

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

|                                    |   |                             |
|------------------------------------|---|-----------------------------|
| Joseph Sciglitano,                 | : |                             |
|                                    | : |                             |
| Petitioner                         | : |                             |
|                                    | : |                             |
| v.                                 | : | No. 1241 C.D. 2010          |
|                                    | : |                             |
| Workers' Compensation Appeal Board | : | Submitted: October 22, 2010 |
| (Boedco, Inc.),                    | : |                             |
|                                    | : |                             |
| Respondent                         | : |                             |

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE COHN JUBELIRER**

**FILED: April 14, 2011**

Joseph Sciglitano (Claimant) petitions for review of the Order of the Workers' Compensation Appeal Board (Board) that affirmed the Decision and Order on remand of the Workers' Compensation Judge (WCJ), which granted Claimant's Claim Petition, the Termination Petition of Boedco, Inc. (Employer), and Claimant's Penalty Petition, but assessed no penalties against Employer. Claimant argues that the WCJ's Decision was not reasoned, there was insufficient basis to grant the Termination Petition, and the WCJ abused her discretion in failing to assess penalties against Employer.

Claimant began working for Employer in June 2006<sup>1</sup> as a carpenter on a project to construct a two-story house. On June 20, 2006,<sup>2</sup> an 80-90 pound wooden beam slipped while Claimant was handing it up to a coworker and struck Claimant on the head. Claimant continued working and, on the same day, fell from a stepladder, injuring his hip, side, and shoulder. Claimant did not immediately seek treatment for these injuries. On June 30, 2006, Claimant was standing on the second floor of the structure while Employer's owner and a co-worker were standing above him on pieces of plywood supported by ceiling joists. While Claimant was handing a level up to his co-worker, approximately eight of the joists gave way and Claimant was struck by the plywood and joists. Claimant did not return to work after June 30, 2006.

Claimant filed a Claim Petition for the June 20, 2006 injuries (First Claim Petition)<sup>3</sup> on August 11, 2006. On the same date, Claimant filed another Claim Petition for his June 30, 2006 injury (Second Claim Petition). Also on August 11, 2006, Claimant filed two penalty petitions against Employer on the grounds that Employer had failed to timely issue a notice of compensation payable or a notice of compensation denial with respect to each date of injury. (First Penalty Petition

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<sup>1</sup> The WCJ's findings are inconsistent on this point. The WCJ found that Claimant started working for Employer on "June 7 or 8, 2006" and that Employer "hired the Claimant as a carpenter on June 19, 2006." (WCJ Decision, Findings of Fact (FOF) ¶¶ 11, 19, March 16, 2009.)

<sup>2</sup> The testimony in the record differs as to whether the date of this incident was June 14, 2006 or June 20, 2006. The WCJ found that the incident occurred on June 20, 2006, (FOF ¶ 12), and this fact is not relevant on appeal. In this opinion we will use June 20, 2006 as the date of the first incident.

<sup>3</sup> In the First Claim Petition, Claimant stated the date of the injuries as June 14, 2006.

and Second Penalty Petition, respectively.) Both penalty petitions requested 50% penalties. Employer filed an Answer to the First Claim Petition and First Penalty Petition on August 25, 2006; however, Employer did not timely file an Answer to the Second Claim Petition and Second Penalty Petition.

A hearing was held before the WCJ on May 15, 2007. At the hearing, Employer admitted that it failed to file an Answer to the Second Claim Petition. (WCJ Hr'g Tr. at 6, R.R. at a-000154, May 15, 2007.) Therefore, the WCJ issued an Interim/Interlocutory Order on June 12, 2007 granting the Second Claim Petition and ordering Employer to pay Claimant wage-loss benefits for the period from June 30, 2006 through September 4, 2006. At this hearing, Claimant presented his own deposition testimony, along with live testimony, as well as the deposition testimony of his treating physician, Edward Stankiewicz, M.D. Employer presented the deposition testimony of Employer's owner, Robert Jenkins, and Employer's medical expert, Karl Rosenfeld, M.D.

In his deposition testimony, taken on November 10, 2006, Claimant testified as to the circumstances of his injuries, as described above. In addition, Claimant testified that, subsequent to his June 30, 2006 injury and until he began treating with Dr. Stankiewicz on August 15, 2006, he experienced pain in his neck, shoulders, back, hip and legs. (Claimant Dep. at 22, R.R. at a-000052.) Claimant stated that, at the time of the deposition, he was still experiencing this pain but that the pain in his neck had improved somewhat during his treatment with Dr. Stankiewicz. (Claimant Dep. at 26, R.R. at a-000056.) At the May 15, 2007 hearing, Claimant testified that he did not believe he had hit a plateau in the relief

he was receiving from his therapy with Dr. Stankiewicz. (WCJ Hr'g Tr. at 17, R.R. at a-000165.) Claimant testified that he did not believe he could return to his pre-injury job or carry heavy weights, but he was not sure what kind of work he could do. (WCJ Hr'g Tr. at 16, 23, R.R. at a-000164, a-000171.)

Claimant also presented the deposition testimony of his treating physician, Dr. Stankiewicz. Dr. Stankiewicz testified that he first began treating Claimant on August 15, 2006, when Claimant presented with symptoms of impingement syndrome in his left shoulder and spasms in his neck and lower back. (Stankiewicz Dep. at 9, 12-13, R.R. at a-000069-70.) Dr. Stankiewicz testified that a sitting leg raise test indicated "irritation of the nerve roots in [Claimant's] lower back" and that Claimant's range of motion in his lower back was significantly limited. (Stankiewicz Dep. at 13, R.R. at a-000070.) Dr. Stankiewicz opined that, as a result of the June 20 and June 30, 2006 work incidents, Claimant sustained: "[n]umber one, a cerebral contusion; number two, a cerebral concussion; number three, a cervical sprain; number four, a cervical migraine; number five, a contusion of the left and right shoulder; number six, neuralgia or radiculitis; number seven, lumbar sprain or strain." (Stankiewicz Dep. at 14, R.R. at a-000071.) Dr. Stankiewicz ordered x-rays of Claimant's spine, which revealed no fractures. Dr. Stankiewicz prescribed Flexeril, Vicodin, and physical therapy, and recommended that Claimant not return to work. (Stankiewicz Dep. at 19, R.R. at a-000072.) As of the date of Dr. Stankiewicz's deposition, November 16, 2006, Dr. Stankiewicz opined that Claimant:

has had some mild improvement in his physical status, but in general has continued to suffer primarily with neck pain, low back pain, as well as left shoulder pain. He does have some right hip discomfort,

but his symptoms in those areas have remained consistent throughout his treatment period with some moderate improvement. I'm happy to state that is a postconcussion-type syndrome symptomatology has not been bothersome to him, and that appears to have resolved. . . . [B]ut symptoms persist in the neck, low back, and left shoulder, primarily with some right hip pain.

(Stankiewicz Dep. at 20-21, R.R. at a-000072.) With regard to Claimant's current condition, Dr. Stankiewicz testified that, as a result of the work incidents, Claimant

sustained a cerebral contusion, a cerebral concussion, both of which have appeared to be resolved. He sustained a cervical sprain, and presently has by MRI and clinical examination a disc bulge at the area of C4-C5 and broad based spondylitic ridging at the area of C5-C6. I have to state for the record that some of this changed on the MRI's degenerative nature, but [Claimant] had been asymptomatic prior to the injury and now is symptomatic. So a component of the abnormalities on the MRI of the cervical spine is preexisting and degenerative in nature. In addition to those diagnoses, [Claimant] had a cervical migraine . . . which he continues to have. He also had a contusion of the left and the right shoulder, and he continues to have pain in his left and right shoulder. By MRI and clinical examination [Claimant] has a small partial thickness tendonopathy of the supraspinatus tendon and a tendonitis. In addition to that, [Claimant] had hip pain; meaning, right hip pain, probably a bursitis, traumatic in nature, etiology still being worked up, and [Claimant] has low back pain as a result of the work-related injury, and that low back is a result of disc herniations at the area of L2-L3 and L3-L4, which does cause impingement on the dural sac and neuroforaminal narrowing. I have to state that there is some acuteness to the diagnostic studies that I referred to; although, there are some preexisting degenerative changes, [Claimant] does have evidence of acute injury in these diagnostic studies; for example, evidence of cervical spine straightening on the cervical spine MRI; meaning, he has spasms, and this is consistent with a semi-acute injury in this nature.

