

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Lorraine Paradis,	:	
	Petitioner	:
v.	:	Nos. 2045 & 2046 C.D. 2010
	:	Nos. 324 & 325 C.D. 2011
Workers' Compensation Appeal	:	Submitted: July 22, 2011
Board (Abington Memorial Hospital),	:	
Respondent	:	

**BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge**

***OPINION NOT REPORTED***

**MEMORANDUM OPINION  
BY JUDGE BROBSON**

**FILED:** October 28, 2011

In these consolidated cases, Petitioner Lorraine Paradis (Claimant) petitions for review of four orders of the Workers' Compensation Appeal Board (Board), two of which the Board issued on August 31, 2010, and two of which the Board issued on January 27, 2011. All four orders relate to two discrete claim petitions Claimant filed with the Bureau of Workers' Compensation. One claim petition involves Claimant's assertion that she sustained a work-related injury on February 3, 2005 (initial injury). The second claim petition involves Claimant's assertion that, on September 25, 2005, she sustained an aggravation of the symptoms associated with her February 3, 2005 injury (aggravation injury).

The Board affirmed the orders of a Workers' Compensation Judge (WCJ), which (1) granted Claimant's claim petition relating to her alleged initial injury, and (2) denied Claimant's second claim petition relating to her alleged

aggravation injury.<sup>1</sup> The WCJ's order regarding Claimant's initial injury (1) granted Claimant's claim petition; (2) suspended Claimant's workers' compensation benefits effective the date of the initial injury, thereby effectively awarding only medical benefits; and (3) terminated Claimant's benefits effective June 24, 2008.

The other two Board orders for which Claimant has petitioned for review are the Board's orders denying petitions for rehearing that Claimant filed on December 8, 2010, after the Board issued its August 31, 2010 orders on the merits of Claimant's claim petitions. For the reasons that follow, we affirm the Board's orders.

Claimant filed her claim petitions on January 22, 2008. As suggested above, Claimant alleged that she (1) sustained her initial injury on February 3, 2005, while working in her position as a registered nurse for Abington Memorial Hospital (Employer),<sup>2</sup> and (2) experienced an aggravation of the symptoms of her initial injury while she was working for Employer on September 25, 2005. Employer filed answers denying Claimant's allegations. The Bureau of Workers' Compensation consolidated the two claim petitions, and the WCJ conducted hearings.

In support of her claim petitions, Claimant testified that she slipped and fell on water and grapes while she was on duty on February 3, 2005, and that she landed on her left hip. (R.R. at 63a.) Claimant testified that she remained on

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<sup>1</sup> The two adjudications the WCJ rendered with respect to Claimant's two claim petitions are identical.

<sup>2</sup> Claimant alleged the following work-related injuries as a result of her fall: "left hip, left buttock, left gluteus, left thigh, lower back, sacroiliac joint, piriformis syndrome, myalgia." (Reproduced Record (R.R.) at 1a.)

regular duty after her fall, but that, because of “intense pain” following her fall, she saw one of Employer’s on-staff physicians, Lora Regan, M.D., two days following her injury. (R.R. at 64a.) Claimant testified that she saw Dr. Regan again on February 11, 2005, because of “left hip discomfort.” (R.R. at 31a.) Claimant testified that Dr. Regan instructed her to avoid “sit-to-stand” patient transfers (transferring patients from one position to another) (*id.*) and prescribed physical therapy (R.R. at 65a-66a). Claimant continued to see Dr. Regan “whenever [Dr. Regan] asked to see [her].” (R.R. at 66a.)

Claimant testified that, when Dr. Regan re-evaluated her on March 22, 2005, she felt better, having completed physical therapy. (R.R. at 32a.) Claimant testified that she was not “completely better,” but Dr. Regan discharged her. (*Id.*) In accordance with Dr. Regan’s release of Claimant to return to her regular duties, Claimant began again to lift patients, but “the pain returned to [her] left hip area, to the gluteal area.” (*Id.*)

Claimant complained to Employer about the continued pain, but, according to Claimant’s testimony, Employer’s health services refused to see Claimant in April 2005, because Dr. Regan had discharged her. (*Id.*) Upon her further complaint to Employer, Dr. Regan examined Claimant again in May 2005, but Claimant continued to perform her regular duties following that examination. (*Id.*) Claimant also continued to see medical personnel through Employer’s employee health services system throughout the summer of 2005, during which time she resumed physical therapy. (R.R. at 31a-32a.) Claimant testified that during that period her pain would subside, but that the pain would increase during the course of her workday with the lifting requirements of her job. (*Id.*) Claimant

testified that she continued to experience left hip pain on August 16, 2005, when Employer's employee health services system again discharged her. (*Id.*)

Claimant testified that on September 25, 2005, while she was transferring a patient from a bed to a chair, she felt extreme pain in her hip and gluteal area at that time and throughout the remainder of her shift. (R.R. at 34a.) Claimant stated that she continued to feel more pain than usual following that event, and saw Dr. Regan again on September 30, 2005. (*Id.*) Claimant testified that Dr. Regan placed a restriction on Claimant at that time, again instructing her not to perform sit-to-stand transfers. (*Id.*) Claimant testified that she began to experience severe pain in her left gluteal area and saw Dr. Peff for possible sciatica. (*Id.*) Claimant testified that she began to undergo physical therapy again in November 2005. (*Id.*)

Claimant testified that, because of the pain she was experiencing, in the summer of 2005 she began to request that Employer transfer her from the medical surgical unit to a position that would not require lifting. (R.R. at 35a.) In December 2005, Claimant began to experience pain in her wrist following a visit to the emergency room. (R.R. at 36a.) In early January 2006, Employer transferred Claimant to a different unit that required less lifting. (R.R. at 35a.) Claimant testified that in January 2006, she began to see John McPhillemy, M.D., (R.R. at 36a), for tendinitis in her right wrist and continued discomfort in her left hip. (R.R. at 67a.) Claimant also testified that she began to see Dr. John Beight in April 2006 for her wrist problem and a shoulder problem that subsequently arose as a consequence of her wrist problem. (R.R. at 29a-30a.)

Claimant testified that in April 2006 she began to discuss her return to work with Employer, with the understanding that she was still partially disabled

because of her non-work-related wrist and shoulder problems. (R.R. at 37a-38a.) In May 2006, Claimant also began to attend physical therapy again. (*Id.*) Claimant began working in a different, part-time position (approximately four hours per week), in September 2006. (R.R. at 39a.) That position with Employer's community health outreach department paid the same as her pre-injury job. (*Id.*) Claimant testified that she continued to have left hip pain in the fall of 2006, and she then saw Richard P. Rosenstein, D.O. (R.R. at 40a.) Claimant testified that Dr. Rosenstein's examination of her was different from Dr. Regan's, Dr. Peff's, or Dr. McPhillemy's examinations. (*Id.*) Claimant described Dr. Rosenstein's exam as encompassing deeper palpitation of the areas of discomfort and testified that Dr. Rosenstein made requests for and observations of a greater variety of movement compared to the other physicians who had examined her. (*Id.*) Claimant testified that those movements more accurately reflected typical positions that she would encounter during her regular duties in her pre-injury position. (*Id.*) In December 2006, Claimant began to see a chiropractor, Willet Neff, D.C. (R.R. at 41a.)

Claimant testified that she began to see Mark Wenneker, D.O., in December 2007, and that, at the time of her deposition on July 30, 2008, she continued to be in Dr. Wenneker's care. (R.R. at 43a.) Claimant described Dr. Wenneker's examination of her as extensive. (*Id.*) Claimant testified regarding a needle treatment that Dr. Wenneker administered every two-to-three weeks, which Claimant describes as causing initial soreness but ultimate short-term relief for Claimant's hip area. (R.R. at 44a.) Claimant returned to physical therapy on a twice-weekly basis in February 2007. (*Id.*) At the time of her deposition, Claimant testified that she receives physical therapy once every week, uses an ice pack at night, and uses a hot pack before performing stretching exercises. (*Id.*)

Claimant testified that she continues to have a painful hip and sometimes wakes up in the middle of the night with hip pain, which requires her on occasion to sleep on a recliner. (*Id.*)

With regard to loss of work following her initial injury, Claimant testified that she missed six non-sequential days of work during 2005 because of her left hip injury. (R.R. at 68a-69a.) Claimant testified that she “was put on medical leave” in January 2006, because of her wrist tendinitis, a condition Claimant does not contend was related to work. (R.R. at 69a.) In January 2007, Claimant began working an additional job with Employer as a “unit secretary.” (R.R. at 41a.) This position required Claimant to work forty (40) hours every two weeks, but paid less than her position as a registered nurse. (R.R. at 42a.)

Claimant also presented the deposition testimony of Dr. Wenneker. Dr. Wenneker testified that he reviewed the notes and records he received of various physicians who examined and/or treated Claimant, including an x-ray, MRI, and EMG. Dr. Wenneker opined that Claimant suffers from an injury or injuries in the nature of residual intermittent mild to moderate left hip pain secondary to healed myofibrosis, adhesive vasculitis of the left hip from fibrosis repair, enthesopathy, somatic dysfunction of the left lower extremities, skin sensation disorder of the left hip and thigh, and post-traumatic left hip myofascial pain syndrome. (R.R. at 120a.) Dr. Wenneker opined that Claimant’s February 2005 (initial) work injury caused these conditions. (*Id.*)

Dr. Wenneker also testified regarding the results of the MRI, EMG, and x-ray tests performed on Claimant. With regard to the x-ray, Dr. Wenneker noted that the x-ray showed no fractures or dislocations. (R.R. at 114a.) Similarly, Dr. Wenneker testified that the EMG performed on Claimant showed no abnormal

findings relative to Claimant's complaints. (R.R. at 113a.) Dr. Wenneker also opined that one of his diagnoses, enthesopathy, likely would not be reflected in an MRI unless the subject of the study also has "calcification," which Dr. Wenneker stated would not be typical. (R.R. at 121a.) Dr. Wenneker testified that he would not expect to see any indication of Claimant's condition reflected on the MRI, x-ray, or EMG. (R.R. at 113a-14a.) Dr. Wenneker's testimony indicates that he accepted Claimant's description of other physician's examinations of her as involving superficial palpitation of Claimant's hip area and that he believed that such examinations would be insufficient to produce a response from Claimant demonstrating the pain Claimant was experiencing. (R.R. at 129a.) Dr. Wenneker testified that, within a reasonable degree of medical certainty, he believed that Claimant's injury at work on February 3, 2005, caused her to become disabled from performing her regular job responsibilities as a registered nurse. (R.R. at 129a.)

Employer submitted the deposition testimony of Dr. Regan, who is Employer's Director for its Employee Student Health Services department and its Center for Occupational Health. (R.R. at 6a-7a.) Dr. Regan testified that she first examined Claimant on February 4, 2005, in response to Claimant's condition following her fall.<sup>3</sup> (R.R. at 165a.) Dr. Regan testified that she indicated in a note that Claimant complained of pain in her left hip and that she had hip pain when walking. (*Id.*) Dr. Regan testified that upon examining Claimant she observed mild lateral tenderness of the left hip with a full and normal range of motion. (*Id.*) Further, Dr. Regan testified that Claimant did not notice an increase of pain with motion. (*Id.*) Dr. Regan testified that she noted equal sensation in Claimant's

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<sup>3</sup> The date Dr. Regan recites appears to contradict Claimant's testimony that she saw Dr. Regan two days after she fell, but this discrepancy is not relevant.

lower extremities and that her gait was normal with heel-to-toe walking. (*Id.*) Dr. Regan testified that, based upon her examination of Claimant, she diagnosed Claimant's injury as left hip strain, and concluded that Claimant could return to her regular duties, including lifting patients, the same day. (R.R. at 166a.) Dr. Regan testified that the next time she saw Claimant was on February 25, 2005, during which visit Claimant indicated to Dr. Regan that she continued to have pain when lying on her left side, that she had no pain in the morning but pain increased in her left hip as the day progressed, and that sometimes pain radiated to her lower back or knee. (*Id.*) Dr. Regan testified that during the course of her examination, Claimant had mild tenderness of the left lateral hip, full range of motion, no tenderness in her lower back, and flexion of forty-five degrees, with hip pain at higher degrees of flexion. (*Id.*) Dr. Regan testified that her diagnosis remained the same, but that she directed Claimant to avoid sit-to-stand patient transfers. (*Id.*)

Dr. Regan testified that she next examined Claimant on March 4, 2005. (*Id.*) Dr. Regan testified that Claimant reported that her hip felt the same, with "aching pain in the left, especially lateral left thigh [and increasing pain] with hip external rotation." (*Id.*) Dr. Regan testified that her examination of Claimant revealed minimal tenderness, a non-tender back, flexion of ninety degrees, extension of twenty degrees, and that during the examination, Claimant noted hip pain. (R.R. at 167a.) Dr. Regan testified that her neurologic exam of Claimant revealed normal reflexes, strength, and sensation, and a good range of motion of the hip, with occasional pain that was greater with external rotation. (*Id.*) Dr. Regan also testified regarding a March 2, 2005 x-ray of Claimant's left hip and noted "femoral heads were in appropriate position. The hip joints and sacroiliac joints were symmetric. No significant joint space narrowing or osteophyte



formation. The sacral arcuate lines are intact. There was some degenerative changes noted in the lower lumbar spine. That was the only finding.” (*Id.*) Dr. Regan testified that she directed Claimant to continue to avoid sit-to-stand patient transfers. (*Id.*)

Dr. Regan testified that she saw Claimant again on March 11, 2005, and that Claimant “was doing well . . . she was doing a home exercise program . . . which caused some low back pain . . . [which Claimant’s physical therapist directed Claimant] to discontinue . . . She reported no numbness or tingling in the lower extremities. No change from her baseline.” (*Id.*) Dr. Regan testified that her examination of Claimant on that day revealed a non-tender back, minimal left hip tenderness, full range of motion of the hip, and normal neurological response, including reflexes, strength, and sensation. (*Id.*) Dr. Regan testified that her diagnosis of hip strain did not change, but that she directed Claimant to continue to avoid sit-to-stand patient transfers. (*Id.*)

Dr. Regan saw Claimant again on March 22, 2005. (*Id.*) Dr. Regan testified that Claimant indicated that her hip pain was “much better,” that she had no problem performing her regular activities at home or work, and that although she awoke “with some discomfort in her hip,” changing positions relieved the pain. (R.R. at 167a-68a.) Dr. Regan testified that following her examination of Claimant that day, her diagnosis was the same, but that Claimant was ready to be released from Employer’s care. (R.R. at 168a.) Dr. Regan testified that based upon that opinion, she discharged Claimant to regular work as of that day. (*Id.*)

Dr. Regan testified that she saw Claimant again on May 16, 2005. (*Id.*) Dr. Regan testified that Claimant reported that she had been able to perform all of her regular duties, but that she had back pain that sometimes began around

lunch time but usually not until the evening after work. Dr. Regan testified that Claimant indicated she had such pain even when not at work and when performing cleaning tasks at home. Dr. Regan testified that Claimant indicated she had pain in “her left lower back radiating along her left lateral thigh,” and she sometimes felt twinges of pain when walking and walking up steps. (*Id.*) Dr. Regan testified regarding her objective findings when she examined Claimant, including normal neurological and motor functions. (*Id.*) Dr. Regan testified that during that visit Claimant also complained about “tingling in all digits upper and lower extremities increased with wiggling digits.” (*Id.*) Dr. Regan testified that she recorded in her notes that Claimant had hip and back pain after work and physical activity at home, but that she advised Claimant that her examination was normal. (*Id.*) Dr. Regan testified that her office note indicated that she found no objective indications of ongoing injury of any kind and that there was no reason for Claimant to discontinue her work activities. (*Id.*)

Dr. Regan testified that she saw Claimant again on June 28, 2005. (R.R. at 169a.) Dr. Regan testified that Claimant reported daily lower back pain and left hip pain, improved flexibility, and that she gets help, when available, with lifting when she is at work. (*Id.*) Dr. Regan testified that, upon examination that day, Claimant had mild left hip tenderness, increased pain with internal and external rotation of the hip, and a normal neurological exam. (*Id.*) Dr. Regan testified that her diagnosis that day continued to be left hip strain and that Claimant could return to regular work activities without restrictions that day. (*Id.*)

Dr. Regan testified that when she examined Claimant again on July 19, 2005, Claimant complained of pain in her “left hip laterally on occasion with walking stairs,” pain when applying ice, pain referred to the anterior hip, and pain

when lying on her right side, but that Claimant indicated that she had no significant back pain and was able to perform all activities at home and work. (*Id.*) Dr. Regan testified that her examination of Claimant that day revealed “mild left trochanter tenderness only to deep palpitation[,] . . . pain was increased with external rotation to the hip . . . [and] her neurologic exam was intact in the lower extremities.” (*Id.*) Dr. Regan testified that she again diagnosed Claimant with a left hip strain, but she cleared Claimant to return to regular work responsibilities. (*Id.*)

Dr. Regan testified that Claimant returned to see her on August 9, 2005, and complained of occasional episodes of left hip pain after forty-five to sixty minutes of driving, a twinge of pain for five minutes after getting out of a car, a stab of pain in her hip while pushing a cart at the grocery store, waking up with tenderness, a flare-up while gardening, and pain lasting five minutes and improving with ice and a change in body position. (*Id.*) Dr. Regan testified that upon examination, she observed minimal tenderness around the left lateral hip, full range of motion, increasing pain with external rotation, and a normal neurological exam and gait. (*Id.*) Dr. Regan testified that at the time of her examination of Claimant on that day, Claimant refused Dr. Regan’s discharge of Claimant, because Claimant disagreed with Dr. Regan’s opinion that she was completely better. (R.R. at 169a-70a.) Dr. Regan testified that she scheduled another visit for Claimant because “activities at home are as painful as activities at work.” (R.R. at 170a.)

Dr. Regan also testified regarding her examination of Claimant on September 6, 2005. (*Id.*) Dr. Regan testified that Claimant reported some pain in her hip following long car rides, pain occasionally in the left lateral hip when she

wakes up but which is relieved within a few minutes with ice or stretching, and no symptoms below her knees. (*Id.*) Dr. Regan testified that upon examination, Claimant had no tenderness in her back, mild tenderness in her left lateral hip, full range of motion of her hip, and a normal neurological exam. (*Id.*) Dr. Regan testified that her diagnosis of left hip strain remained the same, and she gave Claimant medical clearance to return to work without restrictions and discharged Claimant from Employer's care. (*Id.*)

In summarizing her ultimate opinion, Dr. Regan testified as follows:

[I]t was apparent from my record that I felt that her injuries sustained on 2/3/05 had resolved. She had minimal symptoms that I thought were not medically worrisome. Her symptoms were relieved by a change in position and Advil. And I did not believe she needed any further medical care from myself or from anyone related to this problem.

Employer engaged in the following colloquy with Dr. Regan:

Q: Did you believe at that point in time she was able to resume her regular duties without restrictions?

A: Yes, I felt that was well established, and she had been working in a full duty capacity for several months prior to being discharged.

(*Id.*) During cross-examination, Dr. Regan admitted that her notes indicated that following the alleged work incident on September 25, 2005, Dr. Regan identified Claimant as suffering from a hip sprain or strain and that her notes from those examinations referred to the date of Claimant's *initial* injury (February 3, 2005). (R.R. at 180a-82a.) Further, Dr. Regan testified that those notes indicated Claimant was advised to avoid sit-to-stand patient transfers. (*Id.*) Dr. Regan further admitted to similar notations in three subsequent examinations of Claimant,

the last of which occurred in November 2005. (*Id.*) During cross-examination, Claimant's counsel also asked Dr. Regan whether she believed in late summer of 2005 that Claimant had fully recovered from her work-related injury. Dr. Regan stated that "she had a fall in February. This is August. So I did not feel based on my exam and the information that I had that activity restriction was going to be helpful in her recovery. In fact, it was my assessment that she had recovered." (R.R. at 178a.) Dr. Regan admitted that Claimant continues to have pain, and Dr. Regan admitted that her notes written in early September 2005 continued to indicate that Claimant had a hip sprain or strain. (R.R. at 179a.) Dr. Regan testified that she believed Claimant's injury had resolved and that Claimant required no further medical treatment for her injury. (*Id.*)

With regard to the injuries Dr. Wenneker had diagnosed, Dr. Regan testified that she did not believe Claimant suffered from any of those conditions. (R.R. at 170a.) Dr. Regan testified that she did not believe that Claimant suffered from enthesopathy because that condition involves calcification, and she believed that if Claimant had enthesopathy, the x-ray would have shown calcification. (*Id.*) Dr. Regan testified that she did not believe Claimant suffered from adhesive capsulitis, because such a diagnosis is likely only where a patient demonstrates restrictions in hip motion. (*Id.*) With regard to the diagnosis of healed myofibrosis, Dr. Regan testified that she did not believe Claimant had this condition, because Claimant had only minimal tenderness and a fine range of motion around the hip area. (R.R. at 171a.)

Employer also offered the testimony of Donald Leatherwood II, M.D., who conducted an independent medical examination of Claimant on June 24, 2008. (R.R. at 194a.) Dr. Leatherwood testified that he agreed with Dr. Regan's opinion

that Claimant's sole work-related injury consisted of a left hip sprain or strain. Dr. Leatherwood noted that he examined Claimant and had reviewed all of her medical reports, notes, and tests that had been produced for his evaluation. (R.R. at 194a.) Dr. Leatherwood testified that all of the tests performed on Claimant were negative. (R.R. at 198a-99a.) Dr. Leatherwood testified regarding the reasons why he did not agree with Dr. Wenneker's diagnoses, indicating that either his examination of Claimant or the tests that were performed on Claimant would have revealed such conditions, which they did not. (R.R. at 200a.) With regard to the diagnosis of adhesive capsulitis, Dr. Leatherwood testified that such a condition would likely only occur if Claimant had dislocated her hip joint or "subluxed" beyond normal limits. (*Id.*) Dr. Leatherwood testified that he believed that Claimant's complaints were subjective in nature and that there were no objective grounds from which he could conclude that Claimant still suffered from a hip sprain or strain. (R.R. at 201a, 205a.) Ultimately, Dr. Leatherwood opined that Claimant had fully recovered from her hip sprain or strain and was capable of performing her regular duties as a registered nurse. (R.R. at 201a.) Dr. Leatherwood stated that the only condition he noticed on the x-ray and MRI was mild arthritis, which he opined is normal for most humans over twenty years of age. (R.R. at 206a.)

On August 11, 2009, the WCJ issued his orders relating to Claimant's two claim petitions. The WCJ found Claimant's testimony regarding her initial injury credible, and he concluded that Claimant proved that she sustained a work-related injury on February 3, 2005, but failed to prove that she sustained an aggravation of her work-related injury on September 25, 2005. Further, the WCJ concluded that any disability that Claimant may continue to experience following

her absence from work for her wrist and shoulder injuries was not causally related to her work-related injury. The WCJ described Dr. Wenneker's testimony as "less than credible," reaching this opinion by noting that Dr. Wenneker had issued his December 2008 report without having reviewed Claimant's medical records. (Finding of Fact (F.F.) 3.)

On the other hand, the WCJ deemed the testimony of Dr. Regan to be credible. (F.F. 4.) The WCJ indicated that he found Dr. Regan's testimony credible because of her professional certifications as an internist and practitioner of occupational medicine, and because she became Claimant's treating physician following the February 3, 2005 injury and examined Claimant on ten occasions. (F.F. 4) Where Dr. Leatherwood's opinions concurred with Dr. Regan's, the WCJ deemed Dr. Leatherwood's testimony to be credible. (F.F. 5.)

Oddly, the WCJ does not specifically identify the injury that Claimant sustained, but based upon his credibility determinations it is clear that he accepted Dr. Regan's and Dr. Leatherwood's opinion that Claimant sustained a left hip sprain or strain. The WCJ concluded that Claimant's work-related injury had fully resolved by the time Dr. Leatherwood examined Claimant on June 24, 2008. The WCJ suspended benefits as of the date of Claimant's February 3, 2005 injury after concluding that Claimant suffered no loss of earnings, stating ultimately that "[a]ny wage loss Claimant may have suffered was not the result of the February 3, 2005 incident." (WCJ's Decision, at Order, ¶ 2.) The WCJ terminated Claimant's benefits as of June 24, 2008, based upon Dr. Leatherwood's testimony that Claimant's injury had fully resolved by that date.

Claimant appealed the WCJ's orders to the Board, which concluded that the WCJ did not err in his decision. Claimant filed with this Court petitions

for review of the WCJ's orders. While those petitions for review were pending in this Court, Claimant filed a petition for rehearing with the Board, based upon an ultrasound study performed on Claimant on February 22, 2010, and an e-mail that Dr. Wenneker sent to Claimant regarding the results of the study. The Board issued two orders denying Claimant's petition for rehearing, and Claimant petitioned this Court for review of those orders as well. Thereafter, this Court consolidated the four appeals for the purpose of our review.<sup>4</sup>

### **Decisions on the Merits**

On appeal from the Board's orders affirming the WCJ's decisions, Claimant raises the following issues for our review: (1) whether the WCJ's factual findings relating to the issue of wage loss are not supported by substantial evidence or are contradictory, such that the WCJ erred in concluding that Claimant did not suffer a loss of wages as a consequence of her initial injury; (2) whether the WCJ's factual findings regarding the date of Claimant's full recovery are supported by substantial evidence; (3) whether the WCJ erred in sustaining Employer's hearsay objection to the admission of Dr. Rosenstein's Physical Capacities Checklist and Dr. Wenneker's Functional Capacity Evaluation; (4) whether the Board erred in

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<sup>4</sup> This Court's standard of review with regard to the Board's order affirming the WCJ's decision is limited to determining whether an error of law was committed, whether constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704. We acknowledge our Supreme Court's decision in *Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe)*, 571 Pa. 189, 812 A.2d 478 (2002), wherein the Court held that "review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which such question is properly brought before the court." *Wintermyer*, 571 Pa. at 203, 812 A.2d at 487.

With regard to the two orders of the Board denying Claimant's request for a rehearing, our standard of review is limited to considering whether the Board abused its discretion. *Giant Eagle v. Workmen's Comp. Appeal Bd. (Bensy)*, 651 A.2d 212, 217 (Pa. Cmwlth. 1994).



concluding that the WCJ did not err with regard to his findings and conclusions relating to Claimant's average weekly wage; and (5) whether the Board erred in concluding that the WCJ rendered a reasoned decision.

Claimant first argues that the WCJ erred in concluding that Claimant is not entitled to any wage loss benefits. An injured employee seeking to obtain workers' compensation benefits for a work-related injury bears the burden of proving all elements necessary to support an award. *Neidlinger v. Workers' Comp. Appeal Bd. (Quaker Alloy/CMI Int'l)*, 798 A.2d 334, 338 (Pa. Cmwlth. 2002). Pursuant to Section 301(c)(1) of the Workers' Compensation Act (Act),<sup>5</sup> an employee's injuries are compensable if they (1) arise in the course of employment and (2) are causally related thereto. *ICT Group v. Workers' Comp. Appeal Bd. (Churchray-Woytunick)*, 995 A.2d 927, 930 (Pa. Cmwlth. 2010). Further, an employee must demonstrate that she is disabled as a consequence of the work-related injury. *Inglis House v. Workmen's Comp. Appeal Bd. (Reedy)*, 535 Pa. 135, 634 A.2d 592 (1993). The term "disability" is synonymous with an employee's loss of earning power. *Potere v. Workers' Comp. Appeal Bd. (Kempcorp)*, 21 A.3d 684, 690 (Pa. Cmwlth. 2011). An employee continues to bear the burden of proof with regard to the issue of disability throughout the proceedings. *Id.* Thus, Claimant bore the burden to establish not only that she was injured during the course of her employment and that the injury was causally related to her work, but she also had to demonstrate that her injury caused a loss of earning ability.

We briefly summarize the essence of Claimant's first argument as follows: The WCJ's decision is internally inconsistent. Because the WCJ

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<sup>5</sup> Act of June 2, 1915, P.L. 735, as amended, 77 P.S. § 411(1).

concluded that Claimant sustained her burden to prove that she suffered a work-related injury on February 3, 2005, when he suspended her benefits as of the that date, Claimant was entitled to partial disability benefits for the period following November 2, 2006, when her physicians concluded that she had recovered from any problems related to Claimant's non-work-related wrist and shoulder injuries, and she returned to part-time work with Employer in a position she felt she was capable of performing given her work-related injury, but for which she was paid less than her pre-work-related injury position as a full-time registered nurse.

In support of her claim, Claimant asserts that she began to request a transfer in late 2005 partly in response to Dr. Regan's direction to avoid the sit-to-stand transfers required of her regular job, and that she accepted a transfer to Employer's Same Day Surgery unit in late 2005 because of her work-related injury and Dr. Regan's direction.<sup>6</sup> Claimant acknowledges that she stopped working on January 20, 2006, because of her non-work-related wrist and subsequent shoulder problems. Claimant began working a part-time job with Employer in September 2006, when her physician determined that she had recovered *in part* from those non-work-related injuries. That position—Community Health nurse—only provided approximately four hours of work per week. Claimant argues that when she recovered completely from her non-work-related injuries on November 2, 2006, she became eligible for partial workers' compensation benefits based upon the fact that she was no longer earning wages comparable to her pre-work-injury job.

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<sup>6</sup> Because the position in this unit did not result in any wage loss, Claimant does not seek any wage loss benefits for this period.

Claimant points out an apparent discrepancy between Dr. Regan's testimony and notes regarding Dr. Regan's examination of Claimant after September 2005. Dr. Regan's notes *and testimony* regarding her examination of Claimant on September 6, 2005 indicate that Dr. Regan discharged Claimant based upon Dr. Regan's opinion that Claimant was capable of returning to work and performing all of her work duties, including lifting patients. On the other hand, Claimant argues, Dr. Regan testified on *cross-examination* that Dr. Regan's notes indicated that on at least three subsequent examinations, following Claimant's alleged September 25, 2005 aggravation injury, she described Claimant as having a hip sprain or strain. Dr. Regan admitted that her notes regarding these examinations referred to the February 3, 2005 injury, and that her notes indicate that Claimant was again instructed to avoid sit-to-stand patient transfers. While this evidence presents an apparent contradiction, we conclude that Dr. Regan's testimony regarding her notes of her post-September 2005 examinations do not impair the competency of her *testimony* regarding her ultimate opinion that Claimant no longer suffered from a work-related disability as of September 6, 2005.

In *Corcoran v. Workers' Compensation Appeal Board (Capital Cities/Times Leader)*, 725 A.2d 868, 872 (Pa. Cmwlth. 1999), this Court rejected a claimant's argument that contradictory *testimony* a medical expert offered on cross-examination rendered the expert's testimony on direct equivocal:

Generally, an expert's testimony is unequivocal when the expert opines that, in his or her professional opinion, the result in question did come from the assigned cause. Expert testimony is competent to support a finding of fact even where the witness admits to uncertainty, doubt, reservation, or a lack of information with regard to medical and scientific details; provided

that the witness does not recant the opinion or belief first expressed.

Our review of [the medical expert]’s testimony reveals that he unequivocally opined that Claimant had fully recovered from his work injury. Furthermore, with regard to the work restrictions, [the medical expert] connected the need for those restrictions to Claimant’s non-work-related condition and not to his work-related injury. Although [the medical expert] did state during cross-examination that Claimant could do his job prior to [the date of the work-related injury], and that Claimant’s complaints did not develop until after that injury, answers given during cross-examination do not destroy the effectiveness of a physician’s previous opinion. Rather, such statements go to the weight and credibility of medical testimony, not the competency, [of the medical expert]’s opinion, and questions of weight and credibility of medical testimony are within the exclusive province of the WCJ to resolve.

(Citations omitted.)

Although Dr. Regan’s reference to her notes in this case, unlike the medical testimony at issue in *Corcoran*, suggests that restrictions placed upon Claimant following September 2005 related to Claimant’s February 2005 work-related injury, the testimony Dr. Regan gave concerned the contents of her notes, not specifically the essence of her opinion at the time she rendered the notes. As indicated above, and although this case involves a contradiction on cross-examination arising from the contents of notes rather than opinion, we nevertheless believe that the rule identified in *Corcoran*, holding that contradictions on cross-examination may affect the weight and credibility a workers’ compensation judge assigns the testimony of a medical expert rather than the competency of the testimony, still applies. Thus, the WCJ, in his role as fact finder and arbiter of weight and credibility, had the power to review Dr. Regan’s testimony as a whole and to determine that her testimony and notes relating to her

post-September 2005 examinations of Claimant were not entitled to the same weight that he assigned to the opinion she provided on direct examination.

Claimant argues that, when viewing the record as a whole, there is no reasonable conclusion to draw but that Claimant's work-related injury was the reason that Claimant could not earn the same amount of wages when she returned to work in November 2006. We disagree. Dr. Regan repeatedly expressed the opinion that Claimant's injury was a hip sprain or strain. She testified credibly that she did not agree with any of the other diagnoses rendered by Claimant's medical expert. Dr. Regan expressed her belief that Claimant was capable of performing her pre-injury job, including patient transfers. Ultimately, Dr. Regan testified with a reasonable degree of medical certainty that although Claimant may have continued to experience some pain or discomfort as a result of the initial injury, as of September 6, 2005, Claimant was capable of returning to work with no restrictions.

Thus, the WCJ did not err in concluding that Dr. Regan's testimony, while insufficient to support a termination, was sufficient to support the WCJ's conclusion that Employer was entitled to on-going suspension of benefits.<sup>7</sup> The WCJ found Dr. Regan's testimony credible and did not find sufficient credible evidence to support Claimant's assertion that her work-related injury caused her to seek and assume lower paying positions following her recovery from her non-work-related wrist and shoulder injuries. In short, the WCJ concluded that

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<sup>7</sup> Dr. Regan, on redirect examination, did testify that she believed, following her September 6, 2005 examination of Claimant that Claimant had recovered from her February 3, 2005 work-related hip sprain/strain injury. (R.R. at 183a; Notes of Testimony, Dr. Regan at 88-89 (latter page missing from reproduced record.) The WCJ apparently did not accept Dr. Regan's opinion that Claimant was fully recovered at that time, but did accept Dr. Regan's opinion that Claimant was capable of performing the duties of her pre-injury job.

