IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Fayette Transportation Services, Inc., Petitioner	:	
v.	:	No. 1702 C.D. 2007
	:	SUBMITTED: January 4, 2008
Workers' Compensation Appeal Board (Reese), Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge[1]
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** July 18, 2008

Fayette Transportation Services, Inc. (Fayette) petitions for review of an order of the Workers' Compensation Appeal Board (Board), which affirmed the decision of a Workers' Compensation Judge (WCJ) granting the Penalty Petition filed by George Reese (Claimant) against Fayette and the Cura Group, Inc., a Florida Corporation which acted as Fayette's third party administrator. We affirm.

Although not a model of clarity, the record reflects that Fayette (which is now out of business) was a small trucking company located near Uniontown,

[1] This case was reassigned to the author on April 2, 2008.

Pennsylvania. Fayette contracted with Cura[2] to have Cura, a Florida corporation, assume Fayette's payroll, tax filing, benefits administration and insurance placement obligations (including Workers' Compensation) for a fee.[3] In this connection, Cura placed Workers' Compensation insurance for the Fayette/Cura employees with Frontier Insurance Company, but this policy expired on November 10, 2001.[4] Approximately one month later, on December 19, 2001, Claimant sustained a lower back injury while in the course and scope of his employment with Fayette/Cura and Cura itself began making compensation payments. On May 28, 2004, Claimant filed a Penalty Petition alleging that Fayette and Cura violated the Workers' Compensation Act (Act)[5] by failing to timely pay his workers' compensation benefits and medical benefits when due.

A series of four hearings were held before two WCJs on April 22, 2004, June 30, 2004, August 25, 2004 and May 10, 2005. Thereafter, on May 26, 2005, Fayette/Cura's counsel advised the WCJ by letter that Cura filed voluntary Chapter 11 bankruptcy proceedings under the federal Bankruptcy Code on May 12, 2005, and asserted that the proceedings before the WCJ were subject to an automatic stay. On

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[2] Cura appears to be affiliated or to have merged with another company called America's PEO, under whose name some of Claimant's compensation checks were issued, and with a company called Certified HR Services. Cura is also referred to in the record as "Curra."

[3] This type of contractual arrangement has been referred to as "employee leasing." Evidently, Cura provided such services for many small companies. We note a letter from Certified HR Services (Cura's successor or affiliate) stating that Claimant was an employee of Cura until June 20, 2003, although his actual work was done for Fayette in Uniontown. However, we need not here decide whether Cura became a co-employer for purposes of the Act under this arrangement because Cura's liability for penalties is not at issue in this appeal. Indeed, the record is insufficient for us to make such a determination.

[4] Frontier was placed in Rehabilitation under the supervision of the New York Insurance Department in October of 2001.

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

this basis, the WCJ placed the case in indefinite postponement. The WCJ subsequently removed the case from indefinite postponement "due to a lack of contact by [Fayette or Cura] regarding the status of any type of bankruptcy proceedings in regard to this matter." (Opinion at p. 4).

On January 16, 2006, the WCJ received a letter from counsel advising the WCJ that her firm no longer represented Fayette/Cura, and requested that the WCJ issue an order regarding the firm's withdrawal as counsel. By interlocutory order dated June 6, 2006, the WCJ granted counsel's request. The interlocutory order provided that employer was to obtain new counsel within thirty days to represent its interest, and that if no new counsel were secured within that time, Claimant's workers' compensation case would be placed in concluded status and placed in line for a decision.

Based upon the testimony and evidence presented at the hearings, the WCJ determined that Fayette/Cura violated the Act by failing to pay Claimant's medical expenses and indemnity benefits on a timely basis. By decision dated October 10, 2006, the WCJ granted Claimant's Penalty Petition against Fayette and Cura and assessed a 10% penalty on all late compensation checks and a 25% penalty on all unpaid medical expenses. Fayette appealed the WCJ's order to the Board, which affirmed, and now petitions this Court for review of the Board's order. Fayette raises the following questions for our review:

1. Whether the automatic stay, imposed due to the Chapter 11 Bankruptcy filing by Cura, should have been lifted by the WCJ.

