

On May 7, 2007, before the WCJ, Pitt introduced into evidence its fee agreement with Claimant and withdrew the claim petition. On May 23, 2007, the WCJ issued a decision that recognized the fee agreement such that Pitt began to receive ongoing attorney fees of 20% of Claimant's compensation.

On January 24, 2008, Claimant hired George Martin (Attorney Martin) to represent him. On January 29, 2008, Claimant returned to work briefly. On January 30, 2008, Employer issued a notice of suspension. On February 7, 2008, Claimant as represented by Attorney Martin petitioned to challenge the notice of suspension. On March 14, 2008, the petition was granted and partial disability benefits were reinstated from February 1, 2008, to February 25, 2008, along with total disability benefits from February 26, 2008, forward. The WCJ awarded Attorney Martin a twenty percent attorney fee.

On March 17, 2008, Employer petitioned to modify Claimant's benefits on the basis that Claimant was offered a specific job.

On April 17, 2008, the WCJ conducted a hearing. Employer and Claimant, represented by Attorney John Dogum of Attorney Martin's office agreed to go to mediation. On May 28, 2008, Attorney Martin sent Pitt a letter indicating that its entitlement to attorney fees was nullified when the notification of suspension was filed.

The WCJ conducted a hearing on June 12, 2008. Employer and Claimant presented a compromise and release agreement for the WCJ. Attorney

George Walker of Pitt submitted a quantum meruit affidavit as well as a contingent fee agreement. Attorney Alfred Carlson (Attorney Carlson) of Attorney Martin's office stated that because Pitt received \$74.50 per week from March 16, 2007, to January 29, 2008, for a total of \$3,382, Pitt was not entitled to a quantum meruit claim because "Mr. Pitt's office has already been compensated for the entire amount of the quantum meruit and in fact has been compensated approximately \$1,200 over and above the quantum meruit award which has been submitted associated with this case." Notes of Testimony, June 12, 2008, (N.T.) at 6; Reproduced Record (R.R.) at 61a. Attorney Carlson also stated that none of the negotiations for the compromise and release agreement were conducted by Pitt. N.T. at 6; R.R. at 61a.

Attorney Walker stated that it was Pitt's position that it was entitled to a quantum meruit fee. N.T. at 7; R.R. at 63a.

Claimant testified that Attorney Martin was his attorney, and Attorney Martin negotiated the settlement. N.T. at 11; R.R. at 66a. Claimant further testified that he would like Attorney Martin to receive an attorney fee but not Pitt. N.T. at 12; R.R. at 67a.

The WCJ adopted and approved the compromise and release agreement and dismissed the modification petition as moot. The WCJ approved Attorney Martin's fee agreement and awarded Attorney Martin twenty percent of Claimant's proceeds. The WCJ awarded Pitt \$150 as a quantum meruit fee to be

deducted from Attorney Martin's fee. The WCJ made the following relevant findings of fact:

9. For purposes of the fee dispute issue, this Judge has marked into evidence . . . correspondence from Larry Pitt Esq. dated May 19, 2008 in which Mr. Pitt explained that he represented the Claimant in an earlier Reinstatement Petition which was decided by WCJ Lincicome in a Decision dated June 7, 2007, and that he had continued to receive his contingent fee following that Decision. He was not terminated by Claimant nor did he receive correspondence directly from Martin Banks advising him that they had entered their appearance as counsel in the instant matter.

10. This Judge has also marked into evidence correspondence from George Martin Esq. dated May 28, 2008 responding to Mr. Pitt's correspondence. Mr. Martin asserts that Mr. Pitt's entitlement to a fee was nullified [sic] when a Notification of Suspension was filed suspending benefits as of January 29, 2008. A Challenge Petition was then filed by Mr. Martin's firm, who continued to represent the Claimant on that, and in defense of the Modification/Suspension Petition before this Judge. This Judge is not privy to whether or not Mr. Martin was successful in transferring the attorney's fee to himself following the success of the Challenge Petition.

11. This Judge finds, based upon the assertion that Mr. Pitt received his twenty percent fee through January 29, 2008, that Mr. Pitt would not then be entitled to a quantum meruit fee for the same time period. In review of the quantum meruit fee presented . . ., all time set forth therein pre-dated January 29, 2008 and therefore the fees sought are for a period during when Mr. Pitt continued to receive his twenty percent fee. He is not entitled to both. The only fee that is set forth after January 29, 2008 is the .5 hour for attending the April 17, 2008 [hearing]. Since the Claimant failed to terminate Mr. Pitt's services nor did Mr. Martin's firm contact Mr. Pitt or advise of his undertaking services for the Claimant, Mr. Pitt was

forced to attend the April 17, 2008 hearing. As such, the .5 charge as set forth . . . is awarded to Mr. Pitt. All other quantum meruit fees presented by Mr. Pitt are denied.

WCJ's Decision, June 24, 2008, Findings of Fact Nos. 9-11 at 2; R.R. at 13a.

Pitt appealed to the Board which affirmed.

Pitt contends that the Board erred when it affirmed WCJ McCormick's decision to award a fee of \$150 where the proper standard was to apportion the fee between Pitt and Attorney Martin.¹

Pitt asserts that the WCJ should have split the attorney fees of \$20,000.00 from the Compromise and Release Agreement based on the length of time that each attorney represented Claimant. Pitt asserts that until the time of its informal discharge on March 19, 2008, Pitt attempted to resolve the matter with Employer's insurance carrier. As a result, Pitt asserts that the \$150.00 quantum meruit award was wholly insufficient. Because Pitt represented Claimant from March 29, 2007, and Attorney Martin represented Claimant after January 24, 2008, Pitt asserts that the fee generated from the compromise and release agreement should be apportioned with seventy-five percent going to Pitt and twenty-five percent going to Attorney Martin.

¹ This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

In Hendricks v. Workers' Compensation Appeal Board (Phoenix Pipe & Tube, 909 A.2d 445 (Pa. Cmwlth. 2008), this Court addressed the issue of apportionment of attorney fees between two successive attorneys in a workers' compensation case. In Hendricks, Kevin Hendricks (Hendricks) received workers' compensation benefits pursuant to a notice of compensation payable. His employer, Phoenix Pipe & Tube (Phoenix) petitioned to terminate benefits. Hendricks hired attorney Adam Sager (Attorney Sager) to represent him in defense of the termination petition. Hendricks signed a fee agreement that entitled Attorney Sager to twenty percent of Hendricks's ongoing workers' compensation benefits. Attorney Sager successfully defended the petition. Attorney Sager received twenty percent of Hendricks's benefits each week. Over three years later on April 12, 2001, Hendricks terminated Attorney Sager and expressed his intent to hire Attorney Paul Silver (Attorney Silver) as his new counsel. Hendricks, 909 A.2d at 447.

In 2002, Attorney Silver petitioned for approval of counsel fees and asked the Workers' Compensation Appeal Board to approve his fifteen percent fee agreement with Hendricks. The Workers' Compensation Appeal Board rejected the request because Attorney Sager had been receiving an approved twenty percent counsel fee for past services rendered in connection with the successful defense of a termination fee. The Workers' Compensation Appeal Board also stated that it had no authority to discontinue that fee. In November 2004, Hendricks, through Attorney Silver petitioned for penalties and alleged that Phoenix had failed to pay Hendricks's medical bills. The Workers' Compensation Judge continued the hearings as the parties pursued settlement negotiations. On March 9, 2005,

Attorney Silver requested approval of his attorney fee agreement pending resolution of the matter. By interlocutory order dated March 31, 2005, the Workers' Compensation Judge approved Attorney Silver's fee. In April 2005, Phoenix ceased making payments to Attorney Sager. Hendricks, 909 A.2d at 447.

Attorney Sager filed a penalty petition against Phoenix for its failure to pay him his twenty percent fee beginning in April 2005. Phoenix and Attorney Silver settled Silver's penalty petition. The Workers' Compensation Judge permitted the withdrawal of Silver's petition and approved his counsel fee. The Workers' Compensation Judge also dismissed Attorney Sager's petition on the basis that jurisdiction to resolve a fee dispute rested with the appropriate court of common pleas. Attorney Sager petitioned for appeal nunc pro tunc for reinstatement of counsel fees with the Workers' Compensation Appeal Board which treated the petition as an appeal. Attorney Silver moved to quash the appeal. The Workers' Compensation Appeal Board denied the motion to quash and reversed the award of counsel fees to Attorney Silver and directed Phoenix to pay twenty percent of Hendricks's compensation to Attorney Sager. The Workers' Compensation Appeal Board reasoned that the fee agreement between Hendricks and Attorney Sager had not been extinguished just because Hendricks retained new counsel. Hendricks, 909 A.2d at 447-448.

Attorney Silver petitioned for review with this Court. Attorney Silver contended that the Workers' Compensation Appeal Board exceeded its authority when it decided the fee dispute, that the Board improperly considered evidence that

was never before the Workers' Compensation Judge, and that his fee agreement superseded Attorney Sager's fee agreement. Hendricks, 909 A.2d at 448-449.

This Court examined the relevant statutes and caselaw and affirmed² the Board's determination that the WCJ and Board had authority to determine the division of counsel fees:

The Board, also, correctly highlighted the importance of enforcing a claimant's fee obligation to workers' compensation counsel. . . . It is also important to protect a claimant's right to be represented by counsel of his or her choice. The balancing of these two important interests and its effect on the workers' compensation system, squarely places this issue with the competence of the WCJs and Board, authorities whose varied responsibilities also include guarding the workers' compensation system.

Hendricks, 909 A.2d at 456.

It is clear from Hendricks that the WCJ and the Board have the authority to allocate the fees between two attorneys who have represented the same claimant.

Pitt argues that it is entitled to seventy-five percent of the fee because it represented Claimant until March 19, 2008, when it was informally discharged.

² With respect to the other issues, this Court vacated the portion of the Board's order that awarded Attorney Sager fees and remanded to the Board to remand to the WCJ for further proceedings.

Pitt bases its argument on Section 442 of the Workers' Compensation Act (Act)³ which 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.

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 upon by claimant and his attorneys, without regard to any per centum. In the case of compromise and release settlement agreements, no counsel fees shall exceed twenty per centum of the workers' compensation settlement amount.

Pitt argues that Section 442 does not require a WCJ to calculate attorney fees pursuant to a quantum meruit component and that an apportionment of the fee between two attorneys is the appropriate measure. A close reading of Section 442 does not lead to this conclusion. While it is true that with a compromise and release agreement the counsel fees shall not exceed twenty percent of the settlement amount, Section 442 is silent as to the method by which a WCJ may apportion fees.

³ Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §998.

Pitt next asserts that it represented Claimant from the time of the award by the WCJ on May 23, 2007. Pitt asserts that because Pitt was not properly discharged and Attorney Martin assisted Claimant in an attempt to avoid his obligation to Pitt, Pitt was entitled to a percentage of the twenty percent fee from the compromise and release. Pitt cites to Gingerich v. Workers' Compensation Appeal Board (U.S. Filter), 825 A.2d 788 (Pa. Cmwlth. 2003), *petition for allowance of appeal denied*, 576 Pa. 815, 839 A.2d 354 (2003).

In Gingerich, Jeffrey Gingerich had died while in the course of his employment with U.S. Filter. Donna S. Gingerich (Gingerich) filed a fatal claim petition and was awarded workers' compensation benefits commencing on September 8, 1994, and continuing for as long as she was entitled. In an order in which the Workers' Compensation Judge awarded benefits to Gingerich, the Workers' Compensation Judge also awarded ongoing attorney fees in the amount of twenty percent of Gingerich's compensation to Elizabeth Gebhardt (Attorney Gebhardt), Gingerich's attorney. Gingerich received a sum in a third party action that was in excess of U.S. Filter's accrued lien. She was represented by John C. Evans (Attorney Evans). Gingerich then entered into a compromise and release agreement with U.S. Filter. She was represented by Attorney Evans. In the agreement she agreed to retain all the proceeds from the third party action, was not required to satisfy U.S. Filter's subrogation lien for benefits already paid to Gingerich, and agreed to release U.S. Filter from all future payments of fatal claim benefits. U.S. Filter agreed to pay any attorney fee owed to Attorney Gebhardt. However, the Workers' Compensation Judge determined that no fee was owed to Attorney Gebhardt. Gingerich appealed the decision on the attorney fees to the

Board which affirmed. Gingerich petitioned for review with this Court and asserted that her waiver of future benefits did not extinguish Attorney Gebhardt's right to ongoing attorney fees. Gingerich, 825 A.2d at 789-790.

This Court reversed and determined that Attorney Gebhardt did not release Gingerich from liability for the attorney fee and Gingerich could not release herself from liability so her liability for the attorney fees still existed. Gingerich, 825 A.2d at 791.

Although Gingerich involved a compromise and release agreement and multiple attorneys, it is distinguishable from the present case. In Gingerich, Gingerich was still receiving weekly benefits under the claim petition in which Attorney Gebhardt represented her and would for the foreseeable future until she entered into the Compromise and Release Agreement.

Here, the fee agreement between Pitt and Claimant stated that "Larry Pitt & Associates . . . will receive twenty percent (20%) of all compensation payable to me for as long as I receive workers' compensation benefits." Contingent Fee Agreement, March 29, 2007, at 1; R.R. at 81a. That in fact happened. Claimant's benefits ceased when Employer issued the notification of suspension on January 29, 2008. Claimant no longer received workers' compensation benefits, so Pitt was not entitled to any fee. Under Attorney Martin's representation, Claimant successfully challenged the suspension and obtained a reinstatement of benefits and ultimately negotiated the compromise and release agreement. While Claimant should have notified Pitt earlier that he no

longer wished Pitt to represent him, Pitt had received the compensation due him under the fee agreement. In its quantum meruit affidavit, Pitt listed no work performed for Claimant after January 22, 2008, with the exception of taking half an hour to attend the April 17, 2008, hearing. The WCJ authorized compensation of \$150 for that time.

The WCJ and the Board did not err when they awarded Pitt \$150. Hendricks. Pitt does not cite any statute or caselaw which explicitly sets forth that a split of the fee should be based on the closed period of representation or, seventy-five percent of the fee, especially when Pitt was already compensated for its services during the time it represented Claimant.

Accordingly, this Court affirms.

BERNARD L. MCGINLEY, Judge

