



petition, alleging that she had sustained work-related injuries to her left shoulder and hand, as well as to her neck and cervical discs, causing missed work and continuing disability. After Employer filed an answer denying Babu's averments of injury and disability, Babu filed a petition for penalties, based on Employer's failure to investigate the claim and file a timely NCP. In April 2001, Babu amended her claim petition to include injuries to her right side and shoulder. Babu was examined by Employer's medical expert, Ronald Greene, M.D., an orthopedic specialist, on November 19, 2001.

After a hearing, the WCJ determined that Babu sustained a work-related left cervical/trapezius and cervical spinal strain/sprain with myofascial pain syndrome, but that the work incident did not cause brachial plexopathy, cervical radiculopathy, left epicondylitis, carpal tunnel, or any right side injury. Finding that Employer violated Sections 406.1 and 407 of the Workers' Compensation Act (Act)<sup>1</sup> by not filing a NCP or NCD within 21 days of receiving notice of the injury, the WCJ imposed a fine of \$5000. 77 P.S. §§ 717.1, 731. The WCJ also found that Employer's contest was unreasonable from the date of the claim's filing until the date of Dr. Greene's evaluation, and ordered Employer to pay Babu's counsel fees for that time period.

From this ruling, Babu appealed, and the Board affirmed in part and remanded in part. Before the remand, however, Babu petitioned the Board for a rehearing, and the Board modified its decision in several respects. As relevant to this appeal, the combined effect of the two Board decisions was to reject several of Babu's arguments and remand several of them to the WCJ. The Board rejected Babu's arguments that the WCJ erred in failing to find right side injuries and more

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<sup>1</sup> Act of June 2, 1915, P.L. 736, *as amended*.

extensive left side injuries, in failing to strike the testimony of Dr. Greene, and in refusing to penalize Employer for failure to file a timely brief with the WCJ. The Board remanded for the WCJ to consider if Babu should be compensated for Ayurvedic treatment she received in India, and to reconsider the time period for which Employer was responsible for Babu's attorney fees.

On remand, the WCJ found that the Ayurvedic treatment was not compensable, and that the original time period for the counsel fees award was proper. On appeal, the Board affirmed. An appeal to this court followed.

In this appeal, Babu raises six issues: (1) whether it was error for the WCJ to deny Babu's motion to strike the testimony of Dr. Greene for credibility and other issues; (2) whether it was error for the WCJ to refuse to find left side neurological injury; (3) whether it was error for the WCJ to refuse to find right side injury; (4) whether it was error to refuse to award Babu counsel fees for the period after the date of Dr. Greene's exam; (5) whether it was error for the WCJ refuse to penalize Employer more than \$5,000; and (6) whether it was error for the WCJ to find the Ayurvedic treatment not compensable.

Babu argues that Dr. Greene's testimony should have been struck for two reasons: first, because of questions raised about his truthfulness in reports and testimony in prior cases; and second, because he allegedly blocked the view of the nurse observer during his examination of Babu. We find these arguments to be without merit.

In *voir dire* and later on cross-examination, Babu's counsel attempted to establish that Dr. Greene was untrustworthy. After Dr. Greene had testified that he was licensed to practice medicine, and board-certified in orthopedic medicine, Babu's counsel questioned him about his testimony in a 1988 case in which he had

admitted to backdating a report. The rest of the cross-examination seemed mostly focused on airing personal animus the lawyer and the doctor had built up for each other after facing each other numerous times. Dr. Greene's professional qualifications were never seriously questioned in *voir dire* or cross examination.

A witness may testify as an expert if “the witness has any reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine.” *Miller v. Brass Rail Tavern, Inc.*, 541 Pa. 474, 480-81, 664 A.2d 525, 528 (1995). Babu did not question Dr. Greene's status as a licensed doctor and orthopedic specialist, and it was therefore well within the WCJ's discretion to qualify him as a medical expert.

Babu's objection to Dr. Greene's testimony is better characterized as a challenge to the credibility determination made by the WCJ in favor of Dr. Greene. However, “[c]redibility determinations and the evaluation of evidentiary weight are within the province of the WCJ as the fact-finder, and the WCJ may accept or reject the testimony of any witness, including medical testimony, in whole or in part.” *Clear Channel Broad. v. Workers' Comp. Appeal Bd. (Perry)*, 938 A.2d 1150, 1156 (Pa. Cmwlth. 2007). Despite counsel's attempts at impeachment, the WCJ chose to credit some of Dr. Greene's conclusions. We cannot revisit that decision.

Babu also argues that Dr. Greene's testimony should be stricken because he allegedly blocked the view of the nurse observer during his examination. The nurse, Amy Cohen, was employed by Babu to observe Dr. Greene's examination, as permitted under the Section 314 of the Act. In his deposition, when asked to explain some of the differences between his and

Cohen's descriptions of the exam, Dr. Greene stated that based on where Cohen was sitting while the exam was taking place, he did not think that Cohen could see everything that was going on. Contrary to the assertion in Babu's brief, Dr. Greene at no point stated that he intentionally blocked Cohen's view. For her part, Cohen testified her view was not obscured.

Babu argues that Dr. Greene's testimony should be stricken whether or not Cohen's view was actually obscured: if the view was not obscured, the testimony should be stricken because Dr. Greene's testimony was untrue; if the view was obscured, it should be stricken because Dr. Greene was intentionally frustrating the statute allowing observers at the examination. Both legs of this argument fail. If the view was not obscured, the questions raised about Dr. Greene's testimony are credibility questions, which, as noted above, are the province of the WCJ. If the view was obscured, there are no grounds to strike the testimony for two reasons. First, there is no factual finding, nor any basis in the record, for the proposition that Dr. Greene's blocking of Cohen's view was intentional. Second, even if Dr. Greene intentionally blocked Cohen's view, there is no legal basis for striking the entirety of Dr. Greene's testimony. Babu points to no case nor any statute that endorses such a remedy.

Babu's next argument is that the WCJ erred in finding no neurological injury. As this is a challenge to a WCJ finding of fact, we review to determine if it supported by substantial, competent evidence. *Universal Cyclops Steel Corp. v. Workmen's Comp. Appeal Bd. (Krawczynski.)*, 305 A.2d 757 (Pa. Cmwlth. 1973). In his extensive findings of fact and discussion, the WCJ reviewed the report of the clinic's treating doctor and the testimony of experts from both sides. He noted that all three agreed there was muscular injury of some degree, but that only Dr.

Zalewska, Babu's expert, had found neurological damage. He noted that Babu herself had been less than forthcoming about her past medical history and had initially, and in some cases completely, failed to inform all three doctors about prior injuries to her shoulder. For this reason, the WCJ found "real credibility problems" with Babu. WCJ's 2006 Decision at 12. He noted that Babu's failure to disclose the prior injuries hurt her case because it invalidated the results of several imaging tests. These tests found potential nerve damage, but the doctors administering them were never informed of Babu's prior shoulder injuries. The WCJ accepted Dr. Greene's finding that any nerve damage revealed on these tests was, in fact, caused by the earlier injuries. The WCJ evaluated voluminous testimony from both sides and issued a reasoned decision supported by substantial evidence.

The conclusion that Babu did not suffer a compensable right side injury is also supported by the record. Babu's expert, Dr. Zalewska, testified that Babu suffered from preexisting right side injuries, and that the injury to her left side "probably aggravated" those injuries, a conclusion the WCJ characterized as equivocal. WCJ's 2006 Decision at 13. In contrast, Dr. Greene testified that in his examination, Babu did not complain of any right side pain. Babu points out that this account of events is disputed by Cohen, the nurse observer. However, as noted above, the WCJ is the fact-finder, and he was entitled to find Dr. Greene's testimony credible, and accept his account of events over Cohen's. Regardless, the equivocal nature of Dr. Zalewska's diagnosis of right side injury is sufficient to support the WCJ's decision on this point. *See Mensah v. Workers' Comp. Appeal Bd. (Norrell Temp Agency)*, 716 A.2d 707 (Pa. Cmwlth. 1998).

Babu next asserts that it was error not to award counsel fees for unreasonable contest continuing past the date of Dr. Greene's examination. As the WCJ noted in his second opinion, at the time Employer filed its answer denying all injury and disability, it had Babu's incident report, as well as the treatment records from its own clinic indicating an injury had occurred. Because Employer had this material in its possession, the WCJ concluded that it was unreasonable for Employer to deny all of the allegations of Babu's complaint. However, after examining Babu for Employer, Dr. Greene concluded that a number of Babu's claimed injuries were nonexistent, that several others were attributable to prior injuries, and that there was no functional disability stemming from the work incident. The WCJ concluded that Dr. Greene's testimony provided Employer with a basis to reasonably contest Babu's claim. Therefore, the WCJ awarded counsel fees for the time between the initiation of the claim and Dr. Greene's examination.

In general, employers are obliged to pay employee's counsel fees in workers' compensation disputes unless the employer can establish that their contest is reasonable. *Boyer v. Workers' Comp. Appeal Bd. (First Capital Insulation, Inc.)*, 740 A.2d 294 (Pa. Cmwlth. 1999). If, over the course of litigation, an unreasonable contest becomes reasonable, an employer is obliged to pay counsel fees for only the portion of the contest which was unreasonable. *Arnold v. Workers' Comp. Appeal Bd. (Baker Indus.)*, 859 A.2d 866 (Pa. Cmwlth. 2004); *Crouse v. Workers' Comp. Appeal Bd. (NSP Energy SVC)*, 801 A.2d 655 (Pa. Cmwlth. 2002). Reasonable contest exists when there is conflicting medical testimony about the extent of disability. *Montgomery Hosp. v. Workers' Comp. Appeal Bd. (Armstrong)*, 793 A.2d 182 (Pa. Cmwlth. 2002).

Babu appears to argue that because Dr. Greene did find some injury, Employer should have agreed prior to the hearing to pay lost wages for the work Babu missed immediately after her injury. Babu asserts that if this payment had been made, the bulk of the claim would have been resolved and it would have been a simple matter to settle the remainder out of court, avoiding litigation. Because Employer was responsible for dragging out the litigation, Babu argues, it should be responsible for further counsel fees.

Even putting aside the considerable factual assumptions that would have to be made to accept Babu's argument, it fails because it is unsupported in the law. Babu cites no case or statute supporting the award of counsel fees for this rationale. Because Dr. Greene's conclusions created conflicting medical testimony over virtually every issue in this case, the WCJ was correct to conclude that after his examination, there was reasonable contest, and to therefore limit the award of counsel fees.

Babu next argues that it was error for the WCJ to refuse to penalize Employer more than \$5000 for its failure to file a timely NCD and its failure to file a timely brief. Employer was required by Sections 406.1 and 407 of the Act to file either a NCD or a NCP within 21 days after it received notice of the injury. Employer received notice of the injuries on February 28, 2000, but did not file a NCD until August 8, 2000, which the WCJ correctly found was a violation of the Act. The WCJ also found that because Employer had been providing Babu medical care for her injury, it should have filed an NCP, not an NCD. The WCJ considered the hardship imposed on Babu by these violations, and penalized Employer \$5000.



Section 435(d)(1) of the Act authorizes a WCJ to penalize an employer between ten and fifty percent of the total award for violations of the Act causing unreasonable or excessive delays. This court reviews penalties of this sort only for abuse of discretion. *Brutico v. Workers' Comp. Appeal Bd. (US Airways, Inc.)*, 866 A.2d 1152 (Pa. Cmwlth. 2004). The WCJ, on remand, characterized its penalty as thirty-three percent of the award. Babu, using different figures, argues that it is actually only a twenty-five percent penalty. This dispute is of no import, however, because both twenty-five and thirty-three percent fall within the acceptable penalty range, and there is no evidence of abuse of discretion.

Before the Board, Babu argued that Employer should also be penalized for failure to file a brief with the WCJ, after requesting an extension of time in which to file. The Board rejected that argument, because Babu failed to request that the WCJ impose a penalty for failure to file a brief. The Board was correct to do so, because the issue is waived without a specific request for penalty to the WCJ and a hearing on the issue. *Becerra v. Workers' Comp. Appeal Bd. (Leaseway Sys.)*, 586 A.2d 485, n. 4 (Pa. Cmwlth. 1991).

Finally, Babu argues that the WCJ erred in finding her Ayurvedic treatment not compensable. This treatment, which Babu traveled to India to receive, involves hot oil, massage and herbal therapy. The WCJ found that, while the treatment did have some causal relation to the injury, it was not compensable for two reasons. First, the invoice from the Ayurvedic center lists treatment for a number of injuries, some of which were recognized by the WCJ and some of which were not, without designating which treatments were for which injury. In addition, the WCJ found that there was no evidence that Babu received this treatment pursuant to a proper referral.

Babu argues that at the very least, the court should remand on this issue, to resolve a supposed contradiction in the WCJ opinion. This stems from the WCJ's third conclusion of law, which states that "[a]ll massage therapy applied to the injured body parts of Rachel Babu is causally related to the work incident." WCJ 2008 opinion at 8. Babu argues that this conclusion is inconsistent with the WCJ's discussion section, which explains that because the Ayurvedic bill was not sufficiently specific as to what procedures were performed on which body parts, the therapy is not compensable. However, there is no contradiction in the WCJ opinion because the WCJ found that the therapy that was applied to the injured body parts was related to the work incident, however, some of the therapy was applied to body parts not found to be injured by the WCJ and therefore was unrelated. The bill was not sufficiently specific in differentiating the two, so the WCJ was forced to deny the whole claim.

Services provided by non-licensed medical providers are compensable if they are provided under the supervision of or upon referral by a licensed practitioner. *Boleratz v. Workers' Comp. Appeal Bd. (Airgas, Inc.)*, 932 A.2d 1014 (Pa. Cmwlth 2007). In addition, employers are only required to pay medical expenses that are causally related to the work injury. *Iten v. Workers' Comp. Appeal Bd. (ABF Freight Sys., Inc.)*, 847 A.2d 814 (Pa. Cmwlth. 2004). The Ayurvedic treatment fails both of these requirements. There was no evidence that the treatment Babu underwent was pursuant to prescription or referral, and in fact, Babu's own expert said she would not prescribe it. In addition, the WCJ found that the bill did not sufficiently explain what procedures were done, making the determination of whether the treatment was work-related impossible. Because

both of these defects are sufficient to deny reimbursement, the WCJ properly found the Ayurvedic treatment was not compensable.

For all the foregoing reasons, we affirm.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Rachel Babu,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1592 C.D. 2009
	:	
Workers' Compensation Appeal	:	
Board (Temple Continuing Care	:	
Center),	:	
	:	
Respondent	:	

**ORDER**

AND NOW, this 20th day of April, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby AFFIRMED.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge