

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Quincy Mapp, :  
Petitioner :  
 :  
v. : No. 413 C.D. 2008  
 : Submitted: May 30, 2008  
Workers' Compensation Appeal :  
Board (School District of :  
Philadelphia), :  
Respondent :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE LEAVITT

FILED: July 17, 2008

Quincy Mapp (Claimant) petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) dismissing Claimant's penalty petition and denying his request for unreasonable contest fees. The Board affirmed the decision of the Workers' Compensation Judge (WCJ) that Employer did not violate a prior order when it paid statutory interest on the net amount of compensation payable, as opposed to the gross amount. For the reasons that follow, we will affirm the Board's adjudication.

Claimant was employed as a delivery person by the School District of Philadelphia (Employer). On July 29, 1999, Claimant was involved in a work-related vehicle accident and began receiving disability benefits pursuant to a Notice of Compensation Payable (NCP) that described the injury as a low back

strain. Claimant also developed pain in his right shoulder and sought treatment for both his low back and right shoulder with Employer's panel physician.

On July 26, 2000, Claimant returned to his pre-injury position without a loss in wages. Claimant again experienced right shoulder pain while driving for Employer and, as a result, left work on February 7, 2002. Claimant subsequently returned to his pre-injury position on April 27, 2003.<sup>1</sup>

Employer filed a petition for termination/suspension alleging that Claimant had fully recovered from the work injury. In the alternative, the Employer sought to have Claimant's benefits suspended because he had returned to his pre-injury position at wages equal to or greater than his pre-injury wages. Claimant answered by admitting that he had returned to work but denying that he had fully recovered. Claimant then filed claim, reinstatement, and review petitions seeking to modify the NCP's description of his work-related injury to include a right rotator cuff tear. Employer denied the allegations in Claimant's petitions. The petitions of Claimant and Employer were consolidated for a hearing before WCJ Scott M. Olin.

On November 7, 2003, the WCJ issued a decision that amended the NCP to include a right rotator cuff tear. The WCJ also found that Claimant returned to his pre-injury duties on July 26, 2000, without a loss in wages and, therefore, Claimant's weekly indemnity benefits were suspended as of that date. The WCJ further found that Claimant suffered a recurrence of his work-related

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<sup>1</sup> Claimant initially asserted that he returned to his pre-injury position with an alleged weekly wage loss of \$101.00; however, Claimant failed to present any evidence or stipulation of fact to establish this claim.

injury resulting in a wage loss for the period of February 8, 2002, through April 27, 2003. As a result, the WCJ issued an order stating, in relevant part, as follows:

The petitions for Reinstatement and/or Review of Compensation Benefits filed by [Claimant] are GRANTED. The description of the July 29, 1999 work injury in the Notice of Compensation Payable is amended to include right rotator cuff tear. *In addition, the [Employer] shall remit to [Claimant] with interest at ten percent (10%) per annum temporary total weekly indemnity benefits of \$510.10 from February 7, 2002 through April 27, 2003, subject to credits due the Employer for unemployment compensation benefits and wage/salary continuation received by the Claimant. All entitlement to weekly indemnity benefits as of April 28, 2003, is SUSPENDED.*

WCJ Order dated November 7, 2003, at 13 (emphasis added). Employer was also directed to pay Claimant \$1,500 in unreasonable contest fees. Neither party appealed the WCJ's order.

On December 15, 2003, Claimant filed a penalty petition alleging that Employer violated the Workers' Compensation Act<sup>2</sup> by failing to pay the correct amount of statutory interest ordered by the WCJ in his November 7, 2003, order. Claimant also alleged that Employer violated the Act by refusing to pay Claimant's counsel his full legal fee. Claimant requested a fifty percent penalty and unreasonable contest fees. Employer denied the allegation that it had not complied fully with the WCJ's order.

Hearings on Claimant's penalty petition were held before the WCJ. In support of his penalty petition, Claimant submitted an affidavit, with an attached invoice, a contingent fee agreement, a packet of litigation costs, and an hourly

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<sup>2</sup> Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§1-1041.4; 2501-2708.

breakdown of legal work performed by Claimant's counsel. Claimant also introduced the deposition testimony of Renee B. Zemble, Employer's claims adjuster.

Ms. Zemble testified that Claimant's weekly benefits for the period of February 7, 2002, through April 27, 2003, totaled \$32,254.91. During that period Employer had paid Claimant \$4,714.11 for wage continuation, sickness and accident benefits, which was credited against the compensation awarded. This resulted in a net compensation award of \$27,640.80. Ms. Zemble testified that Employer paid the \$27,640.80, plus statutory interest, of which 20 percent was paid to Claimant's counsel. She also presented proof that Employer paid the unreasonable contest attorney fee of \$1,500.

Employer submitted a computer printout dated February 10, 2004, as well as a computer payroll check inquiry dated February 10, 2004. The printouts confirmed Ms. Zemble's testimony that Employer took a credit for wage continuation and then added interest to the net compensation payable before issuing checks for the respective balances owed. The printouts also confirmed that Employer paid the unreasonable contest attorney fee of \$1,500. Also admitted was the WCJ's prior decision dated November 7, 2003.

The WCJ found that his November 7, 2003, order directed Employer to remit interest only on the net amount of benefits awarded, *i.e.*, the total amount of indemnity benefits minus the Employer's credit for wage continuation and sickness/accident benefits. The WCJ also found that Employer remitted the \$1,500 payment for an unreasonable contest as ordered in the prior proceeding. As a result, the WCJ dismissed Claimant's penalty petition and denied his request for

fees for unreasonable contest of the penalty petition. Claimant appealed to the Board, which affirmed. Claimant now petitions for review.<sup>3</sup>

Claimant raises three issues for this Court's review. First, Claimant challenges the determination that the statutory interest was to be computed on the net compensation payable after subtraction of Employer's credits, rather than on the gross compensation of \$32,254.91. Accordingly, Claimant argues that the WCJ erred in holding that Employer did not violate the Act. Second, Claimant contends that the WCJ erred in failing to award counsel fees on the gross amount of compensation rather than on the net compensation payable. Lastly, Claimant asserts that the WCJ erred in failing to impose unreasonable contest fees for Employer's contest of Claimant's penalty petition.

We consider, first, Claimant's argument that he was entitled to statutory interest on the gross compensation award, *i.e.*, the amount owed before application of Employer's credit for the disability and medical benefits it paid to Claimant. Claimant contends that the Act requires that statutory interest be calculated on the gross compensation amount before credits are applied. Thus, Claimant asserts that his penalty petition should have been granted.

When a claimant seeks an award of penalties, the claimant bears the burden of proving that a violation of the Act occurred. *Shuster v. Workers' Compensation Appeal Board (Pennsylvania Human Relations Commission)*, 745 A.2d 1282, 1288 (Pa. Cmwlth. 2000). Nevertheless, proving a violation does not automatically result in an award of penalties. It is for the WCJ to decide whether

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<sup>3</sup> This Court's review of an order of the Board is limited to determining whether the necessary findings of fact were supported by substantial evidence, constitutional rights were violated, or errors of law were committed. *Borough of Heidelberg v. Workers' Compensation Appeal Board (Selva)*, 894 A.2d 861, 863 n.3 (Pa. Cmwlth. 2006).

to impose penalties for a violation and the appropriate amount of any penalties. *City of Philadelphia v. Workers' Compensation Appeal Board (Sherlock)*, 934 A.2d 156, 160 (Pa. Cmwlth. 2007). This Court will not overturn a WCJ's assessment of penalties absent an abuse of discretion. *Id.* at 161.

Absent the grant of a supersedeas or stay, all orders regarding workers' compensation benefits are subject to immediate payment. *Id.* Section 430(b) of the Act provides, in relevant part, as follows:

Any insurer or employer who terminates, decreases or refuses to make any payment provided for in the decision without filing a petition and being granted a supersedeas shall be subject to a penalty as provided in Section 435 ...

77 P.S. §971(b). Section 435(d)(i) of the Act provides as follows:

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

77 P.S. §991(d)(i).

Section 406.1 of the Act requires the payment of interest on all due and unpaid compensation when there is a delay in payment regardless of the reason.<sup>4</sup> *Kerns v. Workmen's Compensation Appeal Board (Colt Resources, Inc.)*,

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<sup>4</sup> Section 406.1 of the Act, added by the Act of February 8, 1972, P.L. 25, provides, in relevant part, as follows:

Interest shall accrue on *all due and unpaid compensation* at the rate of ten percentum per annum. Any payment of compensation prior or subsequent to an agreement or notice of compensation payable or a notice of temporary compensation payable or greater in amount than provided therein shall, to the  
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613 A.2d 85, 91 (Pa. Cmwlth. 1992). Interest payments are not a penalty to the employer; rather, they are compensation to the claimant for the loss of the use of the funds during the contest. *Lastoka v. Workmen's Compensation Appeal Board*, 413 A.2d 481, 483 (Pa. Cmwlth. 1980). Indeed, Section 406.1 does not provide for interest on all awards of compensation. "Rather, Section 406.1 authorizes the payment of interest only in those cases in which an employer's payment of compensation payments is *delayed*." *Laundry Owners Mutual Liability Insurance Assoc. v. Workmen's Compensation Appeal Board (Herpak)*, 537 Pa. 367, 371, 655 A.2d 697, 698 (1994) (emphasis added).

Here, the WCJ's November 7, 2003, order directed Employer to pay an award of compensation, minus Employer's credits, plus statutory interest. Claimant does not dispute that the WCJ's order awarded interest on the net compensation payable and acknowledges that Employer complied with the terms of that order. Claimant argues, however, that the WCJ's order was incorrect because it should have imposed statutory interest on the gross amount of compensation prior to any deductions for Employer's credits.

Section 406.1 authorizes the payment of interest only in those cases in which an employer's payment of compensation payments is outstanding and delinquent. Assuming, *arguendo*, that interest should have been awarded on the gross amount prior to the deduction of Employer's credits, Claimant did not appeal

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extent of the amount of such payment or payments, discharge the liability of the employer with respect to such case.

77 P.S. §717.1(a) (emphasis added).

the November 7, 2003, order. Accordingly, this order is final and binding.<sup>5</sup> *Borough of Beaver v. Steckman*, 728 A.2d 418, 419 (Pa. Cmwlth. 1999). Because Employer complied with the November 7, 2003, order, we must affirm the WCJ's determination that Claimant failed to establish that Employer violated the Act by not complying with the WCJ's November 7, 2003, order.

Claimant next argues that the WCJ erred in holding that Employer did not violate the Act by not paying the full amount of counsel fees ordered. The award of counsel fees in workers' compensation cases is governed by Section 442 of the Act, which states, in pertinent part:

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*.

77 P.S. §998 (emphasis added). This Court has interpreted the term "amount awarded" as used in Section 442 to include all amounts of compensation awarded to a claimant in a WCJ's order. *Workmen's Compensation Appeal Board v. General Machine Products Co.*, 353 A.2d 911, 915 (Pa. Cmwlth. 1976). This Court has also held that the fact that an employer was granted a credit against the amount awarded to the claimant does not preclude the award of counsel fees on the gross compensation amount awarded. *Ford Aerospace v. Workmen's Compensation Appeal Board (Davis)*, 478 A.2d 507, 509 (Pa. Cmwlth. 1984)

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<sup>5</sup> Under Section 423 of the Act, 77 P.S. §853, a party has 20 days after notice of a WCJ's adjudication to file an appeal with the Board.



(under Section 442, employer was not entitled to have counsel fees calculated on the basis of the net compensation award).

Claimant contends that Claimant's counsel created a pecuniary benefit for Employer in the form of credits and, as a result, Claimant's counsel fee should have been based on the gross compensation prior to the deductions for Employer's credits. Although Claimant's argument is not without merit, he failed to raise that issue below. Instead, the only issue raised was that Employer did not pay the unreasonable contest fee of \$1,500.

In his petition for penalties, Claimant asserted the following:

[Employer] also violated *Sec. 440 of the Act* by refusing to pay counsel its full legal fee interest of \$7,311.15. Credits for wage continuation and child support are deductible from the [Claimant's] share. Because the violations of the Act are intentional, [Claimant] requests assessment of a 50% penalty on compensation that is due and owing.

Reproduced Record at 65a (emphasis added) (R.R. \_\_). Similarly, in the appeal to the Board, Claimant alleged the following errors on appeal:

The WCJ erred by allowing [Employer's] credits to have priority over the calculation of [Claimant's] counsel fee and statutory interest in violation of *Sec ... 440 of the Act*.

R.R. 58a (emphasis added). Section 440 of the Act provides for the award of unreasonable contest fees.<sup>6</sup> In support of his penalty petition, Claimant submitted an affidavit attesting that:

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<sup>6</sup> Section 440(a) of the Act, added by the Act of February 8, 1972, P.L. 25, provides in relevant part:

In any contested case where the insurer has contested liability in whole or in part ... the employe ... in whose favor the matter at issue has been finally determined  
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I never received payment of the \$1,500.00 attorney fees owed to me because my [Employer] committed an unreasonable contest.

R.R. 35a.

In short, the only issue raised by Claimant was whether Employer paid the attorney fee awarded for Employer's unreasonable contest. Claimant did not challenge the calculation of the 20 percent fee. Accordingly, the issue of whether Claimant's counsel fee should have been calculated on the gross compensation award has not been preserved but, rather, waived.<sup>7</sup> *Wheeler v. Workers' Compensation Appeal Board (Reading Hospital and Medical Center)*, 829 A.2d 730, 735 (Pa. Cmwlth. 2003) (“[i]t is well established that an issue is waived unless it is preserved at every stage of the proceeding ... [t]he strict doctrine of waiver applies to a workers' compensation proceeding.”).<sup>8</sup>

Claimant's final argument is that the WCJ erred in failing to assess unreasonable contest fees. Under Section 440(a) of the Act, counsel fees should be awarded to the party “in whose favor the matter at issue had been finally

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in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for attorneys' fees, witnesses, necessary medical examination and the value of unreimbursed lost time to attend the proceedings: provided that cost for attorney fees may be excluded when reasonable basis for the contest has been established by employer or insurer.

77 P.S. §996(a).

<sup>7</sup> See Pennsylvania Rule of Appellate Procedure 1551(a), which states, in relevant part:

Review of quasijudicial orders shall be conducted by the court on the record made before the government unit. No question shall be heard or considered by the court which is not raised before the government unit....

PA. R.A.P. 1551(a).

<sup>8</sup> Claimant did not appeal the WCJ's finding that Employer properly remitted the \$1,500 unreasonable contest fees awarded in the November 7, 2003, order.

determined in whole or in part,” unless the WCJ excludes the fees because the contest was reasonable. 77 P.S. §996(a). Here, Claimant initiated the workers’ compensation proceedings through a penalty petition pursuant to Section 435(d)(i) of the Act, 77 P.S. §991(d)(i). Because the penalty petition was not decided in Claimant’s favor, he is not entitled to counsel fees. Accordingly, we will affirm the denial of Claimant’s request for unreasonable contest fees.

Based on the foregoing, the Board’s dismissal of Claimant’s penalty petition and denial of unreasonable contest fees will be affirmed.

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MARY HANNAH LEAVITT, Judge

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Philadelphia),	:	
	:	
Respondent	:	

**ORDER**

AND NOW, this 17<sup>th</sup> day of July, 2008, the order of the Workers' Compensation Appeal Board dated February 22, 2008, in the above-captioned matter is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge