IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jose Berdecia-Cortes,	:	
Petitioner	:	
	:	
v.	:	No. 1636 C.D. 2008
	:	Submitted: October 31, 2008
Workers' Compensation Appeal Board (Delaware Valley Lift Truck and Nationwide Mutual Insurance Company),	:	
Respondents	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: December 3, 2008

Jose Berdecia-Cortes (Claimant) appeals the order of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ) granting Delaware Valley Lift Truck's (Employer) request for a modification of benefits, denying in part his claim petition to add injuries because of his failure to give Employer timely notice, as well as denying his request for penalties. Discerning no error, we affirm.

On May 4, 2005, Claimant sustained a work-related injury. Employer issued a notice of temporary compensation payable on May 18, 2005, identifying

Claimant's injury as a lumbar spine strain and setting forth a compensation rate of $542.33 per week. In August 2005, Employer issued a notice stopping temporary compensation as of July 28, 2005, and a notice of workers' compensation denial because Claimant was not disabled due to a work injury within the meaning of the Workers' Compensation Act (Act).[1] Employer continued to pay for causally-related medical treatment. On November 10, 2005, the parties entered into a supplemental agreement agreeing that on September 21, 2005, Claimant's disability recurred.

On May 1, 2006, Employer filed a utilization review request challenging the reasonableness of the disc surgery Claimant was to undergo on May 4, 2006, and the matter was assigned to a Utilization Review Organization (URO). Claimant underwent surgery as scheduled, but on June 27, 2006, the URO found the surgery unnecessary and unreasonable.

On June 15, 2006, Claimant filed a claim petition alleging that he suffered orthopedic and neurological injuries to his spine, including anatomic abnormalities with sciatic impairment in the left leg, including radiculopathy due to the work injury of May 4, 2004. He further alleged that injuries to his shoulders occurred in either August or September 2005 as a result of the "light-duty" work he was assigned to perform after his work injury. Claimant also filed a petition to modify or suspend compensation benefits as of June 15, 2005, because the description of the injury and the average weekly wage were incorrect. Claimant

[1] Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§1-104.4, 2501-2708.

also requested penalties and attorneys' fees for an unreasonable contest. Claimant later filed a petition for review of utilization review determination on July 31, 2006, seeking a review of the determination that the disc compression surgery performed by Denis P. Rogers, M.D. (Dr. Rogers) on May 4, 2006, was neither reasonable nor necessary. Employer filed answers denying Claimant's petitions and filed its own petition to modify or suspend compensation benefits as of August 7, 2006, because Claimant had been offered a job within his capabilities.

Before the WCJ, Claimant testified that he worked for Employer as a forklift mechanic since 2001, and that his job was physically demanding requiring him to lift parts weighing approximately 100 pounds. On May 4, 2005, he was working at a Kmart warehouse where he maintained forklifts. While there, his supervisor and co-owner of Employer, Jim Meyer, asked him to bring six sideshifters weighing between 100 and 130 pounds from Kmart to the Employer's work site. While performing this task, Claimant testified that he slipped and fell and felt a hard pain in the left side of his lower back, buttocks, groin area, left knee and into his foot, but that he continued to work. Because of increasing pain from his injury, he called Jack Meyer, Employer's co-owner, who made an appointment for Claimant to see Jeffrey Geller, M.D. (Dr. Geller).

Claimant testified that when Dr. Geller examined him, he complained of lower back pain as well as pain in his buttocks, groin and left leg. Claimant stated that he received treatment for two to three months following the accident and that he attempted to continue working for Employer. Claimant explained that he was given medication, physical therapy and epidurals, but that the epidurals

provided no relief. He also testified that Dr. Geller had placed him on a lifting restriction of 50 pounds, and that another doctor he sought treatment from, Dr. Schwartz, restricted him to 20 pounds. Claimant stated that he returned to work on August 1, 2005, to a light-duty position which consisted of disassembling forklifts, grinding off rust and painting the parts. Claimant testified that he used an electric grinder and spray gun as well as air tools to disassemble the forklifts. According to Claimant, forklift parts could weigh up to 50 pounds or more.

