IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kirk E. Jones, Petitioner	:	
v.	:	No. 266 C.D. 2009
Workers' Compensation Appeal Board (Lower Lackawanna Sanitary Authority), Respondent	:	Submitted: September 18, 2009

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE JAMES R. KELLEY, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: January 15, 2010

Kirk E. Jones (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) which affirmed an order of a Workers' Compensation Judge (WCJ) granting Claimant's Penalty Petition pursuant to the Pennsylvania Workers' Compensation Act (Act)[1] and awarding penalties thereunder, and declining to award Claimant attorney fees for an unreasonable contest on the part of Lower Lackawanna Sanitary Authority (Employer). We affirm.

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

The relevant facts of this matter are not in dispute. On July 20, 2005, Claimant injured his lower back in the course and scope of his work for Employer following a physical attack by a coworker. Claimant thereafter filed a Claim Petition on August 8, 2005. On October 28, 2005, Employer filed a Notice of Compensation Payable (NCP) accepting liability for Claimant's injury, and Claimant subsequently began receiving temporary total disability benefits under the Act.

On November 9, 2005, Employer filed a Suspension Petition alleging that a specific job had been offered to Claimant. On November 18, 2005, Claimant filed a Penalty Petition alleging that Employer had ceased to pay wage loss benefits and/or had failed to pay benefits in a timely fashion, and sought a fifty percent penalty in addition to attorney fees for Employer's alleged unreasonable contest. On December 9, 2005, Claimant filed a Petition to Review Weekly Wage seeking a recalculation of his average weekly wage. On July 17, 2006, Claimant filed a second Penalty Petition alleging that Employer had failed to pay outstanding medical bills, and again seeking a fifty percent penalty and attorney fees for Employer's unreasonable contest. Hearings before the WCJ ensued.

By Decision and Order dated December 27, 2006 (2006 Decision), the WCJ granted Claimant's Review Petition and both Penalty Petitions, and denied Employer's Suspension Petition.[2] In part relevant to the instant appeal, in his grant of Claimant's Review Petition the WCJ increased Claimant's average weekly wage

[2] The 2006 Decision further dismissed Claimant's Claim Petition as moot in the wake of Employer's filing of the NCP.

by $26.44, to $493.76. Employer appealed to the Board, and also filed a Petition for Supersedeas. By Order dated February 8, 2007, the Board granted Employer's Petition for Supersedeas in regards to an award of penalties and unreasonable contest fees, and denied it in all other respects.

The Board affirmed the 2006 Decision in all respects with the exception of the issue of unreasonable contest fees, by Order dated October 27, 2007. The Board remanded the matter on that issue to the WCJ for proceedings to determine what portion, if any, of the attorney fees at issue were related to Employer's Suspension Petition, and what portion if any were related to criminal proceedings that also arose out of Claimant's work injury.

In April, 2007, Claimant filed the Penalty Petition at issue presently (hereinafter, the Penalty Petition), alleging that wage loss benefits, litigation costs, and medical benefits had not been paid or reimbursed in a timely fashion in violation of the WCJ's 2006 Decision. In relevant part, Claimant averred that Employer had failed to pay benefits at his new average weekly wage established in the 2006 Decision, had failed to pay his benefits weekly as opposed to biweekly, and had failed to reimburse medical expenses originally paid on Claimant's behalf by Highmark Blue Shield (Highmark).

During the ensuing proceedings before the WCJ, Employer presented the testimony of Leo Murray, an adjuster from Excalibur Insurance Management Services (Excalibur), the company that had adjusted Employer's claim.

Most generally summarized, Murray testified that although he was aware of the multiple decisions and orders in this case, including the supersedeas

grant, he had erroneously interpreted the Board's order as indicating that supersedeas had been granted on the issue of Claimant's higher average weekly wage, and had erroneously interpreted that Claimant's benefits were to be paid at the lower rate. When contacted regarding that error, Murray immediately corrected it and promptly paid Claimant all due back wages with interest.

Murray testified that any unpaid litigation costs were the result of Claimant's counsel's failure to submit an itemization of litigation costs showing which costs Claimant had paid and which costs Claimant's counsel had paid.

Murray also testified that Excalibur regularly paid without exception only biweekly benefits (at double the weekly rate) to its many claimants on claims it administered, as Claimant had been paid. Following Claimant's Penalty Petition objection to biweekly payment, Claimant was switched to weekly payments after so authorized by Murray's superiors.

Finally, Murray testified as to the unreimbursed medical expenses claimed as paid by Highmark on Claimant's behalf in Claimant's Penalty Petition. Murray testified that Health Care Recoveries sought reimbursement of these expenses under a subrogation lien, but had repeatedly failed to supply Murray with any information on the medical providers and treatments at issue as requested. Having had prior business dealings with Health Care Recoveries in which that company had attempted recoveries without documentation or that had already been paid, Murray repeated his requests for documentation, which Health Care Recoveries never supplied. Notwithstanding, eventually Murray requested of his

supervisors that payment be made in good faith on those reimbursements absent Health Care Recoveries' cooperation, which payments were then made.

Murray also testified that Claimant was currently being paid benefits weekly at the proper rate, that no outstanding medical treatment bills existed, that any payment delays or errors were inadvertent and that those errors had been promptly rectified when brought to his attention. The WCJ found Murray's testimony to be credible.

By Decision and Order circulated May 29, 2008, the WCJ awarded a ten percent penalty to Claimant for the wage loss benefits and litigation costs which had not been reimbursed by Employer in a timely fashion, as opposed to the fifty percent penalty requested by Claimant. The WCJ did not award unreasonable contest fees, concluding that Employer's delay in payment was inadvertent and unintentional, and had been promptly rectified when brought to the adjuster's attention. Both Claimant and Employer thereafter appealed to the Board.

The Board, by order dated January 21, 2009, affirmed, relying in part relevant hereto upon the WCJ's credibility determination of Murray's testimony. Claimant now petitions for review of the Board's order.

This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of Board procedures, and whether necessary findings of fact are supported by substantial evidence. Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995). The WCJ, as the ultimate fact finder in workers' compensation cases, has exclusive

province over questions of credibility and evidentiary weight, and is free to accept or reject the testimony of any witness, including a medical witness, in whole or in part. General Electric Co. v. Workmen's Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), petition for allowance of appeal denied, 529 Pa. 626, 600 A.2d 541 (1991). Determinations as to witness credibility and evidentiary weight are not subject to appellate review. Hayden v. Workmen's Compensation Appeal Board (Wheeling Pittsburgh Steel Corp.), 479 A.2d 631 (Pa. Cmwlth. 1984).

Claimant presents one issue for review: whether the Board erred in failing to award unreasonable contest fees in light of Employer's violations of the Act.

Where a claimant succeeds in a litigated case, reasonable attorney fees are awarded against the employer as a cost under Section 440(a) of the Act,[3] unless the record establishes a reasonable basis for the contest. Pruitt v. Workers'

[3] 77 P.S. § 996(a). Section 440(a) of the Act provides:

> In any contested case where the insurer has contested liability in whole or in part, including contested cases involving petitions to terminate, reinstate, increase, reduce or otherwise modify compensation awards, agreements or other payment arrangements or to set aside final receipts, the employe ... in whose favor the matter at issue has been finally determined in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for attorney's fee, ... Provided, That cost for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or the insurer.

Compensation Appeal Board (Lighthouse Rehabilitation), 730 A.2d 1025 (Pa. Cmwlth. 1999). An award of attorney fees is the rule, and excluding those fees is the exception to be applied only where an employer meets its burden of presenting sufficient evidence to establish that its contest was reasonable. Id. Whether an employer's contest is reasonable is a question of law fully reviewable by this Court. Id.

Claimant argues that Employer's multiple violations of the Act in this matter were not *de minimus*, and that Employer's contest of Claimant's Penalty Petition was not reasonable given those clear and substantial violations. Claimant emphasizes that, contrary to Employer's initial Answer in response to the Penalty Petition stating that it had not violated the Act, the evidence presented by Employer in the litigation on the Penalty Petition went solely to the inadvertence of Employer's violations. Claimant asserts that arguments as to Employer's intent in violating the Act are irrelevant as to whether or not the violations occurred, and irrelevant as to whether unreasonable contest fees were warranted herein. Under the unique facts and procedural posture of this case, we disagree.

Employer initially disputed Claimant's Penalty Petition with a general denial of Claimant's violation assertions. Reproduced Record (R.R.) at 5a. The record shows that prior to Claimant's Penalty Petition filing, Employer had already corrected its average weekly wage/benefit miscalculation, and had paid Claimant all benefits resulting from that error with interest. R.R. at 18a-19a. The record further shows that Employer began paying Claimant on a weekly basis, and paid the medical bill reimbursements due, four months after Claimant's Penalty Petition

filing but prior to the proceedings thereon. R.R. at 33a, 39a. Finally, and notably, the record as a whole shows that Employer did not contest its violations of the Act during the proceedings but limited its evidence to an explanation for its violations, as Claimant emphasizes.

Notwithstanding Claimant's assertion that Employer had no reasonable basis to contest the fact of its violation for its failures in paying the corrected average weekly, and its failures in paying the costs due under the WCJ's 2006 Decision, Employer did have a basis upon which to challenge the penalties to which it was subject. Employer's contest of the Penalty Petition was reasonable in that it had a reasonable basis to present evidence contesting the *extent* of the penalties to which it should be subjected under the WCJ's discretion, in light of its evidence mitigating the violations in regards to its corrections of those errors, and its inadvertence in violating the Act. As such, while Employer's contest of the underlying violations may not have been reasonable if pursued, its contest of the amount of penalties to be assigned thereto was prompted to resolve a genuinely disputed issue, and not to merely harass Claimant, and thusly was reasonable. See generally, Bates v. Workers' Compensation Appeal Board (Titan Const. Staffing, LLC), 878 A.2d 160 (Pa. Cmwlth. 2005), petition for allowance of appeal denied, 588 Pa. 752, A.2d (2006) (in light of the totality of circumstances, reasonableness of an employer's contest depends on whether contest was prompted to resolve a genuinely disputed issue, or merely to harass claimant) .

Accordingly, we affirm.

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JAMES R. KELLEY, Senior Judge

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O R D E R

AND NOW, this 15th day of January, 2010, the order of the Workers' Compensation Appeal Board dated January 21, 2009, at A08-1060, is affirmed.

JAMES R. KELLEY, Senior Judge