

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Phuong Ho,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 126 C.D. 2011
	:	Submitted: June 24, 2011
Workers' Compensation Appeal	:	
Board (Giorgio Fresh Company),	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: September 12, 2011**

In this appeal, Attorney Larry Pitt (First Counsel) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed a decision of a Workers' Compensation Judge (WCJ), which approved a compromise and release agreement (C&R Agreement) between Phuong Ho (Claimant) and Giorgio Fresh Co. (Employer), and awarded First Counsel a \$200.00 counsel fee. First Counsel contends the WCJ, in approving the C&R, failed to: properly consider First Counsel's itemized list of services performed, award him litigation costs, or utilize the proper standard under Section 442 of the Workers' Compensation Act<sup>1</sup> (Act) (relating to attorney's fees for services performed before a WCJ or the Board) to apportion a counsel fee between First Counsel and Attorney Richard Veon (Second Counsel). Upon review, we affirm.

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<sup>1</sup> Act of June 2, 1915, P.L. 736, as amended, added by the Act of February 8, 1972, P.L. 25, 77 P.S. §998.

## **I. Background**

In March 2008, Claimant sustained a work-related low back injury and received total disability benefits pursuant to an agreement with Employer. In December 2008, Employer filed a suspension petition alleging Claimant could return to unrestricted work, and it offered Claimant a specific job. In March 2009, Employer filed a termination petition alleging Claimant fully recovered from her work injury.

As of January 2009, First Counsel represented Claimant. They entered into a contingency fee agreement. First Counsel would receive 20% of all compensation payable to Claimant as long as she received compensation. See Reproduced Record (R.R.) at 41a. First Counsel represented Claimant at a January 2009 hearing on Employer's suspension petition. This hearing resulted in the entry of an interlocutory order that granted Employer's request for supersedeas and stopped payment of Claimant's wage loss benefits. First Counsel introduced his fee agreement into evidence at this hearing.

However, in June 2009, Claimant discharged First Counsel and entered into a contingency fee agreement with Second Counsel. Pursuant to this agreement, Second Counsel would receive 20% "of any recovery by way of settlement or verdict." Id. at 365a. Second Counsel introduced his fee agreement into evidence at a July 2009 hearing. At this time, First Counsel became aware of his discharge.

At a March 2010 hearing, Employer amended its suspension petition to seek approval of a C&R Agreement providing Claimant a lump sum settlement of \$12,000.00. Second Counsel indicated at hearing that he was not seeking a counsel fee, but only recoupment of \$500.00 from Claimant for the cost of a medical examination for a potential additional claim.

After a discussion with First Counsel's associate, the WCJ continued the hearing for 20 days in order for First Counsel to petition for a *quantum meruit* counsel fee. Thereafter, First Counsel submitted an itemized *quantum meruit* bill for \$6,600.00 (22 hours at \$300.00 per hour) and litigation costs of \$179.20. See Ex. Pitt-1; R.R. at 38a-43a.

The WCJ subsequently issued an April 2010 decision approving the C&R Agreement. See R.R. at 13a-17a. The WCJ also approved a \$500.00 counsel fee for Second Counsel and a \$200.00 counsel fee for First Counsel. Id.

In his decision, the WCJ noted that First Counsel's requested fee of \$6,600.00 would represent 55% of the \$12,000.00 lump sum settlement. WCJ's Op., 04/13/2010, Finding of Fact (F.F.) No. 3. The WCJ further found Claimant entered into a contingency fee agreement with First Counsel. F.F. No.4. Claimant did not agree to pay First Counsel a fee based on an hourly rate for time expended. Id. Thus, the WCJ found no legal or contractual basis existed for approval of First Counsel's fee based on time expended at \$300.00 per hour. Id.

In addition, the WCJ found the services rendered by First Counsel, with the possible exception of participation in settlement discussions with Employer's workers' compensation carrier's adjuster, could not be viewed as contributing to the settlement of the case. F.F. No. 5. Giving First Counsel the benefit of the doubt regarding his contribution to the settlement negotiations, the WCJ awarded him a \$200.00 counsel fee to be paid by Employer. Id.

On appeal, the Board affirmed. It recognized that Section 442 of the Act governs counsel fees in cases before the WCJ. Section 442 provides (with emphasis added):

All counsel fees, agreed upon by claimant and his attorneys, for services performed in matters before any [WCJ] or the [B]oard, whether or not allowed as part of a judgment, shall be approved by the [WCJ] or [B]oard as the case may be, providing the counsel fees do not exceed twenty per centum of the amount awarded.

In cases where the efforts of claimant's counsel produce a result favorable to the claimant but where no immediate award of compensation is made, such as in cases of termination or suspension, the hearing official shall allow or award reasonable counsel fees, as agreed by claimant and his attorneys, without regard to any percentum. In the case of compromise and release settlement agreements, no counsel fees shall exceed twenty per centum of the workers' compensation settlement amount.

77 P.S. §998.

The Board noted First Counsel's requested *quantum meruit* fee is nearly three times the 20% fee permitted by Section 442 of the Act in C&R settlement agreements. It recognized that generally, a *quantum meruit* petition is only relevant where unreasonable contest fees are awarded. City of Phila. v. Workers' Comp. Appeal Bd. (Cospelich), 893 A.2d 171 (Pa. Cmwlth. 2006).

The Board also agreed with the WCJ that nothing in the record justified a 55% counsel fee, and that the WCJ acted within his discretion to protect Claimant's interests by modifying an unreasonable counsel fee. See Samuel v. Workers' Comp. Appeal Bd. (Container Corp. of Am.), 814 A.2d 274 (Pa. Cmwlth. 2002) (Section 442 of the Act indicates a legislative intent to protect claimants against unreasonable fees imposed by their attorneys). First Counsel petitions for review.<sup>2</sup>

## II. Issues

First Counsel contends the Board erred in affirming the \$200.00 counsel fee award where the WCJ, in approving the C&R Agreement, failed to: properly consider First Counsel's itemized list of actual services performed; award First Counsel his litigation costs; or, utilize the proper standard under Section 442 of the Act to equitably apportion a counsel fee between First Counsel and Second Counsel.

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<sup>2</sup> This Court's 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. Shannopin Mining Co. v. Workers' Comp. Appeal Bd. (Sereg), 11 A.3d 623 (Pa. Cmwlth. 2011).

### **III. Discussion**

#### **A. Argument**

To begin, First Counsel contends the WCJ failed to properly consider the actual work he performed on behalf of Claimant. He also contends the WCJ failed to award him \$179.20 in litigation costs incurred in defense of Employer's termination and suspension petitions.

First Counsel asserts the WCJ erred in not apportioning a 20% counsel fee between himself and Second Counsel. See Hendricks v. Workers' Compensation Appeal Board (Phoenix Pipe & Tube), 909 A.2d 445 (Pa. Cmwlth. 2006) (where first counsel filed a fee agreement prior to discharge, the WCJ and the Board had the authority to apportion a fee between successive counsel). Here, both fee agreements were filed with the WCJ. Thus, First Counsel argues, Section 442 of the Act is the proper statutory means to make an equitable apportionment of the counsel fee. Hendricks.

As discussed, Claimant received a \$12,000.00 lump sum settlement in the C&R Agreement. Therefore, First Counsel argues, a counsel fee of \$2,400.00 or 20% is *per se* reasonable under Section 442 of the Act. Although Second Counsel gave up his right to a contingency fee at the time of the C&R Agreement, First Counsel did not. First Counsel argues the WCJ has a duty to protect his fee interest. See Gingerich v. Workers' Comp. Appeal Bd. (U.S. Filter), 825 A.2d 788 (Pa. Cmwlth. 2003) (a claimant cannot unilaterally cease her obligation to pay prior counsel by executing a C&R Agreement; prior counsel must agree to the

release). First Counsel therefore asserts the WCJ could have awarded him \$2,400.00.

First Counsel further argues that to disregard the value of work he performed on behalf of Claimant would amount to a capricious disregard of the facts in this case. See Leon E. Wintermyer, Inc. v. Workers' Comp. Appeal Bd. (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002) (review for capricious disregard of material, competent evidence is appropriate in every agency case where such issue is raised). He submitted an itemized statement showing 22 hours of attorney time (at \$300.00 per hour) spent on Claimant's case and expenses of \$179.20 incurred in defending Claimant in the suspension and termination petitions up to the point of his discharge. Thus, First Counsel contends, the WCJ's award of \$200.00 is a capricious disregard of the facts.

In response, Employer first contends First Counsel waived his claim that his contingency fee agreement remained in effect and that the WCJ erred or abused his discretion by not awarding 20% of the settlement amount because he failed to raise this argument before the WCJ or the Board. Rather, First Counsel advanced the argument that Claimant breached the fee agreement and thus he should be awarded *quantum meruit* fees of \$6,600.00 under Section 440 of the Act (unreasonable contest counsel fees and costs), 77 P.S. §996. Issues or legal theories not raised before the Board are deemed waived. Rox Coal Co. v. Workers' Comp. Appeal Bd. (Snizaski), 570 Pa. 60, 807 A.2d 906 (2002); Dilliaine v. Lehigh Valley Trust Co., 457 Pa. 255, 322 A.2d 114 (1974).

Second, Employer contends the WCJ fulfilled his responsibilities under Section 442 of the Act by carefully reviewing the amount and quality of First Counsel's work. As long as the amount and difficulty of Claimant's counsel's work is reasonably related to the fee awarded, this Court will grant significant deference to the WCJ's determination. Hendricks. To that end, Employer asserts, the WCJ found very little, if any, of First Counsel's work contributed to the C&R Agreement. Further, First Counsel failed to present any evidence to the contrary at the hearing reviewing his fee request.

Employer also contends Second Counsel paid First Counsel \$179.20 in litigation costs. The C&R Agreement provided that Employer pay \$3,672.85 in litigation expenses, which included First Counsel's expenses.

## **B. Analysis**

### **1. Waiver of Contingency Fee Claim**

We first examine Employer's contention that First Counsel waived the issue of whether his contingency fee agreement continued in effect. Employer asserts First Counsel failed to raise this issue before the WCJ or in his appeal to the Board. First Counsel argued in his appeal to the Board that his contingency fee agreement had no continuing effect after Claimant breached it. See R.R. at 24a-26a. Therefore, First Counsel sought a *quantum meruit* fee of \$6,600.00 or approximately 55% of Claimant's settlement. Id.

The parties first discussed First Counsel's *quantum meruit* fee petition at the WCJ hearing in March 2010. See Notes of Testimony (N.T.), 3/29/10; R.R.



at 201a-24a. First Counsel, represented by an associate, presented no evidence or argument regarding the fee petition. Id. at 10; R.R. at 207a.

In reviewing First Counsel's fee petition, the WCJ dismissed his claim for a 55% counsel fee as "unbridled, unrestrained greed." Id. at 15; R.R. at 212a. The WCJ observed that the only fee agreement between First Counsel and Claimant was the contingency fee agreement. Id. Claimant never agreed to pay First Counsel an hourly rate or an hourly rate of \$300.00. Id. Therefore, the WCJ found "absolutely no legal and contractual basis" for approving First Counsel's requested fee. WCJ Op., 04/13/10, F.F. No. 4.

The WCJ also recognized a *quantum meruit* fee is not appropriate in a petition for approval of a C&R Agreement because there is no unreasonable contest claim. N.T., 03/29/10, at 16; R.R. at 213a. However, the WCJ did review the itemized services performed by First Counsel. Id. at 15; R.R. at 212a.

In his appeal to the Board, First Counsel argued the WCJ erred in not granting his *quantum meruit* petition. Id. at 24a. He argued that \$300.00 per hour is his standard hourly rate in workers' compensation cases and that the 20% limitation on contingency fee matters no longer applied after Claimant breached the contingency fee agreement. Id. He further asserted his fee petition serves as a lien on Claimant's recovery. Id. Therefore, First Counsel sought reversal of the WCJ's order and entry of an order requiring Employer to pay him the sum of \$6,779.20. Id. at 24a-26a.

First Counsel did not argue before the WCJ or the Board that his 20% contingency fee agreement remained in effect. He did not seek apportionment of a \$2,400.00 counsel fee based on Hendricks. By failing to raise this claim before the WCJ or the Board, First Counsel failed to preserve this issue for appeal. See Rox Coal Co. (failure to raise a legal theory before an administrative tribunal results in a waiver of that issue; the administrative agency must be given the opportunity to correct its legal errors as early as possible); Dilliplaine (appellate court consideration of issues not raised before the trial court results in the trial merely becoming a dress rehearsal and removes the professional necessity for trial counsel to be prepared to properly litigate the case at trial). Therefore, First Counsel waived his claim for a 20% contingency fee. Id.

## **2. WCJ's Fee Award**

Moreover, we agree with the Board that the WCJ provided a sufficiently detailed explanation for his determination of First Counsel's limited fee. Given the unusual circumstances in this case, we also agree that the WCJ acted within his discretion in modifying First Counsel's fee to \$200.00.

In apportioning fees between successive counsel under Section 442 of the Act, a WCJ must consider the nature of the legal work performed, its level of difficulty, and its time requirements in determining a reasonable fee. Hendricks. If the amount and difficulty of the work performed is reasonably related to the fee awarded, this Court will not disturb the WCJ's award. Id.

Further, “[t]he amount of fees to be allowed to counsel ... is one peculiarly within the discretion of the court of first instance. Its opportunities of judging the exact amount of labor, skill and responsibility involved ... are necessarily greater than ours and its judgment should not be interfered with except for plain error.” Eugenie v. Workmen's Comp. Appeal Bd. (Sheltered Employee Serv.), 592 A.2d 358, 362 (Pa. Cmwlth. 1991) (quoting In re Good's Estate, 150 Pa. 307, 310, 24 A. 623 (1892)).

A reasonable counsel fee may be less than 20% depending on the amount and degree of difficulty of the work performed. Eugenie. Here, the WCJ stated he carefully reviewed the description of services First Counsel performed for Claimant. WCJ Op., 04/13/10, F.F. No. 5. With the exception of First Counsel's limited engagement in settlement negotiations with Employer's workers' compensation insurer's adjuster,<sup>3</sup> the WCJ found the remainder of the services First Counsel performed could not be viewed as contributing to the C&R Agreement. Id.

In light of the WCJ's consideration of First Counsel's itemized list of services performed, we reject First Counsel's contention that the WCJ capriciously disregarded the facts of the case. At hearing on the *quantum meruit* petition, First Counsel's associate declined the opportunity to present any evidence or argument in support of First Counsel's petition. See N.T., 3/29/10, at 10; R.R. at 207a.

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<sup>3</sup> First Counsel's *quantum meruit* petition indicates he spent one hour on February 5, 2009, reviewing the file for settlement. R.R. at 39a. On May 11, 2009, First Counsel spent one hour reviewing the file in preparation for settlement negotiations with Employer's carrier's adjuster and half an hour in settlement discussions with the adjuster. Id. at 40a.

Consequently, the record contains no explanation of how the services First Counsel performed, including the settlement discussions, contributed to the C&R Agreement. Therefore, we discern no abuse of discretion by the WCJ in awarding First Counsel \$200.00 as a counsel fee for his limited participation in the resolution of this case. Hendricks; Eugenie.

Additionally, we recognize that Section 442 of the Act evinces the Legislature's intent to protect claimants against unreasonable fees imposed upon them by their attorneys. Weidner v. Workmen's Comp. Appeal Bd. (Firestone Tire & Rubber Co.), 497 Pa. 516, 442 A.2d 242 (1982); Samuel. Here, the WCJ fulfilled this responsibility by rejecting First Counsel's request for an unreasonable counsel fee.

### **3. Litigation Costs**

Finally, First Counsel contends the WCJ erred or abused his discretion by awarding Second Counsel his litigation costs, but denying his request for \$179.20 in litigation expenses. At hearing, Second Counsel stated that Employer will pay First Counsel's litigation costs in addition to the lump sum settlement. See N.T., 03/29/20, at 22; R.R. at 219a. In his reply brief here, First Counsel acknowledges Second Counsel ultimately paid his litigation costs. We therefore dismiss this issue as moot.

For the above reasons, we discern no error in the Board's decision. Accordingly, we affirm.

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ROBERT SIMPSON, Judge

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Workers' Compensation Appeal	:	
Board (Giorgio Fresh Company),	:	
Respondent	:	

**ORDER**

**AND NOW**, this 12<sup>th</sup> day of September, 2011, the order of the Workers' Compensation Appeal Board is **AFFIRMED**.

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ROBERT SIMPSON, Judge