2. Whether it was an error for the WCJ to grant the motion to withdraw filed by counsel for Cura by interlocutory order dated June 6, 2006, without notice to or consultation with Fayette.

3. Whether a penalty should have been imposed against Fayette when the penalty awards imposed by the WCJ were not tied to any discernable or avoidable wrongful conduct of Fayette.[6]

Automatic Stay

When a debtor begins bankruptcy proceedings, an automatic stay arises pursuant to Section 362 of Bankruptcy Code, 11 U.S.C. § 362. Section 362 generally acts to stay the commencement or continuation of any legal proceedings against a debtor while a bankruptcy administration is pending. The automatic stay does not require actual notice to be effective, as the function of the automatic stay provision is to halt all proceedings to collect against debtors once the petition in bankruptcy has been filed.

Section 362 of the Bankruptcy Code is not without exception. Section 362(b)(4) of the Bankruptcy Code, 11 U.S.C. § 362(b)(4),[7] protects a governmental unit's ability to enforce its police or regulatory power. The automatic stay provision of Section 362 has been found not to apply to workers' compensation proceedings. *ANR Freight System v. Workers' Comp. Appeal Bd. (Bursick)*, 728 A.2d 1015, 1020 fn. 7 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 561 Pa. 660, 747 A.2d 902 (1999). The administration of worker's compensation

[6] The issues have been reordered for ease of discussion. Based upon the issues presented, the scope of our review is limited to determining whether the WCJ abused her discretion or committed an error of law.

[7] Section 362(b)(4) of the Bankruptcy Code provides:

(b) The filing of a petition under Sections 301, 302, or 303 of this title does not operate as a stay ...

> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

claims by the State is a valid exercise of a governmental unit's regulatory power, and is exempt from the automatic stay. *Id.* Moreover, the automatic stay provision of Section 362 does not apply until such time as it is proven that the employer "is within the jurisdiction of a bankruptcy court of competent jurisdiction and is affected by the stay provisions of that court." *Id.*

In this case, Cura's counsel advised the WCJ that it had filed voluntary Chapter 11 bankruptcy proceedings. However, Cura failed to provide any information whatsoever to confirm that it was actually within the jurisdiction of the bankruptcy court and that the workers' compensation proceedings were affected by the stay provision of Section 362. Moreover, a penalty proceeding to determine whether an employer has violated the Act is a valid exercise of a WCJ's regulatory power, and is exempt from an automatic stay.[8] Finally, even if the stay would have prevented the penalty petition from going forward against Cura, it would not have prevented the matter from proceeding against Fayette. We, therefore, conclude that the WCJ did not err or abuse her discretion in allowing the workers' compensation proceeding to move forward.

Withdrawal of Counsel

The statutes and regulations relating to workers' compensation proceedings do not set forth rules pertaining to withdrawal of counsel. Nevertheless, we are guided by the Pennsylvania Rules of Civil Procedure, which

[8] As the Board properly notes, while this exception allows regulatory actions to proceed in spite of Section 362, and permits the enforcement of resulting judgments or orders, it does not permit enforcement of money judgments without first obtaining relief from the stay. Should Cura fall within the jurisdiction of a bankruptcy court, the WCJ's penalty assessment may be subject to the automatic stay provisions unless Claimant can establish that he is entitled to relief from the stay. *ANR Freight*, 728 A.2d at 1020 fn. 7.

while not controlling in the workers' compensation arena, are instructive. Pursuant to the Rules of Civil Procedure, an attorney may not withdraw his or her appearance without leave of court, unless another attorney (i) has previously entered or (ii) is simultaneously entering an appearance on behalf of the party, and the change of attorneys does not delay any stage of the litigation. Pa. R.C.P. No. 1012. Leave of court to withdraw an appearance shall be sought by petition; copies of the petition shall be served upon all other parties to the action pursuant to Pa. R.C.P. No. 440. *Id.*; *see also Spector v. Greenstein*, 85 Pa. Super. 177 (1924) (withdrawal should be by leave of court and a client should have notice).

Pursuant to the Pennsylvania Rules of Professional Conduct, an attorney is required to notify a client when he is withdrawing from representing that client. Pa. R.P.C. No. 1.16. The attorney must also take reasonable steps to avoid foreseeable prejudice to the rights of his client, including allowing time for employment of other counsel and surrendering to client all papers and property to which the client is entitled and complying with applicable laws and rules. *Id. See also Commonwealth v. Scheps*, 523 A.2d 363, 368 (Pa. Super.), *petition for allowance of appeal denied*, 516 Pa. 633, 533 A.2d 91 (1987). A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation. *See* Pa. R.P.C. No. 1.16.

Ordinarily, the question of whether an attorney should be permitted to withdraw an appearance is within the discretion of the trial court and the decision of the trial court will be reversed only when plain error is committed. *C. E. Williams Co. v. Henry B. Pancoast Co.*, 412 Pa. 166, 194 A.2d 189 (1963). In the absence of a clear abuse of discretion, matters purely within the discretion of a trial

court are not reversible on appeal. *Id.* There are no prophylactic rules which exist when determining whether a denial or withdrawal amounts to an abuse of discretion. *Scheps*, 523 A.2d at 368. Each case must be decided by balancing the competing interests and giving due regard to the facts presented. *Id.*

Here, Attorney Jill Nolan of the law firm, Swartz Campbell, LLC, was secured by Cura to represent Fayette/Cura in this workers' compensation claim. By letter dated January 16, 2006, Nolan requested permission to withdraw as counsel. In the letter, Nolan advised that for several months the firm had neither meaningful contact with Cura nor instructions on how to proceed or even if continued representation were authorized. Nolan further stated that the firm's bill for legal services remained unpaid since prior to the bankruptcy proceedings. Finally, Nolan stated that she notified Fayette of the request to withdraw as counsel by furnishing it with a copy of the letter.

Approximately six months later, by order dated June 6, 2006, the WCJ granted counsel's request to withdraw and directed Employer to obtain counsel within thirty (30) days to represent its interest. The order advised that if substitute counsel were not secured within this timeframe, the case would be placed in concluded status and placed in line for decision, which is what occurred. The order further advised "[a]t any hearing … a request for reconsideration of this order may be made." The WCJ noted that neither Cura nor Fayette contacted her in regard to the June 6, 2006 interlocutory order.

Fayette claims it did not receive notice of and was not aware of the WCJ's interlocutory order. However, as the Board noted:

> While Defendant argues that the WCJ erred in rendering a Decision in this matter because it was not afforded the opportunity to be present, to participate, or to present

> witnesses, on the contrary, Defendant's prior counsel, who subsequently withdrew, was present at each of the four hearings in this matter, and cross-examined Claimant and presented a witness on Defendant's behalf. Furthermore, while Defendant argues that it was not aware of the Interlocutory Order granting prior defense counsel's request to withdraw, in that the WCJ did not send notice of the Order or otherwise notify Defendant concerning the Order, we see no indication that Defendant argues that it was unaware that prior defense counsel had withdrawn, but only that it was not aware of the issuance of the Interlocutory Order granting the Withdrawal. Because we see no indication that Defendant was not aware that prior defense counsel had withdrawn, neither do we see any indication that Defendant lacked an opportunity to participate, but only that it failed to do so. Moreover, we see no indication that this stage of the litigation was critical in any fashion, as the matter had already been pending for one year and four hearings had been held, and Defendant does not indicate what additional evidence it would have presented had it participated.

See Board Opinion and Order at p. 7-8.

We agree, and conclude that under the circumstances the WCJ did not abuse her discretion in permitting counsel to withdraw.

Penalty Award

An employer is subject to penalties when it violates some provision of the Act, but such penalties must be based upon some discernible and avoidable wrongful conduct. *Snizaski v. Workers' Comp. Appeal Bd. (Rox Coal Co.)*, 586 Pa. 146, 891 A.2d 1267 (2006); *Constructo Temps, Inc. v. Workers' Comp. Appeal Bd. (Tennant)*, 907 A.2d 52 (Pa. Cmwlth. 2006), *affirmed by* 947 A.2d 724 (Pa.

2008).[9] In *Constructo Temps*, this Court held that penalties may not be assessed against an employer that contracted with an insurance company for workers' compensation coverage,[10] when that insurance company subsequently went into liquidation and the State Workmen's Insurance Fund delayed making benefit payments to the claimant.[11]

Here, Fayette does not challenge the WCJ's determinations that Claimant's properly submitted medical expenses were not paid and that Claimant's indemnity benefits were untimely paid. Rather, citing *Constructo Temps*, Fayette

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[9] The issues on appeal in *Constructo Temps* were:

> (1) Whether an order prohibiting the assessment of penalties against the Workers' Compensation Security Fund for its failure to pay reasonable and necessary medical expenses incurred by the claimant violated the humanitarian purposes of the Workers' Compensation Act?
>
> (2) Whether an employer may be assessed a penalty for its failure to pay reasonable and necessary medical expenses incurred by the claimant where the penalties imposed resulted from the conduct of the Workers' Compensation Security Fund?

[10] Pursuant to the Act, employers liable under the Act are required to insure payment of compensation in the State Workmen's Insurance Fund, or in any insurance company, or mutual association or company; such insurer shall assume the employer's liability. Section 305(a)(1) of the Act, 77 P.S. § 501(a)(1).

[11] As we noted in *Constructo Temps*:

> Employer complied with the Act, although, through no fault of Employer, the licensed insurance company with whom it contracted to assume its liability went into liquidation. As noted above, Employer met its statutory obligation by insuring its liability. By doing so, under operation of law, the insuring company assumed responsibility for processing and paying claims against Employer. . . . . Imposition of penalties on Employer amounts to an attempt to penalize into compliance an already compliant employer - it, thus, would not serve its intended purpose of inducing non-compliant employers into compliance, and penalizing avoidable wrongful conduct.

907 A.2d at 61.

contends that since it "obtained insurance from Cura" for workers' compensation liability, Fayette should not have to pay the penalty for Cura's failure to make payments in accordance with the Act. Were Cura an insurance carrier, this argument would have merit. However, Cura was *not* an insurance company. Rather, it was a third party administrator which contracted to undertake personnel administration for its clients, including payroll and the *placement* of insurance. As is noted above, Cura did place workers' compensation insurance for the Fayette employees with Frontier Insurance, but this policy expired before Claimant was injured. After Claimant's injury, Cura undertook to make wage loss payments, but the record is devoid of evidence, and no party has argued, that either Cura or Fayette applied for approval from the Insurance Department to be self-insured for workers' compensation—or any other—purpose. Finally, counsel for Fayette/Cura presented testimony from a Cura employee that it had recently been discovered that a policy for insurance had been placed with Legion Insurance Company,[12] but no policy or certificate was ever produced, and the WCJ discredited the testimony.

Therefore, while Fayette may have acted in good faith and may have believed that through its contract with Cura it had taken the necessary steps to obtain workers' compensation insurance, it did not, in fact, obtain the required coverage. Although Fayette may have a claim against Cura, that is of no help to it in this matter. An employer has an absolute duty under the Act to obtain workers' compensation insurance unless it is approved by the Pennsylvania Insurance Department as a self-insurer. See Section 3505(a)(1) of the Act, 77 P.S. § 501(a)(1). While it may contract with another to handle such administrative obligations, the ultimate responsibility remains with the employer if the third party

[12] At the time of the hearing, Legion was also insolvent, and was in liquidation.

fails to perform. Accordingly, because Fayette/Cura did not obtain insurance which covered Reese's injury, Fayette may not now avoid penalties for the untimely payment of the benefits to which he was entitled.

For the foregoing reasons we affirm the decision of the Board.

BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 18th day of July, 2008, the order of the Workers' Compensation Judge in the above captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge