IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Manuela Peralta, by his plenary guardian Segundo Peralta, Petitioner	:	
v.	:	No. 933 C.D. 2010
	:	Submitted: August 13, 2010
Workers' Compensation Appeal Board (K & S and Greenday, Inc.), Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: March 17, 2011

Manuel Peralta (Claimant), by his guardian, Segundo Peralta, petitions for review of two adjudications of the Workers' Compensation Appeal Board (Board) dismissing his one *nunc pro tunc* and one timely appeal of two decisions of Workers' Compensation Judges (WCJ). The first decision of the WCJ approved the payment of attorney fees to Attorney Larry Pitt, and the second decision imposed a penalty for late payment of Attorney Pitt's fees. Claimant asserts that no one authorized Attorney Pitt to represent him in his claim for workers' compensation. Concluding that the record is insufficient to determine whether Claimant signed a fee agreement with Attorney Pitt or was able to acquiesce to such representation, we vacate the Board's order so that a record can be made on all issues.

Claimant was working for Employer as a laborer when, on February 16, 2008, he fell thirty feet to the ground from scaffolding, resulting in wrist, facial and skull fractures, as well as a brain injury.[1] On March 3, 2008, Shannon Beckier visited Claimant in his hospital room to obtain his agreement to Attorney Pitt's representation.[2] According to Claimant, he was either completely comatose or heavily sedated during Beckier's visit and does not remember executing such an agreement.[3] Three days later, on March 6, 2008, Attorney Pitt had Claimant's brother, Segundo, sign a fee agreement; at the time, Segundo did not have power of attorney to act on behalf of Claimant.

On March 6, 2008, Attorney Pitt filed a claim petition on behalf of Claimant. The petition alleged Claimant's injury to consist of "multiple facial and skull fractures, *brain damage*." Reproduced Record at 2a (R.R.___) (emphasis added).

Sometime after March 6, 2008, K&S and Greenday, Inc. (Employer) issued a Temporary Notice of Compensation Payable (TNCP) describing Claimant's

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[1] There has been no hearing. The facts in this opinion came from a combination of Claimant's appeals to the Board, the NCP and the claim petition.

[2] In his brief, Claimant states that family members contacted Larry Pitt's law firm, which hired a private detective agency, Cipriano Associates, which in turn hired a sub-contractor, Shannon Beckier, to go to the hospital to "sign-up" Claimant. Claimant's Brief at 4. Attorney Pitt does not deny this. The dispute is over Claimant's mental state during the interview. The record provides no details about the signing of either fee agreement. WCJ Rosen took no evidence, and the Board dismissed Claimant's appeal and petition for remand.

[3] Indeed, Claimant explains in his brief that he was rendered virtually blind by the injury. Neither Claimant nor his brother, Segundo, speak or read English. In Claimant's response to Attorney Pitt's Motion to Quash Claimant's *nunc pro tunc* appeal of WCJ Rosen's decision, Claimant states that Beckier told Segundo to place the pen in Claimant's hand and sign Attorney Pitt's fee agreement while Claimant was unconscious. Reproduced Record at 19a (R.R.____).

work injury as "head, face and wrist fractures, lacerations" and accepting liability for medical treatment and disability compensation. Certified Record, Item No. 3, Attachment to WCJ Rosen's Decision and Order.[4] Thereafter, the TNCP converted to a Notice of Compensation Payable (NCP). Employer has paid indemnity and medical benefits to Claimant since February 17, 2008.

A hearing on the claim petition was held before WCJ Rosen on July 22, 2008. No evidence was presented, and Claimant was not present at the hearing. Noting that the TNCP had converted to an NCP by operation of law, WCJ Rosen issued a brief order on July 28, 2008, finding that the claim petition had been resolved and approving Attorney Pitt's request for a 20 percent attorney fee to be deducted from Claimant's indemnity benefit. Attorney Pitt did not request the WCJ to amend the NCP to include "brain damage" as one of Claimant's work injuries, in spite of the fact that the claim petition identified brain damage as a work injury.

On October 17, 2008, Attorney Pitt filed a penalty petition, asserting that Employer had failed to deduct the 20 percent attorney fee from Claimant's benefits, as ordered by the WCJ. Attorney Pitt requested a 50 percent penalty in addition to the payment of his past-due fees.

On January 8, 2009, a hearing was held on the penalty petition. The parties stipulated that Attorney Pitt had not received 20 percent of Claimant's indemnity payments from July 31, 2008, through November 15, 2008, *i.e.*, 16 weeks. Instead, Claimant had received 100 percent of his indemnity benefit. Employer began to deduct Attorney Pitt's fee from Claimant's indemnity benefit on November

[4] The TNCP only appears in the certified record as an attachment to WCJ Rosen's decision. WCJ Rosen did not admit any exhibits. The TNCP is undated.

16, 2008. The parties agreed that the unpaid amount of attorney fees was $1,227.68. WCJ Benischeck granted the parties 60 days to resolve the case, stating that if they failed to do so, he would render a decision based on their stipulations.

On June 5, 2009, while the penalty petition was pending, Attorney Pitt negotiated with Employer to resolve Claimant's case for $240,000. WCJ Benischeck scheduled a hearing on a proposed Compromise and Release Agreement for June 18, 2009. One week before the hearing, on June 11, 2009, Claimant retained Attorney Irving Abramson, who appeared on behalf of Claimant at the June 18, 2009, hearing before WCJ Benischeck. Abramson stated that Claimant did not wish to settle.

WCJ Benischeck did not approve the Compromise and Release Agreement. However, he granted Attorney Pitt's penalty petition based on the parties' prior stipulations.[5] Accordingly, WCJ Benischeck ordered the Employer to pay Attorney Pitt 20 percent of Claimant's compensation for the period of July 31, 2008, to November 15, 2008, which amount was not to be recouped from Claimant. Finally, WCJ Benischeck found that Claimant was entitled to a 10 percent penalty on the unpaid amounts, of which penalty Attorney Pitt was entitled to 20 percent.

After receiving Claimant's medical records, Attorney Abramson filed a review petition to amend Claimant's work injury description to include brain injury and severe visual limitations. Because Attorney Abramson concluded that Claimant's brain injury made it improbable that Claimant knowingly signed a fee agreement in March 2008, he also filed an appeal *nunc pro tunc* of WCJ Rosen's decision approving Attorney Pitt's fee agreement. Also on behalf of Claimant, Attorney Abramson appealed WCJ Benischeck's decision granting the penalty

[5] Attorney Abramson was unaware of the outstanding penalty petition.

petition. In his *nunc pro tunc* appeal to the Board, Claimant alleged that he was not mentally competent to enter into a fee agreement with Attorney Pitt in March of 2008. The appeal also asserted that Segundo Peralta had no authority to enter into a fee agreement on Claimant's behalf. Finally, Claimant alleged that Attorney Pitt did not do any meaningful work for Claimant; instead, Attorney Pitt acted contrary to Claimant's interests by allowing the claim petition to be dismissed without pursuing a change to the NCP to include brain damage as an accepted work injury.

In response, Attorney Pitt filed a motion to quash. He argued that he represented Claimant from March 2008 until June 2009 with Claimant's knowledge and consent. He argued that the claim petition was successful because it caused Employer to convert the TNCP to an NCP. Attorney Pitt further argued that he had successfully negotiated a $240,000 settlement, to which Claimant had agreed until family members intervened. He also challenged the appeal noting that if Claimant were mentally incompetent, as alleged in his appeal, then he could not have authorized Attorney Abramson to file the appeal to the Board. Finally, Attorney Pitt argued that there was no evidence that Claimant ever suffered severe brain damage.

In his response to the motion to quash, Claimant countered that Attorney Pitt's representative asked Claimant's brother, Segundo, to place a pen in Claimant's hand and sign the fee agreement while Claimant was comatose. According to Claimant, medical records show that he was not conscious on the date that Attorney Pitt claims Claimant signed the fee agreement. Indeed, Claimant's medical records indicate that he was "not oriented to time, person and place" until May 29, 2008. R.R. 19a. Further, Claimant asserted that he was about to undergo a series of neurological evaluations that would determine whether Claimant was competent to

act on his own or, rather, required the appointment of a guardian *ad litem*. Claimant explained that he had sufficient "cognitive appreciation" to know that he did not wish to settle his case or to be represented by Attorney Pitt. R.R. 20a. Finally, the response explained that until Attorney Abramson received Claimant's hospital records, he lacked grounds to pursue a *nunc pro tunc* appeal of WCJ Rosen's order. Claimant requested the Board to remand the matter to the WCJ to make factual findings on whether Claimant was competent to enter into a fee agreement with Attorney Pitt; whether Attorney Pitt had authority to file a claim petition; and whether Attorney Pitt proffered a fraudulent fee agreement to WCJ Rosen.

On March 29, 2010, the Court of Common Pleas of Bucks County appointed Segundo as Claimant's plenary guardian, finding that

> [a]s a result of his brain injury, Manuel Peralta is unable to receive and evaluate information effectively, to make and communicate responsible decisions about his estate and his person or to meet essential requirements for his physical health and safety.

Claimant's Brief, Exhibit 1, Final Decree and Appointment of Plenary Guardian, 3/29/2010, at 1. This appointment appears not to have been relayed to the Board.

On May 6, 2010, the Board quashed Claimant's appeals for the stated reason that there was no "obvious fraud discernable from the record" that would warrant a *nunc pro tunc* appeal. Board Opinion at 8. The Board noted that Claimant had to know by November 2008 that he was being represented by Attorney Pitt, when the 20 percent attorney fee began to be deducted from his weekly indemnity benefit; however, Claimant waited until mid-2009 to object to Attorney Pitt's representation. The Board concluded that Claimant had not presented adequate cause for the Board to hear his appeal of WCJ Rosen's decision *nunc pro tunc*. With respect to

Claimant's appeal of WCJ Benischeck's order, granting Attorney Pitt's penalty petition, the Board found, without explanation, that Claimant was not aggrieved. The Board also stated that Attorney Pitt's lien against future indemnity payments was not an issue in the *nunc pro tunc* appeals. As an aside, the Board noted that Attorney Abramson's allegations of unprofessional conduct on the part of Attorney Pitt should be addressed to the disciplinary board. Claimant petitioned for review.

On appeal,[6] Claimant argues that the Board erred in three respects. First, he contends that the Board erred in holding that Claimant failed to present sufficient grounds for a *nunc pro tunc* appeal. Second, Claimant asserts that the Board erred in denying his request for a *nunc pro tunc* appeal without a record on the state of Claimant's mental condition at the relevant points in time. Third, Claimant contends that WCJ Benischeck's decision was invalid because it was based on WCJ Rosen's order, which, in turn, relied upon a fraudulent fee agreement.

First, we address Claimant's contention that the Board erred in quashing Claimant's *nunc pro tunc* appeal of WCJ Rosen's order. Claimant argues that because he was not mentally competent during the time that Attorney Pitt allegedly represented him, he could not appreciate that a fraud had been perpetrated on him. Claimant also argues that he appealed the approval of Attorney Pitt's fee request as soon as he was able to comprehend the egregious nature of Attorney Pitt's behavior.

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[6] Our scope of review is limited to determining whether there has been a violation of constitutional rights, an error of law or whether necessary findings of fact are supported by substantial evidence of record. *Tri-Union Express v. Workers' Compensation Appeal Board (Hickle),* 703 A.2d 558, 561 (Pa. Cmwlth. 1997).

Section 423(a) of the Workers' Compensation Act (Act)[7] gave Claimant 20 days after service of the WCJ's decision to file an appeal.[8] The timeliness of an appeal is jurisdictional and must be strictly enforced. *Manolovich v. Workers' Compensation Appeal Board (Kay Jewelers, Inc.)*, 694 A.2d 405, 409 (Pa. Cmwlth. 1997). However, Section 425 of the Act, 77 P.S. §856, states that the Board has jurisdiction to remand or hold a hearing *de novo* where coercion, duress, or fraud may have affected the proceedings.[9] Claimant argues that Attorney Pitt did not file a timely appeal, and he should have inasmuch as the claim petition identified brain damage as a work injury. Pitt's failure to appeal showed that he had no interest in Claimant's case beyond his payment of attorney fees. Further, by arguing that Claimant is too brain-damaged to file a *nunc pro tunc* appeal, Attorney Pitt has conceded that Claimant was too brain-damaged to authorize Pitt's representation.

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[7] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§1-1041.1, 2501-2708.

[8] Section 423(a) provides:

> Any party in interest may, within twenty days after notice of a workers' compensation judge's adjudication shall have been served upon him, take an appeal to the board on the ground: (1) that the adjudication is not in conformity with the terms of this act, or that the workers' compensation judge committed any other error of law; (2) that the findings of fact and adjudication was unwarranted by sufficient, competent evidence or was procured by fraud, coercion, or other improper conduct of any party in interest. The board may, upon cause shown, extend the time provided in this article for taking such appeal or for the filing of an answer or other pleading.

77 P.S. §853.

[9] Section 425 provides, in relevant part:

> If on appeal it appears that the [WCJ]'s award or disallowance of compensation was capricious or caused by fraud, coercion, or other improper conduct by any party in interest, the board may, grant a hearing de novo before the board, or one or more of its members or remand the case for rehearing to any [WCJ].

77 P.S. §856.

Claimant contends that the Board erred in dismissing his effort to appeal *nunc pro tunc* without a record.

Claimant's allegations of fraud are serious and, if true, warrant that he be granted permission to appeal *nunc pro tunc* WCJ Rosen's order. *See Falkler v. Lower Windsor Township Zoning Hearing Board*, 988 A.2d 764, 770 n.7 (Pa. Cmwlth. 2010). The Board acknowledged that the record was extremely limited. However, the Board refused to remand because it concluded Claimant "knew" by November 2008, when his indemnity benefit was reduced, that he was represented by Attorney Pitt, but he did not object to Pitt's representation until 2009. However, there is no record about what Claimant "knew" or was capable of discerning in November 2008. The Board erred in quashing Claimant's appeal in the absence of any evidence to support its assumption, *i.e.*, that Claimant knew, by November 2008, that he was represented by Attorney Pitt.

This conclusion informs our analysis of Claimant's second issue, *i.e.*, the Board erred in not remanding the matter to the WCJ to make factual findings about Claimant's mental condition during the entire period of Attorney Pitt's alleged representation. Claimant asserts that Attorney Pitt committed fraud on the WCJ when he presented a forged fee agreement, or a fee agreement signed by an unauthorized person, for approval.[10] Claimant argues that had Attorney Pitt brought Claimant to the hearing, WCJ Rosen would have questioned the validity of the fee agreement because at the time Claimant was nearly blind, mentally incompetent and unable to speak English. Claimant further argues that he did not ratify the fraudulent

[10] Since there is no transcript of the hearing before WCJ Rosen, and the WCJ admitted no exhibits, it is not clear what fee agreement Attorney Pitt submitted for approval.

fee agreement; rather, Claimant asserts that he acted as soon as the fog caused by his brain injury began to lift sufficiently for him to comprehend the import of Attorney Pitt's actions. Attorney Pitt counters that Claimant ratified the fee agreement by his actions even if he had not understood the fee agreement at the time it was executed.

There is no record to support the positions of either side. There is zero evidence on Claimant's mental state at any point of time relevant to this controversy. There is zero evidence on Claimant's alleged ratification of his agreement to be represented by Attorney Pitt. A hearing is necessary to decide whether the fee agreement was valid when executed; whether Attorney Pitt ever had authority to act for Claimant; and, if so, the scope of Attorney Pitt's authority to act on behalf of Claimant. Thus, this matter must be remanded, ultimately, to the WCJ, for the presentation of evidence regarding Claimant's allegations of fraud and Attorney Pitt's allegations of ratification of the fee agreement.

Finally, we consider Claimant's contention that the Board erred in awarding penalties against Employer. The WCJ found that Employer violated the Act by failing to pay attorney fees to Attorney Pitt, from July 31, 2008, through November 15, 2008.[11]

Section 435(d) of the Act authorizes a WCJ to impose penalties for violations of the Act; the assessment of penalties and the amount of the penalties imposed are matters within the WCJ's discretion.[12] Further, the party who files a

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[11] Attorney Pitt argues that Claimant does not have standing to appeal the approval of the penalty petition since he is not aggrieved. We find that Claimant has standing to appeal WCJ Benischeck's order because not only is he aggrieved by the 20 percent fee that was deducted from his indemnity benefits between November 2008 and June 2009, but he is also aggrieved by the filing of an invalid fee agreement, if it is so found.

[12] Section 435(d) provides, in relevant part:

(Footnote continued on the next page . . .)

penalty petition bears the burden of proving a violation of the Act occurred. *Gumm v. Workers' Compensation Appeal Board (Steel)*, 942 A.2d 222, 232 (Pa. Cmwlth. 2008) (citing *Shuster v. Workers' Compensation Appeal Board (Pennsylvania Human Relations Commission)*, 745 A.2d 1282, 1288 (Pa. Cmwlth. 2000)). Once the petitioner makes a *prima facie* case that a violation of the Act has occurred, the burden then shifts to the employer to prove it did not violate the Act. *Id.*

There is no dispute that WCJ Rosen ordered that 20 percent be deducted from Claimant's indemnity benefit and paid to Attorney Pitt. The parties also acknowledge that Employer did not pay Attorney Pitt 20 percent of Claimant's indemnity benefit from July 31, 2008, through November 15, 2008, for a total amount of $1,227.68. Orders to pay worker's compensation benefits have immediate effect. *National Fiberstock Corp. (Greater New York Mutual Insurance Co.) v. Workers' Compensation Appeal Board (Grahl)*, 955 A.2d 1057, 1064 (Pa. Cmwlth. 2007). Section 430(b) of the Act provides, in relevant part, as follows:

> Any insurer or employer who terminates, decreases or refuses to make any payment provided for in the decision without filing a

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(continued . . .)

> The department, the board, or any court which may hear any proceedings brought under this act shall have the power to impose penalties as provided herein for violations of the provisions of this act or such rules and regulations or rule of procedure:
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> > (i) Employers and insurers may be penalized a sum not exceeding ten percentum of the amount awarded and interest accrued and payable: Provided, however, that such penalty may be increased to fifty percentum in cases of unreasonable or excessive delays. Such penalty shall be payable to the same persons to whom the compensation is payable.

77 P.S. §991(d). Section 435 of the Act was added by the Act of February 8, 1972, P.L. 25.

> petition and being granted a supersedeas shall be subject to a penalty as provided in Section 435....

77 P.S. §971(b). Thus, unless a WCJ's order is stayed, the award must be paid immediately. However, even where a violation of the Act is found, the assessment of penalties is discretionary. 77 P.S. §991(d)(i).[13] Accordingly, the merits of Attorney Pitt's penalty petition should be considered on remand along with the question of whether Attorney Pitt's fee agreement was valid.

For the foregoing reasons, we vacate the order of the Board dismissing Claimant's appeals. We remand the case to the Board for further remand to a WCJ with instructions to take evidence and render a determination of whether Claimant was mentally capable of signing the fee agreement or, in the alternative, capable of acquiescing in Attorney Pitt's representation. In doing so, the WCJ may make further findings of fact and conclusions of law consistent with this opinion.

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MARY HANNAH LEAVITT, Judge

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[13] Section 435(d)(i) of the Act provides as follows:

> Employers and insurers *may be penalized* a sum not exceeding ten percentum of the amount awarded and interest accrued and payable: provided, however, that such penalty may be increased to fifty percentum in cases of unreasonable and excessive delays. Such penalty shall be payable to the same persons to whom the compensation is payable.

77 P.S. §991(d)(i) (emphasis added).

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Workers' Compensation Appeal Board (K & S and Greenday, Inc.), Respondent	:	

O R D E R

AND NOW, this 17th day of March, 2011, the order of the Workers' Compensation Appeal Board dated May 6, 2010, in the above-captioned matter is VACATED and this case is REMANDED to the Board for further remand to the Workers' Compensation Judge with instructions to take evidence and make further findings of fact and conclusions of law consistent with this opinion.

Jurisdiction relinquished.

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MARY HANNAH LEAVITT, Judge