

On June 11, 2001, Claimant filed a Claim/Review Petition and alleged that he had specific loss of use of his right eye, a closed-head injury and post-concussive syndrome.

On October 20, 2003, the WCJ granted the Claim Petition and ordered that Claimant should be compensated under the specific loss provisions of the Workers' Compensation Act (Act)¹ for the specific loss of use of the right eye. The WCJ also recognized that Claimant had post-concussive syndrome and/or mild traumatic brain injury for the closed period from May 4, 2001 to April 30, 2002. The WCJ found that Claimant had an average weekly wage of \$304.11, and ordered compensation for that closed period, minus any wages earned while employed at Luzerne County Community College.²

The WCJ specifically ordered that once the specific loss, temporary total and temporary partial disability benefits from May 4, 2001, through April 30, 2002, were paid, Employer had "no further obligation to pay Claimant for wage loss, medical benefits, specific loss benefits and/or any other benefit that may be available as the result of the May 4, 2001, injury." WCJ Decision, October, 20, 2003, at 5. Both parties appealed.

¹ Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§1-1041.4, 2501-2708.

² This controversy involves the payment or non-payment of the disability for this closed period. There is no dispute that the specific loss benefits were paid.

The WCJ's decision was affirmed by the Board on October 20, 2003. The decision was not appealed further. Neither party raised any issue with the WCJ's findings as to Claimant's weekly wage.

Petitions Before the Second WCJ – Subject to This Appeal

On April 20 and 29, 2009, approximately five and a half years after Claimant received his last compensation benefit from Employer, Claimant retained new counsel and filed four petitions: (1) a Penalty Petition which alleged Employer failed to pay all temporary total disability and/or medical benefits that were owed under Section 306(f) of the Act, 77 P.S. §531; (2) a Reinstatement Petition which alleged a worsening of his condition; (3) a Penalty Petition for failure to pay unidentified medical bills, and (4) a Review Petition which alleged specific loss/disfigurement to his right eye.

On June 16, 2009, Claimant filed a second Review Petition to add mood disorder and organic affective disorder as part of the original work injury, and a second Reinstatement petition based upon those alleged psychiatric conditions.

All petitions were consolidated and evidence and argument was presented at three hearings. At a May 12, 2009, hearing Employer's counsel argued that the review and reinstatement petitions were barred by the statute of limitations at Section 413(a) of the Act, 77 P.S. §772, which provides that no notice of compensation payable shall be reinstated, unless a petition is filed with the department within three years after the date of the most recent payment of compensation prior to the filing of the petition.

The WCJ agreed to bifurcate the issues and deal with the statute of limitations and timeliness issues separately. The parties stipulated that the last payment of benefits was made to Claimant on March 1, 2004.

The WCJ questioned Claimant's counsel regarding the medical bills that were the subject of the April 29, 2009, Penalty Petition. Counsel was unable to identify any medical bills that were not paid. He stated that the medical bills at issue in his Penalty Petition were "medical bills that were incurred prior to the date of [the first WCJ's] Decision. Right now I'm not sure there are any. I've gotten a number of medical bills back in, and I don't have any that I can recall that predate that October 20, 2003, Decision." Hearing Transcript, May 12, 2009 (H.T., 5/12/09), at 16; Reproduced Record (R.R.) at 83a.

On July 7, 2009, the parties again appeared before the WCJ. Counsel for Employer stated that he had problems getting in touch with the insurance adjuster who had previously handled the claim. He indicated that the claim was transferred to a new insurance company in June of 2004. The only evidence he was able to obtain regarding the payment history was a "payment summary" from the insurance company which set forth the date of payment, the amount and payee. Employer's counsel was unable to produce a specific adjuster to provide details of the exact payments or the break down of the payments.

Claimant's counsel conceded that it was "difficult to tell exactly what was paid to whom for what, and whether it was received and actually cashed." Hearing Transcript, July 7, 2009 (H.T., 7/7/09), at 7; R.R. at 48a.

Claimant testified live before the WCJ. Claimant testified, to the best of his recollection, that he received two payments of \$61,292.67 and \$2,919.46. He did not recall receiving a third check for \$560.94. He also recalled receiving a series of seven checks in June and July of 2001, each in the amount of \$608.22, but he did not recall receiving any other payments beyond those in the payment summary. At no time did Claimant identify or describe what payments were missing or not paid. Nor did he specify the dates he worked for Luzerne County Community College, for which Employer was entitled to a credit. Claimant's counsel also, for that matter, did not clarify what total disability benefits and partial benefits were withheld. He admitted the specific loss benefits were paid. He indicated he wished to depose the adjuster. But, as Employer's counsel pointed out, the adjuster was no longer available. Claimant's counsel also specifically admitted that his client "was a little sketchy because a lot of time has passed." H.T., 5/12/09, at 13; R.R. at 81a.

Employer's counsel indicated that he "calculated what the total partial disability payments would be, and that's \$2,613.87." H.T., 5/12/09, at 10; R.R. at 77a. He did not indicate how he arrived at that figure only that he "calculated that on his working at [Luzerne County Community College] from the date of injury to April 30, 2002" and that this figure was most likely incorrect because Claimant started working for the community college sometime in 2002. In any event, Employer was entitled to a credit for wages earned.

A third hearing was held on September 1, 2009. The WCJ indicated that he "listed the matter today relative to the Review Petition with respect to the specific loss and the disfigurement." Hearing Transcript, September 1, 2009 (H.T., 9/1/09), at 3; R.R. at 91a. The WCJ asked Claimant to describe his disfigurement.

Claimant's counsel interjected and stated that "I have not prepared him [Claimant] to testify today." H.T., 9/1/09, at 4; R.R. at 92a. The WCJ indicated that Claimant "shouldn't need to prepare for this, these questions. And I did list it as a full hearing relative to this [Review] petition." H.T., 9/1/09, at 4; R.R. at 92a. At no time after this did Claimant's counsel object to further questioning by the WCJ. In fact, Counsel instructed his client to show the WCJ which eye was affected by the work injury and proceeded to question him on direct examination about his alleged disfigurement.

Claimant described his disfigurement as a "drooping" right eyelid and eyebrow causing the eye not to open completely. H.T., 9/1/09, at 6-7; R.R. at 94a-95a. When the WCJ asked Claimant when he first noticed the "drooping", Claimant answered: "It took quite a while to heal, of course, after it happened, and I'd say about a month or two after the injury, it started to --- I noticed a little bit, but as time went on it got progressively closing more." H.T., 9/1/09, at 8; R.R. at 96a (Emphasis added). When the WCJ asked Claimant how long his right eye had looked like it did on the day of the hearing, Claimant responded: "About a year, year-and-a-half maybe. Maybe a little longer." H.T., 9/1/09, at 8; R.R. at 96a.

In a decision circulated September 25, 2009, the WCJ denied Claimant's petitions. The WCJ found that Claimant failed to sustain his burden of proving Employer violated the Act or that there were any additional benefits or medical bills owed under the prior adjudication. The WCJ also held that even if Claimant met his burden, his Penalty Petitions were barred by the doctrine of laches. The WCJ also denied Claimant's petition to expand the work injuries and petition which alleged worsening of Claimant's condition. The WCJ concluded the petitions were barred by Section 413(a) of the Act, 77 P.S. §772, because the

petitions were not filed within three years from the date of the last compensation payment. The WCJ further concluded that the Review Petition which sought disfigurement benefits was barred by the doctrine of *res judicata* because, by Claimant's own admission, the disfigurement was present at the time of the prior litigation and Claimant should have presented the claim at that time.

Claimant appealed to the Board which affirmed.

On appeal, Claimant raises seven issues: (1) whether Employer waived the defenses of laches and *res judicata* when it failed to raise them as affirmative defenses; (2) whether the WCJ's decision to dismiss Claimant's petition for penalties on the basis of laches and *res judicata* was supported by substantial evidence; (3) whether the WCJ's determination that Claimant did not sustain his burden of proof on the penalty petition was supported by substantial evidence and/or represented a capricious disregard of evidence; (4) whether the WCJ's use of the incorrectly listed average weekly wage in the prior October 20, 2003, decision represented an error of law; (5) whether Claimant was denied due process at the September 1, 2009, hearing; (6) whether the WCJ's decision was a reasoned decision; and (7) whether the WCJ erred when it failed to allow the parties to file briefs.³

**Whether the WCJ's Denial of Claimant's Penalty Petitions
Was Supported by Substantial Evidence**

Claimant argues that the WCJ erred when he found that Claimant failed to meet his burden of proof on his penalty petitions. Again, Claimant

³ This Court has foregone the sequence of Claimant's arguments.

alleged in his penalty petitions that Employer failed to pay all disability benefits and medical bills owed pursuant to the first WCJ's October 20, 2003, Decision.

The WCJ concluded that Claimant did not present any clear or convincing evidence that Employer failed to issue the proper payments pursuant to the WCJ's October 20, 2003, order.

In seeking a penalty, it is the employee's burden to produce evidence of a violation of the Act. Sanders v. Workers' Compensation Appeal Board (Marriott Corp.), 756 A.2d 129 (Pa. Cmwlth. 2000).

This Court has reviewed the record and finds it amply supports the WCJ's decision. What is clear from the record is that Claimant filed his penalty petitions and attended hearings without knowing whether he actually did not receive all disability benefits. Claimant's counsel clearly indicated that he was not sure at the hearing whether payments were improperly withheld. Although Claimant's counsel presented arguments as to different possible calculations, which admittedly did not take into account credit for wages earned at Luzerne County Community College, Claimant did not present sufficient evidence that he was owed additional benefits in accordance with the first WCJ's October 20, 2003, order. Claimant introduced a payment summary from the second insurance adjuster. He outlined, on direct examination, the payments he received. However, he failed to present any evidence that he was not properly paid. His claim on appeal that these items "indicate that Claimant was not paid the full amount of his award" was a mere, unsupported allegation. Claimant's Brief at 13. This Court must conclude that Claimant failed to explain or demonstrate what amounts he was still owed. Counsel acknowledged that he did not have records from the

community college as to the amount of wages earned by his client. He also had no specific information regarding medical bills that were not paid. This was critical information that Claimant should have had at his disposal before he filed the penalty petitions and alleged that Employer violated the Act.

This Court's review of the record indicates that Claimant never offered any explanation how the payment summary substantiated a violation of the Act. He never offered any calculations which demonstrated what he was owed. The only evidence conceivably presented was Claimant's testimony that he "did not recall" receiving the December 12, 2003, payment for \$560.94. This uncertain and vague testimony was not sufficient to establish that the payment was not made. Claimant had no deposit slips from his bank account from 2003-2004 to show he had received and cashed any check. He did not even search for this information before filing his Penalty Petition or before the hearing. He testified "I don't know, but I don't know if they would even go back that far." N.T., 7/7/09, at 23. The only evidence presented was the payment summary which indicated that the \$560.94 was, in fact, paid.

Claimant has filed briefs in which he attempts to explain in detail for the first time in this proceeding what payments he believes he was owed from Employer. Critically, none of this information or argument was presented to or adequately explained to the WCJ or Board. This Court will not, because it may not, decipher these calculations and explanations proffered for the first time on appeal.

Because Claimant failed to present a single iota of evidence before the WCJ which demonstrated that Employer failed to make payments in accordance with the October 20, 2003, Decision, this Court affirms the Board.

Res Judicata and Laches

Claimant next takes issue with the WCJ's discussion and mention of the equitable doctrines of *res judicata* and laches.

Claimant asserts that the WCJ's application of laches was not supported by substantial evidence because Employer did not demonstrate prejudice due to the delay. This is not correct. At the hearing, both Employer and Claimant were unable to present testimony which refuted the allegations due to the passage of time. Employer was unable to locate the adjuster from the previous insurance company to describe what payments were made and Claimant's counsel readily admitted that Claimant's memory was faulty due to the passage of time.

In any event, as this Court has pointed out, the basis for the WCJ's decision was that Claimant presented no evidence to support his claim that Employer failed to make payments in accordance with the prior Decision. The WCJ simply stated, in dicta, that **even if** Claimant had met his burden of proof, his claims would nevertheless be barred by laches. Thus, laches did not serve as the fundamental legal basis of the WCJ's decision. Rather, his decision was based on Claimant's lack of evidence and failure to meet his burden of proof. Because this Court affirmed the WCJ's conclusion that Claimant failed to meet his burden to produce evidence of a violation of the Act, Claimant's challenge to the alleged application of laches, *sua sponte*, need not be addressed.

With regard to Claimant's contention that the WCJ erroneously raised *res judicata sua sponte* and the application of *res judicata* was not supported by substantial evidence, this Court must reject these arguments, as well. First, Employer's counsel specifically stated, on more than one occasion during argument, that he believed the disfigurement claims were barred because they were "encompassed within the disfigurement that has already been awarded." H.T., 5/12/09, at 16; R.R. at 83a. Employer's counsel also specifically stated that "the Reinstatement Petition should be dismissed based upon the prior Decision." H.T., 5/12/09, at 17; R.R. at 84a. The WCJ absolutely did not raise the issue *sua sponte*.

Claimant next contends that the WCJ's application of the doctrine of *res judicata* was not supported by substantial evidence. Claimant contends correctly that *res judicata* bars a claim where the claim was at issue in a previous proceeding where the claimant knows about the injury and its work relatedness. Weney v. Workers' Compensation Appeal Board (Mac Sprinkler System), 960 A.2d 949 (Pa. Cmwlth. 2008).

Here, Claimant claims he did not recognize that there was an issue regarding his eye disfigurement. However, the record belies his claim. During the hearing on September 1, 2009, Claimant testified that "about a month or two after the injury, it started to --- I noticed a little bit, but as time went on it got progressively closing more." H.T., 9/1/09, at 8; R.R. at 96a. Therefore, by his own admission, which the WCJ clearly believed, Claimant knew of the disfigurement at the time of the prior proceeding.

This issue is meritless.

**Whether the WCJ Erred Regarding
The Correct Average Weekly Wage**

Next, Claimant asserts that the second WCJ somehow relied erroneously on an incorrect weekly wage in reaching his decision. Claimant argued before the WCJ that the October 20, 2003, WCJ decision erroneously listed his average weekly wage as \$304.11, when this was actually his compensation rate. Claimant asserted that it was possible that Employer issued payments based on a \$304.11 average weekly wage, which would produce a compensation rate of \$273.70 per week, as a result an underpayment of benefits to Claimant. Apparently, Claimant believes the WCJ was obligated to correct this error and find that Employer erroneously failed to make the proper wage payments in accordance with the first WCJ's October 20, 2003, Decision. This Court does not agree.

The WCJ correctly found that even if this was an oversight or error, both parties filed an appeal and neither party raised this as an issue at the time. Therefore, the issue was originally waived.

This Court discerns no error. At the July 7, 2009, hearing, Claimant's counsel expressly conceded that the amount of Claimant's weekly wage was never raised as an issue on appeal to the Board from the WCJ's October 20, 2003, Decision. H.T., 7/7/09, at 8; R.R. at 49a. The WCJ did not err when he refused to review the allegation for the first time five years later.

Whether Claimant was Denied Due Process

Next, Claimant contends he was denied due process because the WCJ questioned him during a September 1, 2009, hearing after Claimant's counsel

indicated that he had “not prepared Claimant to testify.” H.T., 9/1/09, at 4; R.R. at 92a.

As the WCJ pointed out, these were not the type of questions Claimant needed to prepare for. The questions pertained to Claimant’s personal observations pertaining to his disfiguration claim. Claimant candidly responded to each question and at no time indicated that he was unable to respond. Claimant’s counsel did not object and, in fact, proceeded to question Claimant himself on the subject of disfigurement.

There was no denial of due process.

Whether the WCJ Failed to Issue a Reasoned Decision

Next, Claimant contends that the WCJ failed to issue a reasoned decision because the WCJ did not specify which pieces of evidence he relied upon in reaching his decision.

Act 44 amendments to Section 422(a) of the Act, 77 P.S. §834⁴, provide that the WCJ shall file “a reasoned decision, containing findings of fact and conclusion of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decision so that all can determine why and how a particular result was reached.” A decision is reasoned if it allows for adequate review by the Board without further elucidation. Daniels v. Workers’

⁴ Added by Act of July 2, 1993, P.L. 190.

Compensation Appeal Board (Tri State Transport), 574 Pa. 61, 828 A.2d 1043 (2003).

Here, the WCJ specifically addressed the issues and the basis for his determinations. Each finding by the WCJ was supported in the record and verified by this Court, which had no difficulty at all determining why and how the WCJ reached his result. Daniels.

This issue is without merit.

Whether the WCJ Erred In Failing to Provide the Parties the Opportunity to Submit Briefs on All Petitions

In his final issue, Claimant contends that the WCJ erred by failing to allow the parties to submit briefs on Claimant's Reinstatement and Review Petitions. The record shows that the WCJ did not issue a briefing schedule after the last hearing and issued his decision within 25 days.

Although there may have been a technical misstep, Claimant did not indicate that he attempted to file a brief, or was denied the opportunity to file one. In fact, the record reflects that after the July 7, 2009, hearing, the WCJ set a briefing schedule and gave the parties the opportunity to brief the issues pertaining to the penalty petitions raised in that hearing, including *res judicata* and the statute of limitations. The last hearing was held on September 1, 2009, where Claimant was questioned on disfigurement. The record shows that, contrary to Claimant's assertion, the WCJ did give the parties an opportunity to file briefs after the July 7, 2009 hearing, and the Claimant did file one. If Claimant wished to file an additional brief, Claimant should have requested an opportunity to do so, but did not.

Because this Court finds Claimant's appeal to be wholly without merit, the order of the Board is affirmed.

BERNARD L. MCGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Christopher Norton,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Workers' Compensation	:	
Appeal Board (K-Mart Corporation),	:	No. 1689 C.D. 2010
Respondent	:	

ORDER

AND NOW, this 15th day of March, 2011, the order of the Workers' Compensation Appeal Board in the above-captioned case is hereby affirmed.

BERNARD L. MCGINLEY, Judge