IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Harold Malseed, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (PMA Group and Township of Haverford), Respondents	:	No. 1143 C.D. 2007
Township of Haverford, as insured by The PMA Insurance Group, Petitioners	:	
v.	:	
Workers' Compensation Appeal Board (Malseed), Respondent	:	No. 1213 C.D. 2007 Submitted: January 4, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: February 25, 2008

Harold Malseed (Claimant) seeks review of the Workers' Compensation Appeal Board's (WCAB) denial of his appeal from the Workers' Compensation Judge's (WCJ) dismissal of his Penalty Petition against PMA Group and the Township of Haverford (Employer) even though he was granted reimbursement of medical costs that Blue Cross/Blue Shield originally paid. Employer cross appeals the award of reimbursement to Claimant of $10,519.08 plus interest in medical expenses that Blue Cross/Blue Shield paid.

The controversy arises from Claimant's back injury, which occurred during the course of his employment in 1978, and entitled him to workers' compensation benefits pursuant to the Workers' Compensation Act (Act).[1] The present litigation was initiated when Claimant filed a Penalty Petition on February 16, 1999, and alleged that Employer did not pay medical bills pursuant to a stipulation between the parties which was incorporated in a Decision by WCJ Seymour Nathanson dated December 8, 1995 (1995 Decision). Following protracted litigation and multiple remands,[2] on May 30, 2006, WCJ Bonnie Callahan determined that Employer was required to reimburse Claimant $10,519.08 in medical expenses paid by Blue Cross/Blue Shield. WCJ Callahan found that Claimant was not entitled to unreasonable contest attorneys fees, and

[1] Act of June 2, 1915, P.L. 736 as amended.

[2] On January 30, 2001, WCJ Karen Wertheimer granted Claimant's petition for penalties in part, ordering Employer to pay a ten percent penalty on medical bills not paid in a timely fashion pursuant to the 1995 Decision. WCJ Wertheimer determined that Claimant's request for $10,519.08 was an improper assertion of a subrogation interest by Claimant on behalf of his private medical insurer, Blue Cross/Blue Shield, which had paid that amount toward Claimant's work-related medical expenses according to the 1995 Decision. On April 29, 2002, the WCAB vacated WCJ Wertheimer's denial of Claimant's request for reimbursement and remanded to determine whether Blue Cross/Blue Shield asserted a subrogation lien. The WCAB also determined that because Employer violated the Act, unreasonable contest attorneys' fees were proper, and remanded to allow submission of a quantum meruit exhibit and for determination of fees.

On March 31, 2004, WCJ John W. Liddy concluded that Employer was not required to reimburse Claimant for medical bills paid by Blue Cross/Blue Shield pursuant to the 1995 Decision, reasoning that the 1995 Decision did not expressly state that was what the parties intended. However, WCJ Liddy did award unreasonable contest attorney's fees of $4,000.00.

On June 3, 2005, the WCAB again remanded for a determination whether Blue Cross/Blue Shield ever asserted a subrogation lien. The WCAB held that if the WCJ found that Blue Cross/Blue Shield did not assert a lien, the WCJ should order the Employer to reimburse Claimant the $10,519.08.

further did not approve the fee agreement between Claimant and his attorney because it did not specify any percentage as an attorney fee.

Both Claimant and Employer appealed to the WCAB. Employer argued that Claimant was not entitled to reimbursement of the $10,519.08 paid by Blue Cross/Blue Shield. Claimant argued that he was entitled to unreasonable contest attorneys' fees and interest, and that the WCJ erred by failing to approve Claimant's fee agreement and to award penalty fees. Employer argued that the award of $10,519.08 was not supported by substantial competent evidence because that award exceeded the amount in the 1995 Decision. The WCAB affirmed the WCJ's decision in all respects, but modified and awarded Claimant interest. Both Claimant and Employer now appeal to this Court.

EMPLOYER'S APPEAL

Employer contends[3,4] that Claimant is not entitled to reimbursement of the amount that Blue Cross/Blue Shield paid toward Claimant's medical expenses because the doctrines of *res judicata* and collateral estoppel bar the action. Pursuant to the stipulation in the 1995 Decision, Employer agreed to pay all reasonable and necessary medical expenses related to the work injury as laid out in the attached exhibit. The exhibit clearly states that Blue Cross/Blue Shield paid

[3] This Court's "review in workers' compensation appeals is limited to determining whether an error of law was committed, constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence." Acme Markets Inc. v. Workers' Compensation Appeal Board (Brown), 890 A.2d 21 (Pa.Cmwlth. 2006) (citing Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704; Bi-Thor Electric, Inc. v. Workers' Compensation Appeal Board (Thornton), 702 A.2d 1145, 1147 n.2 (Pa.Cmwlth. 1997)).

[4] It is expedient to address Employer's appeal before addressing Claimant's appeal.

$10,519.08 of the total $29,718.69.[5] Employer argues that it is not clear whether these expenses were work-related. Employer's argument fails. The stipulation of fact provided that "[t]he Claimant has incurred certain medical expenses related to his work injury. A chart detailing these medical expenses as well as copies of the bills themselves are attached. . . ." Stipulation at Stipulation of Fact No. 5; Claimant's R.R. at 25a. It defies common sense to now argue that the Blue Cross/Blue Shield payments were not work-related when they had been included in the stipulation of items that *were* work-related.

Because those issues of fact had been resolved in the 1995 Decision, Employer is barred by the doctrine of issue preclusion, or collateral estoppel,[6] from

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[5] Exactly, the Proposed Conclusions of Law incorporated in the 1995 Decision provided that "employer is obligated to pay for those reasonable and necessary medical expenses related to the Claimant's work injury as detailed in Exhibit A." Proposed Conclusions of Law, No. 2, Stipulation; Claimant's Reproduced Record (C.R.R.) at 26a. Exhibit A lists each of the expenses Claimant incurred, all related to the work injury, the cost, how much Blue Cross/Blue Shield paid, how much Claimant paid, any amounts waived, and the total still owed. Exhibit A; R.R. at 27a.

[6] Collateral estoppel, or issue preclusion, generally will foreclose relitigation of issues of law or fact in a subsequent action, where the following criteria are met:

> (1) when the issue in the prior adjudication was identical to the one presented in the later action; (2) when there was a final judgment on the merits; (3) when the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; (4) when the party against whom it is asserted has had a full and fair opportunity to litigate the issue in a prior action; and (5) when the determination in the prior proceeding was essential to the judgment.

Cohen v. Workers' Compensation Appeal Board (City of Philadelphia), 589 Pa. 498, 503, 909 A.2d 1261, 1264 (2006) (citing Callaghan v. Workers' Compensation Appeal Board (City of Philadelphia), 750 A.2d 408, 412 (Pa.Cmwlth. 2000)). Here, the determination in the prior

(Footnote continued on next page…)

arguing that the Blue Cross/Blue Shield payments were not directed toward work-related medical expenses, particularly in light of the stipulation of the parties that the attached documents outlined the reasonable medical expenses related to the work injury. See Shaffer v. Workmen's Compensation Appeal Board (Avon Products, Inc.), 692 A.2d 1163 (Pa.Cmwlth. 1997).

CLAIMANT'S APPEAL

I. Employer's Failure to Reimburse and Liability Pursuant to the Act

Claimant contends that the Respondent's failure to reimburse Claimant the $10,519.08[7] was error. The WCAB agreed, as does this Court.

In Frymiare v. Workers' Compensation Appeal Board, 524 A.2d 1016 (Pa.Cmwlth. 1987), appeal denied, 518 Pa. 644, 542 A.2d 1372 (1988), this Court took up the question whether an employer must reimburse a claimant for work-related medical expenses that were paid by a third-party non-employer-funded insurance company. The employer in Frymiare had argued that "the Claimant may be the beneficiary of a 'Double Dip on Medical Expenses.'" Id. at 1019. However,

(continued…)

proceeding, that Employer pay all the work-related medical expenses, included the Blue Cross/Blue Shield payments as laid out in the Exhibit, and was essential to the adjudication.

[7] Claimant argues in his summary of the argument that he is due $10,518.09 pursuant to the 1995 Decision. This Court believes that various references to the amount Claimant argues he was owed were simple typos, since they vary from $10,519.08 to $10,518.09 to $10,514.08 (2006 WCAB Decision at 4). For purposes of this opinion, all references to the amount that Blue Cross/Blue Shield paid are $10,519.08, the amount from the line item found as Appendix A, Claimant's medical expenses, to the 1995 Decision. Appendix B to Claimant's Brief at 26a-28a.

> the reasonableness or logic of this assertion is not apparent. The workmen's compensation insurer is responsible to pay medical expenses of a claimant injured in the course of his employment, and this obligation may not be avoided on the basis that some other source, such as Claimant's wife's sources through her employer [third-party insurer], may have initially defrayed such costs. The exception, of course, is where the source of the payments is funded by the employer.

Id. There is no contention that Employer funded Claimant's Blue Cross/Blue Shield medical insurance. Claimant's position is well taken.

Further, the failure to reimburse Claimant the benefits paid by Blue Cross/Blue Shield subjects Employer to penalties pursuant to Section 435(d)(i) of the Act, 77 P.S. § 991, which provides that:

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

Employer's argument that no penalties should be awarded is disingenuous. While the Claimant bears the burden of establishing a violation of the Act, an employer will be subject to penalties when it fails to make payments pursuant to an award of a Worker's Compensation Judge. Orenich v. Workers' Compensation Appeal Board (Geisinger Wyoming Valley Medical Center), 863 A.2d 165 (Pa. Cmwlth. 2004), *petition for allowance of appeal denied*, 584 Pa. 682, 880 A.2d 1242 (2005); Gens v. Workmen's Compensation Appeal Board (Rehabilitation Hospital), 631 A.2d 804 (Pa. Cmwlth. 1993), *petition for allowance*

of appeal denied, 538 pa. 618, 645 A.2d 1321 (1994). Claimant was owed and due reimbursement of the $10,519.08 pursuant to the 1995 Decision. Twelve years later, and nine years following the initiation of this Penalty Petition, Employer still contests reimbursement of the medical expenses paid by Blue Cross/Blue Shield, in contravention of the 1995 Decision and Frymiare. Claimant was entitled to a penalty of fifty per centum of the $10,519.08, plus interest, and the WCAB's conclusion to the contrary must be reversed.

II. Claimant's Entitlement to Unreasonable Contest Attorneys' Fees

Claimant next contends that Employer's contest was unreasonable and that he is entitled to attorneys' fees pursuant to Section 440 of the Act, 77 P.S. § 996. An employer has the burden of establishing a reasonable basis for a contest. Weiss v. Workmen's Compensation Appeal Board (Birch), 526 A.2d 839 (Pa.Cmwlth. 1987). Whether the employer's contest is reasonable is a question of law, reviewable by this Court. Jodon v. Workmen's Compensation Appeal Board (Corning Glass Works), 420 A.2d 1137 (Pa.Cmwlth. 1980). To determine whether a contest is reasonable, the court must look to the totality of the circumstances. Bates v. Workers' Compensation Appeal Board (Titan Construction Staffing, LLC), 878 A.2d 160 (Pa.Cmwlth. 2005). Unless the employer establishes that the contest was prompted to resolve a genuinely disputed issue, the court will presume that the contest was unreasonable. Essroc Materials v. Workers' Compensation Appeal Board (Braho), 741 A.2d 820 (Pa.Cmwlth. 1999).

Employer notes that its contest was reasonable throughout the litigation because the matter has been remanded on numerous occasions to

determine whether Blue Cross/Blue Shield asserted a subrogation lien, and that this genuinely disputed issue gives rise to a reasonable basis for contest. Based on a totality of the circumstances, this Court disagrees. What prompted the contest was not whether a subrogation lien was asserted but whether Employer attempted to avoid complete liability for the reimbursement by arguing that Blue Cross/Blue Shield had already paid.

Employer decided, unilaterally, to decline to pay Claimant the $10,519.08 amount that was paid to Claimant's health care providers by Blue Cross/Blue Shield. Then, Employer denied that Claimant was entitled to this money, which Employer had previously stipulated it owed. Frymiare, 524 A.2d 1016, clearly on point, is the settled law of the Commonwealth, that an Employer must reimburse Claimant for work-related medical expenses, even if paid by a third-party insurer, if that insurer is not employer-funded. The erroneous holdings of multiple WCJs and the WCAB, in conflict Frymiare, do not establish a reasonable basis to contest.

Further, based on this assertion, Employer's alternative argument that it could not be certain whether the expenses paid by Blue Cross/Blue Shield were related to the work injury, when it is clear from the 1995 Decision that they were, is beyond the pale.

III. Approval of Claimant's Fee Agreement

Finally, the Claimant contends that this Court should approve his counsel fee agreement. Section 442 of the Act, 77 P.S. § 998, provides:

> All counsel fees, agreed upon by claimant and his attorneys, for services performed in matters before any workers' compensation judge or the board, whether or not allowed as part of a judgment, shall be approved by the workers' compensation judge or board as the case may be, providing the counsel fees do not exceed twenty per centum of the amount awarded.

The WCJ must approve an attorney's fee if there is, first, an agreement between the claimant and the attorney, and, second, the agreement does not exceed twenty percent of the amount awarded. Piergalski v. Workmen's Compensation Appeal Board (Viviano Macaroni Co.), 621 A.2d 1069 (Pa.Cmwlth. 1993). There is no authority in the Act for the WCAB to establish a fee for an attorney who has not submitted his fee agreement for approval. Larry Pitt & Associates v. Long, 716 A.2d 695 (Pa.Cmwlth. 1998).

Claimant puts forth the amended representation agreement with his prior attorney, and a supplemental "FORM" that directs the signer to indicate which of two attorneys, prior counsel and current counsel, the signer preferred to have represent him in this workers' compensation matter. Claimant's Reproduced Record (C.R.R.) at 30a-31a. An "X" indicated that Claimant selected his current counsel. This document, by itself, must not be read by this Court to incorporate the terms of a representation agreement which it fails to even reference.

However, Claimant's current attorney, Vatche Kaloustian, (Attorney Kaloustian) during a hearing before WCJ Samuel Beckett occurring on October 20, 1999, discussed his "15 percent" fee agreement with Claimant. Notes of Testimony, October 20, 1999 at 39-41; Reproduced Record (R.R.) at 243a-245a. Further, Attorney Kaloustian presented the prior agreement as his own agreement,

with the qualifier, that "I just want the record to reflect that there is a Fee Agreement." This is sufficient for this Court to find that there was at least a purported fee agreement of fifteen percent, which is sufficient to allocate attorneys' fees. Notes of Testimony, March 20, 2006, at 5-6; R.R. at 111a-112a. In light of the existence of the fee agreement, this Court believes that, in keeping with the liberal construction required by the remedial nature of the Act, the WCJ should have found that a fee agreement of fifteen percent existed between Claimant and Attorney Kaloustian. See Zuback v. Workers' Compensation Appeal Board (Paradise Valley Enterprise), 892 A.2d 41 (Pa.Cmwlth. 2006).

CONCLUSION

Accordingly, the order of the WCAB in the above captioned matter is affirmed with respect to Employer's reimbursement of the amount that Blue Cross/Blue Shield paid towards Claimant's work-related medical bills, i.e., Employer must reimburse Claimant $10,519.08. Employer is also subject to a penalty of fifty per centum on this amount, plus interest. The order of the WCAB denying Claimant's request to approve an attorney's fee agreement is reversed. Finally, the order of the WCAB denying unreasonable contest attorneys' fees is reversed and remanded for determination of appropriate fees.

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BERNARD L. McGINLEY, Judge

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O R D E R

AND NOW, this 25th day of February, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed with respect to Respondents PMA Group and Township of Haverford reimbursing Claimant Malseed $10,519.08 that Blue Cross/Blue Shield paid towards Claimant's work-related medical bills. Respondents are further subject to a penalty of fifty per centum on this amount, plus interest. The order of the Workers' Compensation Appeal Board denying Claimant's request to approve an attorney's fee agreement is reversed. The order of the Workers' Compensation Appeal Board denying unreasonable contest attorneys' fees is reversed and this matter is remanded to the Workers' Compensation Appeal Board to remand to the

Workers' Compensation Judge to determine an appropriate fee consistent with this opinion.

Jurisdiction relinquished.

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BERNARD L. McGINLEY, Judge