Claimant further testified that while he was performing this work, he injured his neck, shoulders and arms and sought additional care from Dr. Rogers. Claimant stated that he reported the additional pain he was feeling to Jim Meyer and another supervisor, Mike Cook, and told them that his light-duty work was increasing his pain and discomfort. Claimant testified that he was given another assignment, but that in September 2005, he started to feel "hard" pain in his neck and shoulders down to his fingers and stopped working as of September 21, 2005.

Claimant testified that on May 4, 2006, Dr. Rogers performed surgery on his back after which he was sent for therapy and a functional capacity evaluation. Claimant stated that the surgery did not improve his pain, and he did not believe he could return to his pre-injury job. Claimant also stated that he was unable to return to the modified work that he performed between August 2005 and September 2005. While initially stating that he did not receive a notice that he could return to work, Claimant changed his testimony to agree that he had received a notice of ability to return to work dated June 27, 2006, from Dr. Rogers. Claimant also admitted that he received a letter dated July 31, 2006, offering him a

light-duty job sweeping floors, cutting grass and cleaning the office area and bathrooms. It also provided that Employer would attempt to make full-time work available wherever possible and that Claimant would earn $5.15 per hour. He did not accept this position because he believed that the work he would be required to perform was beyond his physical capabilities. Finally, Claimant stated that he believed his workers' compensation benefits were incorrectly calculated because they did not take into account any overtime he performed. Claimant submitted his W-2 forms for 2003, 2004 and 2005, which indicated that in 2003, Claimant's gross wage was $38,075.85, in 2004, it was $37,599.51 and in 2005, it was $21,310.00. He also submitted a pay stub from November 26, 2004, that indicated he was earning $20 per hour.

Dr. Rogers, board certified in physical medicine and rehabilitation as well as pain medication, testified on Claimant's behalf. He stated that he first examined Claimant on May 11, 2005, with Claimant complaining of back pain with radiation into his left leg along with tingling, numbness and weakness. He reviewed medical records, shoulder MRIs, a functional capacities study and two reports, including an EMG study which indicated a subacute left lumbosacral radiculopathy at the L5 level. Dr. Rogers stated that he next saw Claimant on September 8, 2005, and that he was aware that Claimant had returned to light-duty work with a 50-pound lifting restriction. Dr. Rogers testified that Claimant had developed shoulder pain due to overhead lifting caused by his light-duty work and that his back and leg pain persisted. A physical examination revealed limited range of motion and a paralumbar tenderness in Claimant's lumbar spine, which was more pronounced on the left side. Straight leg tests resulted in discomfort on

Claimant's left side. He noted that Claimant's shoulder range of motion was diminished with pain at the extremes, and while impingement testing was positive, there were no focal motor deficits in Claimant's upper extremities. He testified that when he again saw Claimant on October 3, 2005, Claimant had quit working because he had increased back pain that Claimant attributed to assembling pallets before he left work. On October 24, 2005, Dr. Rogers again saw Claimant and ordered an MRI of his right shoulder, which revealed evidence of biceps tenosynovitis.

Dr. Rogers opined that Claimant had an L4-5 disc herniation and a left L5 radiculopathy that were directly related to the work incident of May 4, 2005. Further, in his opinion, Claimant's shoulder problems were the result of a repetitive strain type injury to the right shoulder, and the increase of back pain aggravation was caused by assembling the pallets.

Regarding the surgery, Dr. Rogers testified that he referred Claimant to Dr. Marcotte, who evaluated Claimant in December 2005 and March 2006. Dr. Marcotte ordered an MRI of Claimant's lower back and a CT scan of the lumbar spine. According to Dr. Rogers, Dr. Marcotte provided a surgical evaluation and recommended a fusion as a last option. Dr. Rogers stated that on May 4, 2006, he performed a percutaneous disc decompression at L4-5, and that when he subsequently saw Claimant on May 30, 2006, Claimant indicated that he had some improvement in his symptoms and his condition was the same on June 27, 2006. Claimant still reported a pain level at six to seven on a scale of one to 10. Dr. Rogers opined that while the surgery did give Claimant some relief, it was not a

success, and his assessment of Claimant remained an L4-5 disc herniation with left L5 radicular response.

As to his ability to return to work, Dr. Rogers reviewed the results of Claimant's functional capacity evaluation and determined that he was capable of light to medium work with a 35-pound lifting restriction. In his opinion, Claimant could have performed the light-duty job offered to him on July 31, 2006, provided that he did not have to lift more than 35 pounds. Dr. Rogers opined that Claimant's shoulder issues were the least of his medical problems and would not prevent him from performing light-duty work.

Claimant also presented the medical testimony of Barry J. Snyder, M.D. (Dr. Snyder), board certified in orthopedic surgery, who was asked by Claimant's attorney to provide an independent medical evaluation of Claimant. He testified that he examined Claimant on August 7, 2006, and found no neurologic impairment of Claimant's lower extremities, no atrophy of any muscle groups, but that he did have sciatic tension signs in his left leg with straight leg testing, and that Claimant's complaints of pain were consistent with sciatic irritations. Dr. Snyder also stated that there were no objective clinical findings regarding his complaints of left shoulder pain. He testified that he reviewed the objective studies and tests performed on Claimant, and that the May 2005 MRI indicated a herniation of the L4-5 disc and that other records were consistent with a radiculitis and radiculopathy. He opined that Claimant's disc injuries and radiculitis were caused by or at least aggravated by his May 4, 2005 work injury, and that Claimant never had a strain or sprain. He also stated that he agreed that Claimant had a

degenerative disc disease that pre-existed the May 4, 2005 accident, and he also opined that the surgery performed by Dr. Rogers was not a reasonable course of treatment.

Dr. Snyder further testified that he had examined the July 31, 2006 job offer and that, in his opinion, Claimant was not capable of performing the work. He stated that light or sedentary work would be in keeping with Claimant's abilities, but he also admitted that he did not know the extent of the tasks listed in the July 31, 2006 job offer and had only based his opinion on the information provided to him by Claimant.

Mark Lukas, Ed.D (Dr. Lukas) also testified on Claimant's behalf. Dr. Lukas, a certified rehabilitation counselor, performed a vocational assessment of Claimant. After interviewing Claimant and reviewing his various medical reports, Dr. Lukas opined that the work offered in the July 31, 2006 job offer sounded moderately exertional, and that some of the tasks would not comply with Claimant's restrictions.

Employer also presented the testimony of Menachem Meller, M.D., Ph.D. (Dr. Meller), board certified in orthopedic surgery. Dr. Meller testified that Claimant reported to him that he felt no better since his injury; that he had pins and needles across the top of his shoulders and back and the base of his neck and throat; had difficulty sitting; and that he was unable to put all his weight on his left leg while walking. Dr. Meller testified, however, that his physical examination of Claimant revealed a young, fit male and that his examination revealed no

tenderness in the buttock and a normal cervical spine motion with an excellent grip and pinch and normal radial and ulnar pulses. Areas where Claimant noted pins and needles or numbness on a diagram did not reveal such findings during examination. He stated that it was unlikely that Claimant suffered an L5 radiculopathy because that would be indicated by a "foot drop," which Claimant did not have. Dr. Meller stated that Claimant had a degenerated lumbar spine and that it was unclear whether the disc prominence at L4-5 was due to the accident on May 4, 2005, but from a strictly orthopedic view, the accident probably did not cause the disc prominence. Based on his examination of Claimant and his review of Claimant's medical records, he testified that the findings of Claimant's diagnostic studies probably indicated a pre-existing condition and that the work injury was an aggravation. While Claimant would benefit from a work-hardening program, he stated that Claimant was capable of performing the work outlined in the July 31, 2006 job offer.

Employer also offered a June 27, 2006 medical report of Michael Wolk, M.D. (Dr. Wolk) regarding the reasonableness and necessity of the disc decompression surgery performed by Dr. Rogers. According to the report, Dr. Marcotte, to whom Dr. Rogers had referred Claimant, indicated that the surgery would not be of benefit. Further, when Dr. Wolk spoke to Dr. Rogers on June 27, 2006, Dr. Rogers stated that he had hoped Dr. Marcotte would perform the surgery. Dr. Wolk stated that medical literature and clinical studies indicated that surgical considerations were only deemed necessary when all other forms of treatment had been exhausted, and that the use of the dekompresser to perform a decompression, as Dr. Rogers used in Claimant's case, was still considered experimental.

Christopher Terranova (Terranova), a certified vocational rehabilitation specialist, was called by Employer regarding Claimant's earning potential. He testified that he met with Claimant on January 18, 2007, and discussed with Claimant his personal, educational, vocational and injury history. He also reviewed Dr. Lukas' assessment and received physical capacities evaluations from several of Claimant's doctors. He testified that Claimant was unable to do the work offered by the July 31, 2006 letter, but provided a list of positions that were available, full-time positions that fell within Claimant's restrictions. He stated that based on the positions listed, Claimant could earn wages from $320 to $465 per week.

Jack Meyer, Employer's co-owner, testified that he had been Employer's president for 23 years and that he supervised his employees. He stated that he was aware that Claimant had been injured on the job on May 4, 2005, and that he had received documentation from Dr. Rogers in June 2006 which indicated that Claimant could return to work. He testified that he created a light-duty work schedule and offered Claimant a light-duty position in the July 31, 2006 offer. He stated that neither Claimant nor his doctors contacted him regarding Claimant's job duties. He stated that he was aware Claimant had returned to work in August 2005, and that he stopped working in September 2005, but that he did not know why Claimant had ceased working on September 21, 2005. Employer also submitted a statement of wages form that set forth an average weekly rate of $813.49, corresponding to a compensation rate of $542.33.

The WCJ made the following credibility determinations. Regarding Claimant's witnesses, the WCJ found Claimant, Dr. Snyder and Dr. Lukas not credible, and found Dr. Rogers's testimony credible except for the testimony regarding the reasonableness of the surgery. The WCJ accepted the opinion of Dr. Wolk as more credible on that matter. As to Employer's witnesses, the WCJ found Jack Meyer's testimony credible as well as Dr. Meller's, which she found persuasive on the issue that Claimant had a degenerative lumbar spine that was aggravated by his work injury of May 4, 2005, and that he could return to the light-duty work described in the July 31, 2006 job offer. The WCJ rejected Terranova's testimony regarding his vocational assessment of Claimant, particularly in regard to the labor market survey.

Based on those findings, the WCJ granted Claimant's claim petition in part, finding that Claimant suffered a work-related injury on May 4, 2005, that aggravated his degenerated L4-5 discs, but would not address whether Claimant incurred a work-related injury while performing light-duty work in September 2005 because Claimant failed to prove that there was any statutory notice of a repetitive strain shoulder injury. The WCJ also denied Claimant's appeal of the utilization review determination, finding that the disc surgery performed by Dr. Rogers was neither reasonable nor necessary. She then granted Employer's petition to modify indemnity benefits as of August 7, 2006, because Employer's job offer of July 31, 2006, was within his restrictions, and Claimant failed to return to work without a reasonable excuse. The WCJ found Employer's contest to be reasonable and, therefore, denied Claimant's penalty request, but found that Employer had failed to meet its burden to prove it was entitled to a suspension of

benefits. Claimant appealed to the Board, which affirmed and this appeal followed.[2]

I.

On appeal, Claimant maintains that the WCJ erred in modifying his benefits[3] because Employer failed to meets its burden of offering a job that was within his capabilities. Specifically, he contends that the July 31, 2006 job offer was not within his work restrictions because Dr. Meller testified that he would not

[2] On appeal, our scope of review is to determine whether an error of law was committed, whether necessary findings of fact were supported by substantial evidence or whether constitutional rights were violated. *Morey v. Workmen's Compensation Appeal Board (Bethenergy Mines)*, 682 A.2d 673 (Pa. Cmwlth. 1996).

[3] When an employer seeks a modification of benefits based on a specific job under Section 306(b)(2) of the Act, 77 P.S. §512(2), the employer must establish that the position is actually available to the claimant, and that the claimant is capable of performing the position in light of his particular physical, intellectual and vocational limits. *See Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.)*, 516 Pa. 240, 532 A.2d 374 (1987). If an employer satisfies that burden, the claimant must then show that he responded to the offer in good faith. *Anderson v. Workers' Compensation Appeal Board (Pa. Hospice)*, 830 A.2d 636 (Pa. Cmwlth. 2003). Section 306(b)(2) of the Act, 77 P.S. §512(2), provides, in relevant part:

> (2) Earning power shall be determined by the work the employe is capable of performing and shall be based upon expert opinion evidence which includes job listings with agencies of the department, private job placement agencies and advertisements in the usual employment area. Disability partial in character shall apply if the employe is able to perform his previous work or can, considering the employe's residual productive skill, education, age and work experience, engage in any other kind of substantial gainful employment which exists in the usual employment area in which the employe lives within this Commonwealth.

release him to that position unless he underwent three months of a "work hardening" program. That contention misrepresents Dr. Meller's testimony.

On direct-examination, Dr. Meller testified that at the time that he examined Claimant, he was capable of performing light-duty work that included lifting 25 pounds occasionally and 10 pounds frequently. He also opined that based on Claimant's current fitness level, he would be able to lift up to 60-75 pounds on occasion, provided he used the proper body mechanics. Dr. Meller testified that he believed that after a three-month interval of further conditioning, Claimant would be able to move into a medium-duty job. (Reproduced Record at 237-238A.) Dr. Meller also testified that he had reviewed the July 31, 2006 job offer letter and that in his opinion, it was a light-duty position, and Claimant was capable of performing the duties listed therein. (Reproduced Record at 243-244A.)

When questioned about the suggested three-month "work hardening" program on cross-examination, Dr. Meller clarified that he believed Claimant would reach maximum medical improvement if he entered a rehabilitative program for up to 12 weeks, but that the decision to do so belonged to Claimant. However, Dr. Meller stated that in his opinion, Claimant no longer needed medical evaluation or medical treatment, and was capable of performing light-duty work at his current state of ability. (Reproduced Record at 264A.)

Because Dr. Meller's and Dr Rogers's testimonies constitute substantial evidence that the proffered employment was within Claimant's

capabilities, the WCJ did not err in granting Employer's request to modify Claimant's benefits.

II.

Claimant next argues that the WCJ erred in holding that Employer was entitled to a modification of benefits after January 18, 2007, because Terranova, Employer's own vocational expert, testified that Claimant could not perform the modified light-duty position offered in the July 31, 2006 letter. What that contention ignores, however, is that Terranova was deemed not credible by the WCJ,[4] who, in making that finding, instead relied on Dr. Meller's and Dr. Rogers's testimonies that Claimant could perform the duties described in the July 31, 2006 letter. Because Claimant acknowledged that he had received notification of the job offer and refused the proffered employment, Employer met its burden to show that if offered a job within Claimant's capabilities. Therefore, the WCJ did not err in modifying Claimant's benefits to reflect the earnings he would have received if he had accepted this employment.[5]

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[4] Questions of evidentiary weight and credibility are exclusively for the WCJ to determine, and they may only be disregarded if there is no substantial evidence to support such conclusions. Further, the WCJ is free to reject in whole or in part, the testimony of any witness, even medical experts. *Frye v. Workmen's Compensation Appeal Board (Lafferty Trucking Company)*, 467 A.2d 659 (Pa. Cmwlth. 1983).

[5] Claimant also argues that because Terranova testified that the position proffered in the July 31, 2006 letter was not available after January 18, 2007, it no longer existed. We cannot find this statement in Terranova's testimony. Assuming that somehow we overlooked such testimony, an employer is not required to establish that a job remained open indefinitely, only that it remained open at the time the position was offered and refused. *Bennet v. Workmen's Compensation Appeal Board (Hartz Mt. Corporation)*, 632 A.2d 596 (Pa. Cmwlth. 1993).

