

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Rosar Cantafio, :
 :
 Petitioner :
 :
 v. : No. 784 C.D. 2007
 :
 Workers' Compensation Appeal : Argued: October 30, 2007
 Board (Dunmore School District), :
 Respondent :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: March 19, 2008

Rosar Cantafio (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board) which affirmed an order of a Workers' Compensation Judge (WCJ). Pursuant to the Pennsylvania Workers' Compensation Act (Act),¹ the WCJ's order awarded to Claimant and his counsel the reasonable costs of litigation in the amount of \$2,656.35, an amount \$1,000.00

¹ Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 - 1041.4; 2501 – 2626.

lower than that requested by Claimant. We reverse, and remand for further proceedings.

On March 7, 2003, Claimant suffered a work-related injury to his right knee, hip, and lower back while in the course and scope of his employment as head custodian at Dunmore School District (Employer). Thereafter, Claimant filed a Claim Petition, which Employer timely answered, and hearings were subsequently held before the WCJ at which both parties appeared and presented evidence. By Decision and Order dated April 15, 2005 (hereinafter, WCJ Decision I), the WCJ granted Claimant's Claim Petition and awarded ongoing benefits, ordered Employer to pay all reasonable and necessary medical bills, and did not approve any litigation costs for Claimant. On the issue of the litigation costs, the WCJ noted that Claimant had failed to timely submit any request therefor within the requested fourteen-day limit of the WCJ's letter of December 23, 2004. The WCJ's letter had notified counsel of the exhibits entered, and had requested any corrections or additions to that list within the stated time frame.

Claimant thereafter timely appealed WCJ Decision I on the sole issue that the WCJ had erred in failing to award reimbursement for Claimant's litigation costs. After hearing oral argument from the parties, the Board, by order dated August 5, 2005, remanded the matter back to the WCJ for consideration of Claimant's costs of litigation.

On remand, Claimant argued, *inter alia*, that he was entitled to reimbursement for a medical expert's deposition fee amounting to \$3,000.00, in addition to further costs. The WCJ, by Decision and Order dated April 19, 2006

(hereinafter, WCJ Decision II), awarded Claimant reimbursement totaling \$2,656.35, which amount included \$2,000.00 for the requested medical expert deposition fee. The WCJ found, in relevant part, that Claimant had failed to provide any “backup documentation” for his submitted litigation cost summary, and that the \$3,000.00 deposition fee greatly exceeded the usual and customary fee for depositions of the type at issue. The WCJ, considering the reasonableness of the amount of the deposition fee *sua sponte*, concluded that the \$3,000.00 fee was not reasonable. Additionally, the WCJ found that Claimant’s litigation cost summary failed to indicate whether those costs were paid for by Claimant, by Claimant's counsel, or by both parties, and thusly awarded the reimbursement in the names of both Claimant and his counsel. Claimant thereafter timely appealed WCJ Decision II to the Board.

After receiving argument from the parties without receiving additional evidence, the Board, by order dated April 2, 2007, affirmed WCJ Decision II. Claimant now petitions this Court 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). An abuse of discretion occurs not merely when the administrative tribunal reaches a decision contrary to the decision that the appellate court would have reached; rather, an abuse of discretion occurs when the course pursued represents not

merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied, or where the record shows that the action is a result of partiality, prejudice, bias or ill will. Payne v. Workers' Compensation Appeal Board (Elwyn, Inc.), 928 A.2d 377 (Pa. Cmwlth. 2007).

Section 440(a) of the Act² provides:

Contested cases regarding liability; attorney's fees and other costs; limitation and calculation

(a) 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 employee or his dependent, as the case may be, 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, 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 a reasonable basis for the contest has been established by the employer or the insurer.

77 P.S. §996(a). Under the plain language of Section 440(a), the trigger for an award of costs is, most generally, a final determination in a claimant's favor. Jones v. Workers' Compensation Appeal Board (Steris Corp.), 874 A.2d 717 (Pa. Cmwlth. 2005).

Claimant first argues that, herein, there is no dispute that the WCJ found in favor of Claimant, and therefore his claimed costs should have been

awarded in total. In support of that argument, Claimant first³ emphasizes that the WCJ erred by imposing various procedural burdens upon Claimant in his efforts to secure reimbursement for his litigation costs. We disagree.

Claimant argues that in both Decision I and Decision II, the WCJ imposed additional procedural burdens upon Claimant, as a prerequisite of obtaining costs reimbursement, that do not exist within the Act or within any decision interpreting the Act. Those additional burdens, Claimant asserts, included the submission of the Litigation Costs Summary within fourteen days of the exhibit list, an indication of whether the costs were paid by Claimant or Claimant's counsel, back-up documentation, deposition transcripts which indicate a start and stop time, and the actual costs being subject to review by the WCJ. Claimant emphasizes that Section 440(a) of the Act makes clear that costs “*shall be awarded*” without requiring any of the additional procedures mandated by the WCJ in this matter. 77 P.S. §996(a).

² Section 440 of the Act was added by the Act of February 8, 1972, P.L. 25.

³ Claimant also argues that the WCJ misstated the procedural history regarding Claimant's presentation of his litigation costs in his opinion in WCJ Decision I, and that the WCJ's finding therein that Claimant failed to provide a Costs Summary prior to the date of WCJ Decision I was error; Claimant asserts that he provided that Summary almost two months prior to the date of WCJ Decision I. Claimant's argument on this point is of no moment. The subsequent history of this case, including WCJ Decision II, as well as the Board's review thereof, reveal that the WCJ's finding that Claimant had failed to timely submit his Summary had no bearing on the ultimate issue of Claimant's entitlement to the award at issue, and had no effect on the amount of that award. Claimant does not argue, in the appeal *sub judice*, that the WCJ's finding in Decision I regarding Claimant's timely Summary submission had any direct or causal impact on the award at issue.

In its opinion upon review of WCJ Decision II, the Board held that the WCJ's additional procedural burdens amounted to "no reversible error." R.R. at 29a. However, Claimant asserts that while these additional burdens may appear to be insignificant, they represent an abuse of power in that a WCJ does not have authority to impose them, particularly when failure to comply results in penalties precluding a reimbursement of costs.

We disagree with Claimant's dispositive reliance upon these procedural directions, and agree with the Board that these directions do not constitute reversible error under the instant facts. Notwithstanding any such documentation requirement by the WCJ herein as a procedural direction, and/or Claimant's failure, *arguendo*, to provide that documentation, the WCJ herein ordered reimbursement of the litigation costs at issue, and any error on this point is harmless. As the WCJ's procedural directions herein did not result in any denial of the costs sought by Claimant, this argument is without merit. Employer, and the Board, are correct that any additional procedural "requirements" within the WCJ's requests did not preclude reimbursement, and did not influence the WCJ's reduction of the requested deposition fee. While requiring such additional reporting conditions may potentially be an error of law, no such requirement was made as a condition precedent to reimbursement in this case.⁴

⁴ We note that our precedents finding reversible error due to additional procedural requirements mandated by WCJs, in contradiction to Section 440(a)'s clear language, all involve incidences where reimbursement was withheld or prevented by such procedural barriers, a situation not at issue herein. As such, these precedents are inapplicable to the instant facts. See, e.g., Ritter v. Workers' Compensation Appeal Board (Bob's Big Boy), 702 A.2d 24 (Pa. Cmwlth.

(Continued....)

Claimant next argues that the WCJ erred and/or abused his discretion by finding, *sua sponte*, that the deposition fee at issue was not usual or customary, and in concomitantly reducing that fee. We agree, inasmuch as any such finding by the WCJ herein is not supported by any substantial evidence of record.

When a claimant prevails on a petition under the Act, this Court, in its appellate function, gives deference to the WCJ's exercise of discretion in determining and awarding reasonable litigation costs. Braun Baking Co. v. Workers' Compensation Appeal Board (Stevens), 583 A.2d 860 (Pa. Cmwlth. 1990). The question of whether a party's litigation costs are reasonable is one of fact for the WCJ to determine and may not be decided by the reviewing court as a matter of law. Select Security, Inc. v. Workers' Compensation Appeal Board (Kobrin), 901 A.2d 1129 (Pa. Cmwlth. 2006).

This Court has recognized that for litigation costs to be reasonable the WCJ must ascertain the extent to which the costs relate to the matter at issue upon which a claimant has prevailed. Jones. This Court has also remanded litigation cost matters for a general reasonableness determination, emphasizing that the WCJ's discretion lies in his power to determine what portion of multiple litigation costs are related to the portion of the litigation in which the claimant was successful. Select Security. In the instant matter, the deposition is, generally

1997) (Where both parties prevailed in part, and where the Board reversed a WCJ grant of litigation costs, counsel's failure to introduce costs after final determination but prior to WCJ's closing of the record should not be used to frustrate the purpose or the spirit of the Act; reopening the record to determine litigation costs is permissible where the interest of justice, including the humanitarian nature of Act, will be served.).

stated, a reasonable cost as it was essential in securing a successful decision for Claimant, and directly related thereto. However, the reasonableness of the *amount* of that cost is a factual determination that must be supported by substantial evidence of record. Lehigh County; Select Security.

Employer argues that the WCJ properly exercised his discretion under Section 440(a) in finding, as a matter of fact, that the cost of the deposition at issue was unreasonable. Employer emphasizes that the Board, and this Court, must now defer to that discretionary finding. Further, Employer asserts that Claimant's reliance upon Jones, Select Security, and related cost-reasonableness precedents is misplaced in that those precedents addressed merely the reasonableness of multiple costs in matters where neither an employer nor claimant prevailed on every issue before the WCJ. While we agree with Employer that our published precedents have not addressed a *sua sponte* WCJ finding or adjustment of the reasonableness of a specific cost, as opposed to the apportionment on reasonable grounds for multiple costs in which a party only prevailed in part, our standard of review in Workers' Compensation cases controls the instant issue. Simply put, the reasonableness of a particular cost under the Act is indeed an issue of fact for the fact finder, in this case the WCJ. Select Security. As a finding of fact, the finding must be supported by substantial evidence of record. Lehigh County.

In this case the WCJ found that the deposition at issue "is 43 pages long [and the WCJ therefor] estimates it took no longer than one hour for the deposition testimony . . ." WCJ Decision II, Finding 9. Further, the WCJ found that the deposition fee at issue exceeded "the usual and customary fee for

deposition transcripts that other professionals” routinely charge. Id., Finding 10. No evidence of record supports either of these Findings, and thus remand is necessary herein for the narrow purpose of determining the reasonableness of the amount of the deposition costs awarded to Claimant. Lehigh County; Select Security.

Finally, we address Claimant's contention that the WCJ's *sua sponte* posture in addressing the reasonableness of the deposition cost herein was itself an error, notwithstanding the issue of any evidentiary support within the record for that matter. We disagree. Section 440(a), by its own clear language, qualifies its grant of the costs enumerated therein by limiting them to “a reasonable sum.” 77 P.S. §996(a). As such, it is clearly within the purview of the WCJ's application of that statute to determine reasonableness as referenced therein, and we find no error in the WCJ's exercise of that discretion in this matter. Accord Jones (for litigation costs to be reasonable the WCJ must ascertain, under Section 440(a), the extent to which the costs relate to the matter); Braun Baking (WCJ's award of litigation costs to prevailing party was a discretionary act founded in the language of Section 440(a), which discretionary act will not be disturbed on appeal in the absence of any evidentiary issue in support thereof).

Accordingly, we reverse this matter, and remand it to the Board for further remand to the WCJ on the issue of determining the reasonableness of the

amount of the deposition fee awarded to Claimant as a related cost of the instant litigation upon which Claimant has prevailed.⁵

JAMES R. KELLEY, Senior Judge

⁵ We emphasize that the scope of our remand is strictly confined to an address of the reasonableness of the amount of the deposition fee at issue, the reimbursement of which has already been awarded to Claimant and is not in dispute.

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ORDER

AND NOW, this 19th day of March, 2008, the order of the Workers' Compensation Appeal Board, dated April 2, 2007, at A06-0985, is reversed. This matter is remanded to the Board with instruction for further remand to the Workers' Compensation Judge in accordance with the foregoing opinion.

Jurisdiction relinquished.

JAMES R. KELLEY, Senior Judge