Claimant sustained a work-related injury on February 3, 2005, but that Claimant failed to offer credible evidence that she suffered a wage loss as a result of the injury. The WCJ, in finding Dr. Regan's testimony credible, apparently determined that Claimant was capable of performing the duties of her job, and therefore any wage loss she incurred was the result of her own decision not to continue in her pre-injury position. Based upon the foregoing discussion, we conclude that the Board did not err in affirming the WCJ's decision to suspend Claimant's worker's compensation benefits rather than to grant partial disability benefits.

Claimant next argues that the Board erred in affirming the WCJ's conclusion that Claimant had fully recovered as of June 24, 2008—the date of Dr. Leatherwood's examination of Claimant—from her work-related injury. Claimant focuses on Dr. Regan's testimony, noted above, in which Dr. Regan admitted that her notes indicate that in her examinations throughout 2005, she continued to identify Claimant's injury as relating to her initial injury and to advise Claimant to avoid patient transfers. Claimant also seeks to challenge Dr. Leatherwood's testimony. Claimant does not specifically assert that Dr. Leatherwood's testimony does not constitute substantial evidence in support of the WCJ's factual determinations regarding the date of Claimant's recovery. Instead, Claimant focuses on issues relating to the WCJ's acceptance of Dr. Leatherwood's testimony as credible, pointing out merely that Dr. Leatherwood testifies in workers' compensation matters frequently and is considered a specialist in hand and upper extremities, rather than hip or back problems. Claimant characterizes Dr. Leatherwood's report as "sloppy." Further, Claimant takes issue with the alleged failure of the WCJ to identify in his summary of Dr. Leatherwood's testimony

various aspects of that testimony that Claimant argues suggest weaknesses in Dr. Leatherwood's analysis and opinions. We reject Claimant's arguments.

As the ultimate finder of fact, the WCJ has exclusive province over questions of witness credibility and evidentiary weight. *Griffiths v. Workers' Comp. Appeal Bd. (Red Lobster)*, 760 A.2d 72, 76 (Pa. Cmwlth. 2000). "The WCJ . . . is free to accept or reject, in whole or in part, the testimony of any witness, including medical witnesses." *Id.* The WCJ's credibility determinations, therefore, are not reviewable on appeal. *Campbell v. Workers' Comp. Appeal Bd. (Pittsburgh Post Gazette)*, 954 A.2d 726, 731 (Pa. Cmwlth. 2008). The WCJ found Dr. Leatherwood's testimony credible, noting Dr. Leatherwood's testimony that his examination of Claimant and her medical records revealed no ongoing problems, abnormal results, or pain upon movement. Dr. Leatherwood also testified regarding his opinion of Dr. Wenneker's diagnoses, explaining why he disagreed with Dr. Wenneker's opinion. Dr. Leatherwood testified that he found no objective basis to explain Claimant's continued complaints of pain. This Court has held that when a WCJ credits a medical expert's testimony that he found no objective evidence suggesting ongoing disability but rather that a claimant has fully recovered, a workers' compensation judge may properly grant termination despite a claimant's continued complaints of pain. *Kerns v. Workmen's Comp. Appeal Bd. (Colt Res., Inc.)*, 613 A.2d 85 (Pa. Cmwlth. 1992). Based upon Dr. Leatherwood's credited testimony, the WCJ concluded that Claimant had fully recovered from her work-related injury by the time Dr. Leatherwood examined Claimant.<sup>8</sup> We perceive no lack of substantial evidence and no error in the WCJ's legal conclusion regarding Claimant's full recovery by June 24, 2008.

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<sup>8</sup> As indicated above, in our discussion of Claimant's argument that the WCJ erred in failing to award partial benefits, the WCJ suspended benefits up through the date of Dr.

Claimant next argues that the WCJ erred in sustaining Employer's hearsay objections (made during Dr. Wenneker's deposition) to Dr. Wenneker's testimony regarding Dr. Rosenstein's Physical Capacities Checklist and the admission of that document itself. Additionally, the WCJ sustained Employer's hearsay objection to Dr. Wenneker's testimony concerning a Functional Capacity Evaluation that was conducted at the University of Pennsylvania in accordance with a prescription Dr. Wenneker wrote for Claimant.

The first aspect of Dr. Wenneker's testimony at issue involves his testimony reciting Dr. Rosenstein's thoughts, as reflected on the document, regarding the work Claimant could perform during an eight-hour day. (R.R. at 115a.) Additionally, Employer objected to Dr. Wenneker's testimony that he would impose greater restrictions on Claimant than those restrictions Dr. Rosenstein suggested in his Physical Capacities Checklist. (R.R. at 116a.) The final objection Employer made concerned Dr. Wenneker's testimony relating to the Functional Capacity Evaluation conducted at the University of Pennsylvania. (R.R. at 122a-23a.) In that testimony, Dr. Wenneker noted the opinions of the person who conducted the evaluation, and commented that "[t]he opinion of the person doing this was that the patient [would] be unable to meet the pushing, pulling requirements of 60 pounds that was required by the nursing department at Abington." (R.R. at 123a.)

Claimant asserts that the Board erred in concluding that the WCJ committed only harmless error in sustaining Employer's hearsay objections to the

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Leatherwood's examination of Claimant because, although the WCJ determined that Claimant failed to satisfy her burden of proof as to disability, he also apparently determined that Employer's evidence was insufficient to demonstrate that Claimant had fully recovered from her work-related injury until Dr. Leatherwood's examination.



admission of Dr. Wenneker's testimony concerning these documents and Dr. Rosenstein's Physical Capacities Checklist. Claimant asserts that the documents constitute an appropriate source of information upon which Dr. Wenneker could rely upon in rendering his opinion. Claimant reasons that Dr. Wenneker could render an opinion based in part upon the information from the capacity forms. Further, Claimant contends that the content of these documents tends to support Dr. Wenneker's testimony and that, if the WCJ had concluded that Dr. Wenneker could testify based upon the opinions included in the documents, the WCJ's credibility determinations regarding Dr. Wenneker might have been different. Thus, Claimant urges, an erroneous decision regarding these documents could not constitute harmless error.

As indicated above, Dr. Rosenstein's Physical Capacities Checklist consisted of Dr. Rosenstein's opinions regarding the duties he believed Claimant could perform in light of her hip injury. Thus, the testimony of Dr. Wenneker that the WCJ deemed inadmissible hearsay relates solely to the opinions expressed by other medical personnel. Claimant cites the rule of law that a medical expert may express an opinion based upon the records of other physicians when those records, although not part of the record before the adjudicator, are ones upon which such experts customarily rely in their professional practice. *Westinghouse v. Electra Corp./CBS v. Workers' Comp. Appeal Bd. (Burger)*, 838 A.2d 831 (Pa. Cmwlth. 2003); *Empire Steel Castings, Inc. v. Workers' Comp. Appeal Bd. (Cruceta)*, 749 A.2d 1021 (Pa. Cmwlth. 2000). This rule constitutes an *exception* to the hearsay rule, and, consequently, contrary to Employer's position, if the records upon which Dr. Wenneker based his testimony and the document Claimant sought to admit, constitute records upon which medical experts customarily rely in their

professional practice, then neither Dr. Wenneker's testimony nor Dr. Rosenstein's Physical Capacities Checklist would constitute hearsay necessitating corroboration in order for the WCJ to admit the document and testimony.

Employer, while recognizing this exception to the hearsay rule, asserts that this exception applies only to factual information included in another medical professional's records, and does not apply to a medical expert's reliance in testimony upon the medical *opinion* of another expert. Employer refers us to the Pennsylvania Superior Court's decision in *Phillips v. Gerhart*, 801 A.2d 568 (Pa. Super. 2002), which involved the question of whether a trial court in a medical malpractice matter erred in excluding testimony of an expert regarding treating "physicians' opinions that were contained in medical records." *Id.* at 575. The Superior Court opined:

Initially, we noted that the trial court correctly allowed Appellants to present factual information from the hospital records. However, we find that the trial court did not err when it excluded evidence regarding the treating doctors' opinions. We have long held that a medical opinion contained in a hospital record is not admissible unless the doctor who prepared the report is available for in-court, cross-examination regarding the accuracy, reliability, and veracity of his or her opinion. Although the line between statements of fact contained in hospital records and inadmissible medical opinion evidence is not often clear, we believe that the trial court drew the proper line between them in this case.

*Id.* We cannot dispute the Superior Court's observation regarding the sometimes blurry line between medical records that reflect solely opinion and those that reflect facts. In this case, for example, no one has argued that the medical experts could not express an opinion with reference to and in reliance upon the report of the radiologist who performed the x-ray on Claimant's hip. In this case, however,

we must agree with the WCJ's ultimate conclusion that the testimony of Dr. Wenneker, reciting the opinions of other medical professionals concerning their beliefs regarding Claimant's job performance abilities, crossed the line from fact to opinion, thus rendering the *Thomas* rule inapplicable.

Consequently, we need not address the question of whether the excluded testimony and document might have buttressed Dr. Wenneker's credibility and resulted in a different view of credibility on the part of the WCJ. We reiterate here the notion that a fact finder has the sole province in determining the weight and credibility of evidence. *Griffiths*. Claimant has cited no legal authority in support of her assertion that the WCJ's explanations for his credibility determinations warrant re-examination, and, consequently, we reject this argument.

Next, Claimant contends that the Board erred with regard to its review of the WCJ's determination regarding Claimant's average weekly wage. The Board regarded this issue as moot, based upon its affirmance of the WCJ's conclusion that Claimant did not have any disability or wage loss as a result of her work-related injury. Because, as indicated above, we agree with the WCJ's resolution of the disability issue, we also agree with the Board that this issue is moot.

Finally, Claimant asserts that the Board erred in concluding that the WCJ's decision was well-reasoned under the Act. Section 422(a) of the Act<sup>9</sup> requires workers' compensation judges to "adequately explain the reasons for rejecting or discrediting competent evidence. Uncontroverted evidence may not be rejected without reason or for an irrational reason; the workers compensation judge must identify that evidence and explain adequately the reasons for its rejection."

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<sup>9</sup> 77 P.S. § 834.

Claimant argues that the WCJ failed to comply with this requirement because (1) the WCJ did not articulate reasons for his rejection of some of Claimant's testimony; and (2) the WCJ "did not articulate verifiable reasons for his credibility determinations" as to other witnesses.

With regard to the WCJ's credibility determinations concerning Claimant's testimony, our Supreme Court in *Daniels v. Workers' Compensation Appeal Board (Tristate Transport)*, 574 Pa. 61, 828 A.2d 1043 (2003), observed that a workers' compensation judge may render credibility determinations regarding a witness who testifies before the judge based upon first-hand observations of the witness. Because the WCJ heard some of Claimant's testimony during the course of one of his hearings, the WCJ was in a position to judge Claimant's credibility with regard to that testimony on that basis. With regard to Claimant's assertion that the WCJ was required to articulate his reason for not finding all of Claimant's deposition testimony credible, we note that, in certain circumstances, such as where other properly credited testimony results in factual findings that render such articulation unnecessary, the reasoned-decision requirement does not require a workers' compensation judge to articulate the rationale for his credibility determinations. See *Sweigart v. Workers' Comp. Appeal Bd. (Burnhan Corp.)*, 920 A.2d 962 (Pa. Cmwlth. 2007) (holding WCJ not required to make credibility determination regarding Claimant's testimony that physician's treatment alleviated pain where other medical testimony indicated treatment not reasonable or necessary given other available medication equally effective). In this case, as noted above, Dr. Leatherwood's credited testimony indicated that he observed no objective basis for Claimant's complaints of pain. He considered Claimant's complaints to be purely subjective. Based upon this

credited testimony, the WCJ did not need to articulate the basis for his rejection of Claimant's testimony. Further, the WCJ accepted the opinion testimony of Dr. Regan concerning Claimant's continued ability to perform the duties of her pre-injury job. Thus, that testimony and the WCJ's rejection of Claimant's testimony relating to her alleged inability to perform the duties of her pre-injury job after Claimant attempted to return to work following recovery from her wrist and shoulder injury, support the WCJ's decision regarding suspension of Claimant's benefits.<sup>10</sup>

Although Claimant is correct in asserting that *Daniels* requires a WCJ to identify an objective basis for accepting or rejecting the deposition testimony of medical experts, whose demeanor a workers' compensation judge cannot observe, we conclude that the WCJ satisfied that requirement with regard to his credibility determinations concerning the parties' medical experts. In *Daniels*, the Supreme Court provided some guidance as to what objective factors may support a workers' compensation judge's credibility determinations regarding deposition testimony, including the duration of the claimant/doctor relationship and the lapse in time between the date upon which an injury occurs and the date of the witness' examination of a claimant.

In this case, the WCJ identified two basic reasons for his determination that Dr. Regan testified credibly: (1) her professional certification

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<sup>10</sup> We note Claimant's reference to Employer's offer of employment based upon the excluded Physical Capacities Checklist that Claimant submitted to Employer in late 2007, and Employer's offer of employment that satisfied the restrictions identified in that list that were included in response to Claimant's hip condition. We note, however, that Employer's response does not constitute an admission of any type regarding the existence of a work-related disability or injury. That information simply supports a conclusion that Claimant provided Employer with information indicating that she had a hip problem, thus providing Employer with an opportunity to accommodate an employee's condition.

and experience with occupational health issues; and (2) her examination and treatment of Claimant on at least ten occasions. Those reasons qualify as adequate objective reasons to credit a medical expert's opinion. With regard to Dr. Leatherwood, the WCJ, other than noting this physician's orthopedic board certification, did not offer any specific explanation as to why he found that medical expert's testimony credible other than that he found Dr. Leatherwood's opinions to be consistent with Dr. Regan's opinions. This is admittedly a weak basis for making a credibility determination, but it is not necessarily so inadequate to conclude that the WCJ did not satisfy the reasoned-decision requirement. Further, Claimant has offered no argument to support the apparent suggestion that the consistency of one medical expert's opinion with another medical opinion, for which a WCJ has articulated his credibility determination (a boot-strap basis for making a credibility determination), is insufficient under the reasoned decision requirement. Consequently, we conclude that the WCJ rendered a reasoned decision.

We further note that, with regard to Claimant's claim petition alleging that she sustained an aggravation injury, our discussion above of the same evidence, factual findings, and legal conclusions we reviewed concerning Claimant's claim petition relating to her initial injury apply with the same force to Claimant's petition for review relating to her alleged aggravation injury. Accordingly, we affirm the Board's orders affirming the WCJ's decisions concerning the merits of Claimant's claim petitions.

### **Petitions for Rehearing**

Claimant's two remaining petitions for review challenge the Board's orders denying Claimant's petitions for rehearing. Claimant filed her petitions for

rehearing based upon “additional” medical evidence in support of Dr. Wenneker’s opinion that he sent to Claimant and her counsel. The additional evidence, not in existence during the proceedings before the WCJ, was an ultrasound test that was performed on Claimant. The Board issued its orders affirming the WCJ’s decisions on August 13, 2010. Claimant filed her rehearing petitions on December 8, 2010, alleging that an ultrasound test performed February 22, 2010, which purports to indicate abnormalities of her left hip, supports her claim petition. Claimant contended that this test constitutes after-discovered evidence warranting rehearing. Claimant asserts that the test demonstrates that she has enthesopathy, as Dr. Wenneker opined in his testimony. The Board denied the petitions for rehearing without discussion of the merits.

Claimant asserts that the Board erred in denying rehearing because the test constitutes after-discovered evidence. In a workers’ compensation matter, the Board has discretion whether to grant a request for rehearing based upon a claim of after-discovered evidence and may do so when justice requires a rehearing. *Joseph v. Workmen’s Comp. Appeal Bd. (Delphi Co.)*, 522 Pa. 154, 560 A.2d 755 (1989). The Board properly grants rehearing to permit the introduction of additional evidence when such evidence is non-cumulative and the purpose of seeking to admit the evidence is not simply to strengthen a weak case. *Paxos v. Workmen’s Comp. Appeal Bd. (Frankford-Quaker Grocery)*, 631 A.2d 826 (Pa. Cmwlth. 1993).

Claimant relies upon this Court’s decision in *Stitchick v. Workers’ Compensation Appeal Board (Trumbull Corporation)*, 782 A.2d 1133 (Pa. Cmwlth. 2001), in arguing that the Board erred in denying Claimant’s petition for rehearing. In *Stitchick*, a claimant, who had previously had total knee replacement

surgery, fell twice within a month's period allegedly injuring his knees, and claiming that he hurt his right knee in the second fall. The physician who performed the knee replacement surgery opined that when he saw claimant after the first fall he believed that Claimant had "some loosening on the patellar component' of the knee." *Id.* at 1134. The employer's expert opined that the claimant had sustained a contusion on his right knee when he fell. *Id.* Another physician who testified for the employer opined that the claimant had fully recovered from the knee injury. *Id.* The WCJ found the employer's experts credible and denied the claimant's claim petition. The Board rejected the claimant's request for a rehearing because, it reasoned, the parties had presented testimony concerning the particle in the knee, and the workers' compensation judge had not deemed credible testimony regarding a crack in the prosthesis. The Board reasoned that permitting rehearing for the introduction of evidence concerning a surgical examination of the claimant's right knee relating to the alleged crack "would be cumulative and bolster testimony which has already been presented and found not credible." *Id.* at 1136.

On appeal to this Court, we agreed that the evidence the claimant sought to introduce—the operative report and narrative indicating the discovery of a crack only upon surgical removal and inspection of the critical knee component—was not in Claimant's possession or available until after the close of the record. *Id.* First, we noted that, contrary to the Board's recitation of the workers' compensation judge's decision, the judge's factual findings nowhere addressed the question of whether the claimant's prosthetic knee had a crack, but rather, the judge only stated that the claimant had not established the existence of plastic particles in his knee, as his physician had testified. *Id.*



This Court reversed the Board's order, stating:

The after-discovered evidence Claimant wishes to offer is material and would not be cumulative as the WCJ did not have evidence of any actual damage to the Claimant's right knee prosthesis at the time of the first hearing. The new medical information was not readily ascertainable by the x-rays and the other tests previously performed on Claimant . . . when the record was closed . . . or when the WCJ issued the opinion because the evidence was not ascertained or in the possession of Claimant until . . . the operation took place . . . or the date of the narrative report. The Board should have granted Claimant a remand to present this new medical evidence for consideration by the WCJ.

*Id.* at 1136. In *Stitchick*, the claimant, after being unsuccessful in asserting a claim petition, underwent a *procedure* to address a problem for which his treating physicians did not provide a credited opinion identifying the cause of the claimant's problem. The surgical procedure involving his knee replacement revealed a crack in one of the prosthetic parts that had not been ascertainable before the surgery. In this case, Claimant asserts that a diagnostic *test*, which Claimant's physician did not order during the period preceding or during the proceedings before the WCJ, supports her physician's earlier diagnosis.

Although the facts involving the post-hearing evidence at issue in this case bear some similarities to those at issue in *Stitchick*, we conclude that the Board did not abuse its discretion in denying rehearing. Claimant asserted in her petition for rehearing that the results of the ultrasound test would support Dr. Wenneker's diagnosis of enthesopathy. In *Stitchick*, however, a significant factor in the Court's decision appears to be the fact that, at the time of the proceedings before the worker's compensation judge, the claimant's physician did not assert nor seem to have reason to suspect a crack in the claimant's prosthetic knee, and,

consequently, the Court appears to have concluded that there was no reason to expect the claimant's physician to have taken the extreme measure of surgically proceeding for the sole purpose of making a diagnosis. In this case, however, Claimant does not articulate a reason why she did not have this test performed at a time when the results of the test could have been offered to the WCJ in order to aid him in the decision-making process. Accordingly, we cannot conclude that the Board abused its discretion in denying Claimant's petitions for rehearing.

Based upon the foregoing discussion, we affirm all four Board orders that are the subject of these consolidated petitions for review.

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P. KEVIN BROBSON, Judge

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Lorraine Paradis, :  
 :  
 : Petitioner :  
 :  
 : v. : Nos. 2045 & 2046 C.D. 2010  
 : : Nos. 324 & 325 C.D. 2011  
 :  
 : Workers' Compensation Appeal :  
 : Board (Abington Memorial Hospital), :  
 : Respondent :

***ORDER***

AND NOW, this 28th day of October, 2011, the orders of the  
Workers' Compensation Appeal Board are AFFIRMED.

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P. KEVIN BROBSON, Judge