. . . [A]nd lastly [Claimant] has some neurologic problems, be it neuralgia, radiculitis; meaning, that he has, as a result of impingement of the spinal cord by the disc herniations and bulges, irritations of the nerves exiting the spinal cord and irritations of the spinal cord itself.

(Stankiewicz Dep. at 26-28, R.R. at a-000074.)

Employer presented the deposition testimony of Dr. Rosenfeld. Dr. Rosenfeld testified that he examined Claimant on November 28, 2006. (Rosenfeld Dep. at 12, R.R. at a-000094.) Dr. Rosenfeld testified that, on physical examination, Claimant's lower back had a good range of motion, a straight leg test was negative, the reflexes in Claimant's legs were normal, Claimant was able to move his neck without pain, and "could easily look 65 degrees right and left." (Rosenfeld Dep. at 23-25, R.R. at a-000097.) Dr. Rosenfeld testified that Claimant complained of pain in his thoracic and lumbar spine on probing, but only along the midline and not in the cervical spine. (Rosenfeld Dep. at 25, R.R. at a-000097.) Dr. Rosenfeld testified that Claimant had full range of motion in his shoulders and arms and no objective signs of any problems with his shoulders and arms. (Rosenfeld Dep. at 25-26, R.R. at a-000097-98.) Dr. Rosenfeld stated that he did not detect any muscle spasms during his exam and could not find any objective basis for Claimant's subjective complaints of pain. (Rosenfeld Dep. at 26-29, R.R. at a-000098.) Dr. Rosenfeld opined that all of the conditions diagnosed by Dr. Stankiewicz had "vanished" by the time Dr. Rosenfeld examined Claimant. (Rosenfeld Dep. at 29-30, R.R. at a-000098-99.) Dr. Rosenfeld interpreted Claimant's MRI as not showing significant lumbar disc herniation and stated that nothing in Claimant's physical examination correlated with disc herniation. (Rosenfeld Dep. at 34, R.R. at a-000100.) Dr. Rosenfeld indicated that the MRI showed some bulging at the C4-C5 disc, which is not uncommon in an individual of Claimant's age, and was not symptomatic on Claimant's physical examination. (Rosenfeld Dep. at 35, R.R. at a-000100.) Dr. Rosenfeld also opined that the findings on Claimant's MRI reflected pre-existing conditions, not acute results of a work injury. (Rosenfeld Dep. at 35, R.R. at a-000100.) With regard to Claimant's

shoulder, Dr. Rosenfeld stated the MRI showed a “questionable rotator cuff tear,” which he attributed to Claimant’s age and stated was not symptomatic on examination. (Rosenfeld Dep. at 37, R.R. at a-000100.) Finally, Dr. Rosenfeld opined that Claimant has “no need for further treatment and by objective measures, I found him fully recovered. I thought he could do anything occupationally that he wished.” (Rosenfeld Dep. at 37, R.R. at a-000100.)

Claimant submitted a rebuttal report from Dr. Stankiewicz dated February 7, 2007. In it, Dr. Stankiewicz took issue with Dr. Rosenfeld’s opinions that there were no objective signs to substantiate Claimant’s complaints of pain because the MRI studies showed herniated discs and a tendon tear that would cause Claimant’s pain. (Letter from Dr. Stankiewicz to Claimant’s counsel (February 7, 2007) (Stankiewicz Letter) at 2.) Dr. Stankiewicz opined that Claimant’s condition had not significantly changed since his deposition and that Claimant was not capable of returning to work. (Stankiewicz Letter at 1-2.) Dr. Stankiewicz also opined that the disc herniations shown on the MRI were not degenerative changes, but were work related. (Stankiewicz Letter at 2.)

The WCJ found that, as a result of the June 2006 work incidents, Claimant sustained “a cerebral contusion and concussion, a cervical sprain and migraine, a contusion of the left and right shoulder, neuralgia or radiculitis, and lumbar sprain or strain,” but that the head contusion and concussion had resolved by November 16, 2006. (WCJ Decision, Finding of Fact (FOF) ¶ 23, October 11, 2007.) The WCJ also found, on the basis of Dr. Stankiewicz’s testimony, that as a result of the work incidents: Claimant sustained “a contusion of his shoulders and hip, cervical

sprain, lumbar sacral sprain/strain, radiculitis or neuritis, numbness and tingling as a result of traumatization to his neck and low back”; and Claimant could not resume his pre-injury job on August 15, 2006 due to his work-related injuries. (FOF ¶¶ 25, 27.) The WCJ did not include in Claimant’s diagnoses Dr. Stankiewicz’s “additional findings of a disc bulge at C-4 and C-5, broad based spondylitic ridging at the area of C-5 and C-6, small partial thickness tendonopathy of the supraspinatus tendon, tendonitis, right hip pain and a probable traumatic-in-nature bursitis . . . and low back condition as a result of disc herniations at the area of L-2, L-3, and L4.” (FOF ¶ 34.) The WCJ generally credited Dr. Rosenfeld’s interpretations of Claimant’s MRIs and the results of Dr. Rosenfeld’s examination of Claimant. (FOF ¶¶ 38-46.) Most significantly, the WCJ found that:

47. Dr. Rosenfeld’s testimony established, and the [WCJ] finds that he found nothing wrong with the Claimant at the time of his examination and the evidence, particularly Dr. Rosenfeld’s testimony, established, and the [WCJ] finds that the Claimant did not have a disability after November 28, 2006.

48. Based on the evidence, particularly the testimony and statements of Drs. Stankiewicz and Rosenfeld, the [WCJ] finds that the Claimant had the diagnosed conditions of cerebral contusion and concussion, cervical sprain and migraine, contusion of the left and right shoulder, neuralgia or radiculitis, and lumbar strain and strain [sic] as a result of the work injuries in the course of his employment with the [Employer] and that he had a disability as a result thereof from July 1, 2006 to November 28, 2006 inclusive, and that he made a recovery from the work injuries in the course of his employment with the [Employer] after November 28, 2006.

(FOF ¶¶ 47-48.) The WCJ concluded that Claimant was entitled to benefits from June 2006 through November 28, 2006, at which time Claimant’s disability and benefits were terminated. (WCJ Decision, Conclusions of Law (COL) ¶ 5, October



11, 2007.) The WCJ also concluded that Employer violated the Workers' Compensation Act (Act),<sup>4</sup> but declined to assess a penalty. (COL ¶ 4.)

Claimant appealed the WCJ's decision to the Board, arguing that the WCJ erred in failing to assess a penalty against Employer and failed to issue a reasoned decision because she did not explain her reasons for not crediting Dr. Stankiewicz's opinion that Claimant's disability continued. The Board agreed, stating that pursuant Section 422(a) of the Act, 77 P.S. § 834, a WCJ "must also state his or her reason for accepting the evidence and must adequately explain why he or she discredited competent, conflicting evidence." (Board Op. at 4-5, September 9, 2008.) The Board noted that the WCJ failed to make factual findings to support why she credited the opinions and testimony of Dr. Rosenfeld over those of Dr. Stankiewicz. Therefore, the Board remanded the matter to the WCJ to issue a reasoned decision.<sup>5</sup>

On remand, the WCJ issued several new factual findings, one which stated:

The [WCJ] believes and accepts the testimony of the Claimant, Mr. Jenkins, and Drs. Stankiewicz and Rosenfeld and statements in the documents in accordance with the Findings of Fact. The [WCJ] finds that the testimony of Dr. Rosenfeld is more credible and persuasive to an extent, particularly about the lack of any disability of the Claimant after November 28, 2006, than that of Dr. Stankiewicz on the bases of the contradictions between the statements of the Claimant with respect

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<sup>4</sup> Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1-1041.1, 2501-2708.

<sup>5</sup> With regard to Claimant's argument that the WCJ erred in not assessing penalties against Employer, the Board noted that Claimant failed to preserve that issue by failing to challenge the WCJ's conclusion of law assessing no penalties against Employer in his appeal to the Board. (Board Op. at 6-7.)

to his symptoms, specifically the lack of his descriptions of any symptoms in the Claimant's upper extremities at the time of his testimony on two occasions, and the descriptions of the Claimant's symptoms by Dr. Stankiewicz and on the bases of the lack of a correlation between the clinical findings on the Claimant's examination by Dr. Rosenfeld and the findings on the diagnostic tests of the Claimant, particularly the Magnetic Resonance Imaging (MRI) studies.

(FOF ¶ 10, March 16, 2009.) The WCJ also found that:

[A]lthough Dr. Stankiewicz said on February 7, 2007 that the Claimant had continued intermittent numbness and tingling in the upper and lower extremities as a result of a relationship to radiculitis and nerve root spinal cord irritation as a consequence of the herniated discs in the neck and lower back, the Claimant's testimony on November 10, 2006 established that the Claimant had complaints of pain in shoulders, and lower back, hip, and occasionally in his neck and legs on November 10, 2006 and that the Claimant's testimony did not establish that the Claimant had a radiation of numbness, radiation of tingling sensations, or radiation of pain in the upper and lower extremities on November 10, 2006 or May 15, 2007. The [WCJ] finds that the contradictions between the testimony of the Claimant and Dr. Stankiewicz about the Claimant's numbness and tingling in the upper extremities particularly negate Dr. Stankiewicz'[s] testimony about the existence and diagnosis of the numbness and tingling in the upper extremities as a result of the work injury.

35. Dr. Rosenfeld's testimony established, and the [WCJ] finds that the clinical results of the Claimant's examination by Dr. Rosenfeld did not correlate with the findings on the diagnostic tests, particularly the MRI tests, and that the findings on the MRI tests were not indicative of acute injuries, or work injuries in accordance with these findings, and were indicative of pre-existing injuries. The [WCJ] finds that Dr. Rosenfeld's testimony about the lack of a relationship between the findings on the diagnostic tests, particularly the MRI tests, and the Claimant's acute injuries, or work injuries in accordance with these findings, established that the Claimant did not have continued intermittent numbness and tingling in the upper and lower extremities as a result of a relationship to radiculitis and nerve root spinal cord irritation all as a result of the work injury and that Dr. Rosenfeld's testimony refuted Dr. Stankiewicz'[s] testimony about the

causative relationship of the work injury to the Claimant's numbness, tingling, and nerve root spinal cord irritation from the herniated discs in the neck and lower back in accordance with Dr. Stankiewicz'[s] opinion.

(FOF ¶¶ 34-35.) The WCJ reached substantively the same conclusions of law as she had in her previous opinion. Claimant again appealed to the Board, arguing that the WCJ's "credibility determinations are once again difficult to comprehend." (Board Op. at 6, June 7, 2010.) The Board determined that the WCJ's decision was reasoned because she "specifically found the testimony of Dr. Rosenfeld more credible regarding Claimant's ongoing disability due to the inconsistencies between Claimant's testimony and the testimony of Dr. Stankiewicz and the lack of correlation between the clinical findings and the results of diagnostic testing." (Board Op. at 7.) Claimant now appeals to this Court.<sup>6</sup>

Before this Court, Claimant argues that the Board erred in affirming the Order of the WCJ because: (1) the WCJ's Decision is not reasoned as required by Section 422(a); (2) Dr. Rosenfeld's testimony was not sufficient evidence upon which to terminate Claimant's benefits; and (3) the WCJ erred by failing to assess penalties against Employer.

We first address Claimant's argument that the WCJ's Decision was not reasoned as required by Section 422(a). Section 422(a) states in relevant part that:

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<sup>6</sup> In reviewing a decision of the Board, "[o]ur scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether necessary findings of fact are supported by substantial evidence." Brookside Family Practice v. Workers' Compensation Appeal Board (Heacock), 897 A.2d 539, 541 n.3 (Pa. Cmwlth. 2006).

All parties to an adjudicatory proceeding are entitled to a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached. The workers' compensation judge shall specify the evidence upon which the workers' compensation judge relies and state the reasons for accepting it in conformity with this section. When faced with conflicting evidence, the workers' compensation judge must adequately explain the reasons for rejecting or discrediting competent evidence. Uncontroverted evidence may not be rejected for no reason or for an irrational reason; the workers' compensation judge must identify that evidence and explain adequately the reasons for its rejection. The adjudication shall provide the basis for meaningful appellate review.

77 P.S. § 834. Claimant argues that the WCJ's Decision was not reasoned, essentially,<sup>7</sup> because she did not articulate sufficient reasons for crediting Dr. Rosenfeld's testimony over Dr. Stankiewicz's testimony and the reasons she did articulate were not supported by the record. To satisfy the reasoned decision requirements the WCJ is required to pass on the credibility of witnesses' deposition testimony, the WCJ's determination cannot be supported merely by announcing "that she deemed one expert to be more 'credible and persuasive' than another" because "the WCJ did not observe the respective demeanors of the experts." Daniels v. Workers' Compensation Appeal Board (Tristate Transport), 574 Pa. 61, 78, 828 A.2d 1043, 1053 (2003). Rather, Daniels sets forth examples of objective criteria a WCJ can use to determine the credibility of witnesses who testify by deposition, stating:

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<sup>7</sup> Claimant raises a number of faults regarding the WCJ's findings of facts and whether these findings of fact are supported by substantial evidence. However, most of these inconsistencies are minor, such as whether a wall or roof fell on Claimant, and not material to the outcome of the matter.

For example, an expert witness's opinion may be based upon erroneous factual assumptions; or an expert may have had less interaction with the subject; or the interaction was in a less timely fashion; or the expert may betray a bias or interest in the matter. In addition, an expert witness may be unqualified or less qualified than the opposing party's expert; or may be impeached with inconsistencies or contradictions in his or her testimony or reports; *or may be impeached in some other convincing fashion*. But these are relevant factors which are readily capable of identification and easy articulation by the WCJ. The point is that, absent the circumstance where a credibility assessment may be said to have been tied to the inherently subjective circumstance of witness demeanor, some articulation of the actual objective basis for the credibility determination must be offered for the decision to be a “reasoned” one which facilitates effective appellate review.

Id. (citations omitted) (emphasis added). With regard to the review of a WCJ’s credibility determination, this Court has stated:

we believe that, even where a WCJ has based a credibility determination on a cold record, substantial deference is due. We must view the reasoning as a whole and overturn the credibility determination only if it is arbitrary and capricious or so fundamentally dependent on a misapprehension of material facts, or so otherwise flawed, as to render it irrational.

Casne v. Workers’ Compensation Appeal Board (STAT Couriers, Inc.), 962 A.2d 14, 19 (Pa. Cmwlth. 2008). In this case, the WCJ stated that she did not credit Dr. Stankiewicz’s testimony, in part, because Dr. Stankiewicz described Claimant’s symptoms as including intermittent numbness and tingling in Claimant’s extremities and Claimant did not indicate in his own testimony that he experienced these symptoms. (FOF ¶¶ 10, 34, March 16, 2009.) The WCJ is correct that Dr. Stankiewicz described Claimant’s symptoms as including intermittent numbness and tingling in Claimant’s extremities. (Stankiewicz Dep. at 12, 16, 21, 31, R.R. at a-000070-72, a-000075.) Our review of Claimant’s testimony reveals that he never

stated, in either his live or deposition testimony, that he was experiencing or had experienced numbness or tingling in his extremities. Therefore, there was a conflict between Claimant's testimony and Dr. Stankiewicz's testimony, and we conclude that the WCJ's credibility determination in this regard was not based on "a misapprehension of [a] material fact[]." Casne, 962 A.2d at 19.

The WCJ also stated that she credited Dr. Rosenfeld's opinion over Dr. Stankiewicz's opinion partially on the basis "of the lack of a correlation between the clinical findings on the Claimant's examination by Dr. Rosenfeld and the findings on the diagnostic tests of the Claimant, particularly the Magnetic Resonance Imaging (MRI) studies." (FOF ¶ 10.) Claimant argues that the WCJ erred in granting greater credibility to Dr. Rosenfeld, partly on the basis of Dr. Rosenfeld's determination that the abnormalities on Claimant's MRI studies were not reflected by corresponding clinical symptoms. Claimant characterizes the WCJ's credibility determination in this regard as the WCJ "somehow us[ing] this inconsistency [between the MRI results and Dr. Rosenfeld's clinical studies] to support the credibility of Dr. Rosenfeld's testimony – which is blatantly counter intuitive." (Claimant's Br. at 17.) This is not how the WCJ articulated the basis for her credibility determination. While the findings of fact could be more clearly stated, it is plain from their language that the WCJ leant greater weight and credibility to Dr. Rosenfeld's clinical examination of Claimant due, in part, to the conflict between Claimant's testimony and Dr. Stankiewicz's testimony. Consequently, the WCJ deemed Dr. Rosenfeld's interpretation of Claimant's MRI studies, coupled with his physical examination of Claimant, to be more credible and that such credited testimony "refuted Dr. Stankiewicz'[s] testimony about the

causative relationship of the work injury to the Claimant's numbness, tingling, and nerve root spinal cord irritation from the herniated discs in the neck and lower back in accordance with Dr. Stankiewicz'[s] opinion." (FOF ¶ 35.) We cannot say that these bases for crediting Dr. Rosenfeld's testimony over Dr. Stankiewicz's testimony are "arbitrary and capricious or so fundamentally dependent on a misapprehension of material facts, or so otherwise flawed, as to render [them] irrational." Casne, 962 A.2d at 19. We must, therefore, reject Claimant's argument that the WCJ's Decision was not reasoned with respect to its credibility determinations.

We next address Claimant's argument that Dr. Rosenfeld's testimony was not competent testimony upon which Claimant's benefits could be terminated. Claimant argues that because the WCJ credited Dr. Stankiewicz's testimony as to Claimant's diagnosis, which, Claimant argues, includes the abnormalities visible on Claimant's MRI, Employer had the burden of showing that Claimant had recovered from these injuries. Claimant argues that Employer failed to meet its burden of showing that Claimant had completely recovered, despite these abnormalities and Claimant's complaints, where Dr. Rosenfeld himself recognized the presence of the abnormalities.

It is correct that once a claimant has established a work-related injury, the employer "bears the burden of proving either that the employee's disability has ceased, or that any current disability arises from a cause unrelated to the employee's work injury." Campbell v. Workers' Compensation Appeal Board (Antietam Valley Animal Hospital), 705 A.2d 503, 506-07 (Pa. Cmwlth. 1998).

Here, the WCJ found that, as a result of the June 2006 work incidents, Claimant sustained a “cerebral contusion and concussion, cervical sprain and migraine, contusion of the left and right shoulder, neuralgia or radiculitis, and lumbar strain and sprain.” (FOF ¶ 37.) The WCJ made these findings

despite Dr. Stankiewicz’[s] testimony that the Claimant had additional findings of a disc bulge at C-4 and C-5, broad based spondylitic ridging at the area of C-5 and C-6, small partial thickness tendonopathy of the supraspinatus tendon, tendonitis, right hip pain and a probable traumatic-in-nature bursitis with an unspecified etiology in the record, and a low back condition as a result of disc herniations at the area of L-2, L-3, and L-4 with impingement on the dural sac and neuroforaminal narrowing, and some consistent abnormalities with carpal tunnel syndrome.

(FOF ¶ 37.) In other words, despite Dr. Stankiewicz’s testimony that these conditions were work related, the WCJ found that Claimant did not sustain these latter conditions as a result of the June 2006 work incidents. The WCJ further rejected Dr. Stankiewicz’s opinion that Claimant did not have “previous problems with his neck, lower back and left shoulder” prior to the June 2006 work incidents. (FOF ¶ 40.) The WCJ credited Dr. Rosenfeld’s opinion that the MRI of Claimant’s spine “showed moderate disc degeneration with a moderate disc protrusion,” but that, on examination, Dr. Rosenfeld could not find any symptoms reported by Claimant that would clinically correspond with these MRI findings. (FOF ¶¶ 46, 48.) The WCJ also credited Dr. Rosenfeld’s opinion that the “degenerative changes on the MRI scans were not caused, accelerated, or aggravated by work injury.” (FOF ¶ 49.) Because the WCJ never credited that the abnormalities visible in the MRI were caused by the June 2006 work incidents but, in fact, found the opposite, Employer did not bear the burden of proving that the abnormalities on Claimant’s MRI had resolved.



Claimant also argues that Dr. Rosenfeld's testimony is not competent to support the termination of Claimant's benefits because Dr. Rosenfeld did not agree with or acknowledge the work injuries that the WCJ had found to be compensable, per GA & FC Wagman, Inc. v. Workers' Compensation Appeal Board (Auker), 785 A.2d 1087 (Pa. Cmwlth. 2001).

With respect to termination, this Court has held that:

Benefits may be terminated where the employer proves that the claimant is fully recovered from the work injury and has no remaining disability that relates to the work injury. An employer proves full recovery with unequivocal, competent medical evidence. In a termination petition, the employer may not relitigate the nature of the accepted work injury. Accordingly, a medical expert's opinion will not support a termination if that medical expert does not acknowledge the accepted work injuries and does not opine full recovery from those injuries.

Hall v. Workers' Compensation Appeal Board (America Service Group), 3 A.3d 734, 740 (Pa. Cmwlth. 2010) (citations omitted). "A medical expert need not necessarily believe that a particular work injury actually occurred. The expert's opinion is competent if he assumes the presence of an injury and finds it to be resolved by the time of the [examination]." Id. at 741 (citation omitted). Dr. Rosenfeld expressed uncertainty as to whether Claimant had actually sustained the injuries that Dr. Stankiewicz had diagnosed and which the WCJ subsequently found to be work related. (Rosenfeld Dep. at 29-31, R.R. at a-000098-99.) However, Dr. Rosenfeld conceded that it was possible that Claimant had sustained the injuries the WCJ accepted as being work related, but stated that "[a]ll these things, in my opinion, had vanished by the time [Claimant] saw me, except the

complaints.”<sup>8</sup> (Rosenfeld Dep. at 30-31, R.R. at a-000099.) In response to the question of whether, in his opinion, “Claimant ha[d] fully recovered from any and all work injuries he may have sustained in June of 2006,” Dr. Rosenfeld agreed. (Rosenfeld Dep. at 39, R.R. at a-000101.) The WCJ credited this testimony. (FOF ¶ 50.) Taken as a whole, we conclude that Dr. Rosenfeld’s testimony is competent and sufficient to sustain Employer’s burden of proving that Claimant had recovered from his work-related injuries.

Finally, we address Claimant’s argument that the WCJ erred in not assessing a penalty against Employer for its violation of the Act. As the Board noted in its original decision, Claimant waived this issue by failing to raise it in his appeal from the WCJ’s initial Decision to the Board. (Appeal from Judge’s Findings of Fact and Conclusions of Law, October 26, 2007 (disputing only the WCJ’s COL ¶ 5, October 11, 2007, holding that Claimant’s benefits should be terminated).) The fact that the Board remanded this case to the WCJ for other reasons does not give Claimant a “second bite at the apple” on appealing this issue. See Budd Co. v. Workers’ Compensation Appeal Board (Kan), 858 A.2d 170, 180 (Pa. Cmwlth. 2004) (approving WCJ’s refusal to go beyond scope of remand and consider

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<sup>8</sup> To the extent that Claimant’s brief may be read as arguing that Employer bore the burden of proving that Claimant’s pain and the abnormalities present in Claimant’s MRI were the result of a factor other than Claimant’s work injury, see Campbell, 705 A.2d at 506-07 (“An employer seeking to terminate workers’ compensation benefits bears the burden of proving either that the employee’s disability has ceased, or that any current disability arises from a cause unrelated to the employee’s work injury”), this argument is unavailing. The WCJ never accepted the abnormalities on Claimant’s MRI as being work related and Dr. Rosenfeld credibly testified that these abnormalities were due to degenerative changes, not Claimant’s work injuries. (FOF ¶ 49.) In addition, Dr. Rosenfeld credibly testified that there were no objective clinical findings to corroborate Claimant’s subjective complaints of pain. (FOF ¶ 44.)

penalties originally requested by the claimant in that case, stating “[w]here a case is remanded for a specific and limited purpose, a WCJ may not decide issues not encompassed within the remand order, but rather must confine her findings to the stated purpose of the ordered remand”).

For these reasons, we affirm the Order of the Board.

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**RENÉE COHN JUBELIRER, Judge**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

|                                    |   |                    |
|------------------------------------|---|--------------------|
| Joseph Sciglitano,                 | : |                    |
|                                    | : |                    |
| Petitioner                         | : |                    |
|                                    | : |                    |
| v.                                 | : | No. 1241 C.D. 2010 |
|                                    | : |                    |
| Workers' Compensation Appeal Board | : |                    |
| (Boedco, Inc.),                    | : |                    |
|                                    | : |                    |
| Respondent                         | : |                    |

**ORDER**

**NOW**, April 14, 2011, the Order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED**.

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**RENÉE COHN JUBELIRER, Judge**