

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Evette Lewis-Briggs and Law Offices	:	
of Kenneth M. Kapner, P.C.,	:	
Petitioners	:	
	:	
v.	:	No. 1785 C.D. 2012
	:	Argued: October 10, 2013
Workers' Compensation Appeal Board	:	
(Department of Public Welfare),	:	
Respondent	:	

**BEFORE: HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge**

***OPINION NOT REPORTED***

**MEMORANDUM OPINION  
BY JUDGE BROBSON**

**FILED: November 8, 2013**

Petitioner/intervenor Kenneth M. Kapner (Kapner), an attorney who formerly represented Claimant Evette Lewis-Briggs (Claimant), appeals from multiple orders of the Workers' Compensation Appeal Board (Board). In the order at the core of this appeal, dated August 17, 2012, the Board granted in part and denied in part Kapner's motion to intervene, quashed in part Kapner's appeal, and affirmed the February 12, 2010, decision of a Workers' Compensation Judge (WCJ), which directed Kapner to refund to the Department of Public Welfare (Employer) or its insurance carrier \$3,403.80 in overpayment of litigation costs. For the reasons set forth below, we now affirm.

This matter arose on October 9, 1998, when Claimant suffered a work-related injury. Employer accepted her injury through issuance of a notice of compensation payable. (Reproduced Record (R.R.) at 284a.) On December 18, 2002, however, Employer issued a notice of compensation benefits offset (Notice of Offset) on account of Claimant's receipt of a disability pension. Specifically, Employer sought to offset Claimant's indemnity benefits, effective January 12, 2003, to recover Workers' Compensation overpayments made to Claimant from the time she began receiving pension benefits. In response, on February 5, 2003, Claimant, *pro se*, filed a petition to review compensation benefit offset, asserting, *inter alia*, that her "payment into retirement account [was] also being counted." (Certified Record (C.R.), Claimant's review benefit offset petition.)

On February 7, 2003, Employer filed a petition to terminate compensation benefits, alleging that "Claimant has fully recovered from her October 9, 1998 work-injury as of January 14, 2003." (C.R., Employer's termination petition.) Employer also requested supersedeas in connection with the termination petition. On March 5, 2003, Claimant, represented by Kapner, answered the termination petition, denying Employer's allegation that she had fully recovered from her work injury.

By interlocutory order dated March 26, 2003, WCJ Patricia M. Bachman denied Employer's supersedeas request and approved a twenty percent counsel fee for Kapner. (R.R. at 275a.) On March 12, 2004, Claimant filed a petition for penalties, alleging that Employer did not comply with the WCJ order because it failed to pay counsel fees and, as a result, violated the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S.

§§ 1-1041.4, 2501-2708. By an order dated December 10, 2004, the WCJ granted Employer's termination petition (and, in the alternative, suspended Claimant's benefits as of January 14, 2003, for failure to cooperate during an IME), denied Claimant's review offset petition, and denied Claimant's penalty petition. (R.R. at 73a.) Claimant appealed to the Board. On April 24, 2006, the Board affirmed in part and reversed in part the WCJ's decision. In particular, it affirmed the termination of benefits. It reversed the WCJ's decision to the extent the WCJ (1) permitted Employer an offset for Claimant's receipt of pension benefits, (2) suspended Claimant's benefits as of January 13, 2003 for failure to cooperate, and (3) determined that Employer did not violate the Act by failing to pay Kapner twenty percent of Claimant's gross benefits. The Board remanded the matter to the WCJ for an assessment of penalties. (*Id.* at 65a.)

On November 2, 2006, Claimant filed a second penalty petition, alleging that Employer failed to reinstate compensation benefits in accordance with the Board's April 24, 2006 order. On remand, by order dated February 13, 2007, the WCJ ordered Employer to reinstate Claimant's benefits, effective January 12, 2003 until December 10, 2004 (the date of the WCJ's grant of the termination petition), along with the payment of statutory interest on deferred payments. (R.R. at 39a.) The WCJ also directed Employer to pay Kapner litigation costs in the amount of \$3,661.30. Finally, the WCJ denied Claimant's penalty petitions, concluding that Employer established a reasonable basis for contest. (*Id.*) Both parties appealed to the Board. Employer requested a supersedeas order as to the payment of the litigation costs, which was denied. Consequently, Employer paid the litigation costs to Kapner. (*Id.* at 12a, 20a.)

On August 29, 2008, the Board issued an order affirming in part and reversing in part the WCJ's decision. (R.R. at 32a.) The Board reversed the WCJ's decision to the extent it awarded Claimant benefits after January 14, 2003, the date of termination of benefits, and affirmed the WCJ's denial of penalty petitions and her finding of a reasonable contest. (*Id.*) The Board reasoned that Claimant was not entitled to an award of litigation costs in connection with the termination petition because she did not prevail against it. (*Id.* at 26a-27a.) It also determined that, because Claimant was only successful with regard to her review offset petition, she was entitled to litigation costs associated with that petition only. (*Id.* at 28a.) As a result, the Board vacated the award of litigation costs and again remanded the matter to the WCJ for a determination of costs solely related to Claimant's review offset petition. (*Id.*)

On April 21, 2009, following the Board's second remand, Kapner petitioned the WCJ to intervene in the proceeding, asserting that because he ceased representing Claimant as of November 24, 2008, he had to intervene to protect his own economic interest. Specifically, Kapner asserted that "Employer [sought] reimbursement for alleged overpayment of litigation expenses which may involve [his] assets." (C.R., Kapner's petition to intervene). On May 15, 2009, the WCJ issued an interlocutory order granting Kapner's petition.

On second remand, on February 12, 2010, the WCJ issued an order directing Kapner to refund Employer or its insurance carrier \$3,403.80 in overpaid litigation costs related to the termination petition. (R.R. at 21a.) Specifically, the WCJ found that Employer and Kapner had stipulated that Employer paid to Kapner \$3,661.30 in litigation costs, of which only \$257.50 represented costs associated with the review offset petition. (*Id.* at 20-21a.) The remainder of the cost, or

\$3,403.80, was tied to the termination petition. (*Id.*) Also, the WCJ specifically found that “Claimant, presently believed to be *unrepresented*, has not participated in the proceedings on this Remand.” (*Id.* at 20a (emphasis added).)

Kapner appealed the WCJ’s order to the Board, preserving all issues previously appealed by Claimant. In response, Employer filed a motion to quash Kapner’s appeal of previously remanded orders, asserting that Kapner lacked standing. Indeed, Employer argued that Kapner was entitled to appeal only the February 12, 2010 WCJ decision.

On August 17, 2012, the Board granted in part and denied in part Kapner’s motion to intervene, quashed in part his appeal, and affirmed the WCJ’s decision. (R.R. at 16a.) In particular, the Board agreed with Employer that Kapner lacked standing to appeal substantive issues because his “interest in the termination and penalty issues is [not] sufficiently substantial, direct, and immediate.” (*Id.* at 14a.) On the issue of litigation costs, however, the Board ruled that Kapner indeed had standing to appeal because the WCJ had ordered him to refund the overpayment of litigation costs to Employer or its insurance carrier. (*Id.* at 14a-15a.) Finally, based on our decision in *Barrett v. Workers’ Compensation Appeal Board (Sunoco, Inc.)*, 987 A.2d 1280 (Pa. Cmwlth.), *appeal denied*, 608 Pa. 670, 13 A.3d 480 (2010), the Board determined that the WCJ did not err in directing Kapner to disgorge payment of litigation costs.

On appeal,<sup>1</sup> Kapner raises several issues for our review.<sup>2</sup> First, he challenges the merits of the portions of the Board’s orders that were adverse to

---

<sup>1</sup> Our scope of review in a workers’ compensation appeal is limited to determining whether an error of law was committed, whether constitutional rights were violated, or whether **(Footnote continued on next page...)**

Claimant. Second, he argues that, in its August 17, 2012 order, the Board erred in dismissing his appeal from orders pertaining to issues previously litigated by Claimant. Third, Kapner argues that the Board erred in granting in part Employer's motion to quash his appeal of those orders. Finally, he argues that the Board erred in affirming the WCJ's decision directing him to refund to Employer or its insurance carrier \$3,403.80 in overpaid litigation costs.

Kapner's first three arguments broadly involve the issue of standing. Pursuant to Section 702 of the Administrative Agency Law (Law), "[a]ny person *aggrieved* by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals." 2 Pa. C.S. § 702 (emphasis added); *see also* Pa. R.A.P. 501 (providing "any party aggrieved by an appealable order . . . may appeal therefrom.") Whether a party has standing to appeal is determined on a case-by-case basis, and, if one is determined aggrieved, one has standing. *Robb v. Workers' Comp. Appeal Bd. (Dep't of Pub. Welfare)*, 718 A.2d 875 (Pa. Cmwlth. 1998). Although the term "aggrieved" is not defined in the Law, the case law has established that one is "aggrieved" if one (a) has a substantial interest in the subject-matter of the litigation; (b) the interest is direct; and (c) the interest is immediate and not a remote consequence. *S. Whitehall Twp. Police Serv. v. S.*

---

**(continued...)**

necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704.

<sup>2</sup> To the extent Kapner appeals from any order of the Board on Claimant's behalf, we must reject his appeal. As the evidence of record indicates, Kapner no longer represents Claimant and, as such, he is barred by the Pennsylvania Rule of Professional Conduct 1.16(a)(3) from acting on Claimant's behalf.

*Whitehall Twp.*, 521 Pa. 82, 86, 555 A.2d 793, 795 (1989). “A ‘direct’ interest requires a showing that the matter complained of caused harm to the party’s interest.” *Id.* at 86-87, 555 A.2d at 795.

Here, Kapner cannot be considered an aggrieved party for purposes of standing necessary to appeal from orders pertaining to Claimant’s substantive case. Kapner appealed, *inter alia*, from the Board’s orders addressing the termination petition as well as the two penalty petitions. As the record indicates, Kapner solely became involved in this matter because Claimant sought his counsel and representation, which ceased on November 24, 2008. As a result, his interest in the subject-matter of this case is not substantial, direct, and immediate to confer upon him standing. Also, Kapner only has standing before this Court to challenge the Board’s August 17, 2012 order, which addressed, *inter alia*, the issue of overpaid litigation costs, because he had moved for intervenor status. We, therefore, conclude that Kapner lacked standing to appeal the portions of the Board’s orders that were adverse to Claimant, and that the Board did not err in (1) dismissing his appeal from orders pertaining to issues previously litigated by Claimant and (2) granting in part Employer’s motion to quash his appeal from those orders.

We next address Kapner’s argument that the Board erred in affirming the WCJ’s decision directing him to refund the overpaid litigation costs relating to the termination petition. As the WCJ and the Board correctly noted below, a WCJ is authorized to correct the overpayment of litigation costs. *Barrett*, 987 A.2d at 1290. In *Barrett*, we concluded that “[b]ecause the WCJ erroneously ordered Employer to pay \$3,000 [in litigation costs], the WCJ can order *Claimant’s counsel* to refund the overpayment . . . . It is *Claimant’s counsel* that will be

affected, not Claimant, and it will not affect Claimant's compensation benefits."<sup>3</sup>  
*Id.* (emphasis added).

Here, similar to *Barrett*, Employer paid to Kapner \$3,661.30 in litigation costs related to the termination petition and review offset petition following the denial of its request for supersedeas. Thereafter, the Board determined that Employer had to pay litigation costs associated only with Claimant's review offset petition. Kapner and Employer stipulated that \$3,403.80 of the \$3,661.30 that Employer paid to Kapner related to the termination petition. Given our decision in *Barrett*, we cannot agree with Kapner that the WCJ was without authority to order him to refund \$3,403.80 in overpaid litigation costs or that the Board erred in affirming the WCJ's decision.

Accordingly, we affirm the Board's order.

---

P. KEVIN BROBSON, Judge

---

<sup>3</sup> “[T]he Act does not provide any authority for reimbursement to an employer when there has been an overpayment of benefits. When there is an overpayment of benefits to a claimant who is not entitled to those payments, relief *must* be obtained from the supersedeas fund.” *Hurst v. Workers’ Comp. Appeal Bd. (Preston Trucking Co.)*, 823 A.2d 1052, 1061 (Pa. Cmwlth. 2003) (emphasis added).



**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Evette Lewis-Briggs and Law Offices :  
of Kenneth M. Kapner, P.C., :  
Petitioners :  
 :  
v. : No. 1785 C.D. 2012  
 :  
Workers' Compensation Appeal Board :  
(Department of Public Welfare), :  
Respondent :

**ORDER**

AND NOW, this 8<sup>th</sup> day of November, 2013, the order of the  
Workers' Compensation Appeal Board dated August 17, 2012, is hereby  
AFFIRMED.

---

P. KEVIN BROBSON, Judge