	
Workers' Compensation Appeal Board (Pennsylvania Department of Transportation and Compservices, Inc.),	:	
	:	
Respondents	:	

O R D E R

NOW, December 30, 2011, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby AFFIRMED, as modified by the foregoing opinion.

RENÉE COHN JUBELIRER, Judge