III.

Claimant also maintains that the WCJ capriciously disregarded his testimony that he failed to give notice of the shoulder injury within 120 days of the work-related injury as required by Section 311 of the Act, 77 P.S. §631,[6] because he was the only one to give testimony regarding notice of that injury.[7] Capricious

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[6] That section provides in relevant part:

> Unless the employer shall have knowledge of the occurrence of the injury, or unless the employe or someone in his behalf, or some of the dependents or someone in their behalf, shall give notice thereof to the employer within twenty-one days after the injury, no compensation shall be due until such notice be given, and, unless such notice be given within one hundred and twenty days after the occurrence of the injury, no compensation shall be allowed. However, in cases of injury resulting from ionizing radiation or any other cause in which the nature of the injury or its relationship to the employment is not known to the employe, the time for giving notice shall not begin to run until the employe knows, or by the exercise of reasonable diligence should know, of the existence of the injury and its possible relationship to his employment. The term "injury" in this section means, in cases of occupational disease, disability resulting from occupational disease.

[7] Claimant, without developing the argument, appears to contend that his testimony should be given more credence because he testified that he gave notice of the work-related injury to Jim Meyer, who did not testify. The absence of another person's testimony is not a reason to give another party's testimony more credibility. What Claimant seems to suggest without saying so is that an adverse inference should have been drawn because Jim Meyer did not testify. However, the adverse inference rule only applies in cases where an uncalled witness is "peculiarly within the reach and knowledge of only one of the parties." *Allingham v. Workmen's Compensation Appeal Board (City of Pittsburgh)*, 659 A.2d 49, 53 (Pa. Cmwlth. 1995) (citing *Bentivoglio v. Ralston*, 447 Pa. 24, 29, 288 A.2d 745, 748 (1972)). However, "the [adverse] inference [rule] will not necessarily be appropriate ... merely because a party fails to call an employee who has special knowledge of relevant facts, although that relationship may be a factor." *Bonegre v. Workers' Compensation Appeal Board (Bertolini's)*, 863 A.2d 68 (Pa. Cmwlth. 2004). Even assuming that the rule does apply, the WCJ is permitted, but not required, to draw the adverse inference. *Id.*; *see also Coombs v. Workmen's Compensation Appeal Board*

(Footnote continued on next page…)

disregard of the evidence occurs when the factfinder willfully and deliberately disregards competent testimony and relevant evidence which one of ordinary intelligence could not possibly have avoided in reaching a result. *Arena v. Packaging Systems Corp*., 510 Pa. 34, 507 A.2d 18 (1986); *see also Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe)*, 571 Pa. 189, 812 A.2d 478 (2002).

In this case, the WCJ did not ignore Claimant's testimony, but instead found it not credible and explained in detail why she arrived at that finding. According to the WCJ, Claimant did not present testimony in a straightforward manner, particularly with regard to whether he aggravated his earlier injury or whether a new, separate incident occurred. Claimant was contradictory when he testified regarding his notice of his own work release and eventually admitted that he had been released by Dr. Rogers as of June 27, 2006. Moreover, the WCJ found unpersuasive Claimant's repeated statements that he could not return to work because he needed more treatment, coupled with his failure to testify as to what he felt was wrong with him or his limitations. Finally, the WCJ noted that Claimant's testimony was contradictory to the testimony of credible medical experts.

(continued…)

(Philadelphia Electric Company), 689 A.2d 996, 998 (Pa. Cmwlth. 1997). Nothing in this case even suggests that Jim Meyer was not subject to subpoena by Claimant.

Because the WCJ gave a detailed explanation of why she found Claimant not credible, she did not capriciously ignore any evidence. Because it was Claimant's burden to establish that he gave the requisite notice to his employer of his injury, *Gribble v. Workmen's Compensation Appeal Board (Cambria County Association for the Blind)*, 692 A.2d 1160 (Pa. Cmwlth. 1997), once his testimony was not accepted, he failed to meet that burden.

IV.

Claimant next contends that the WCJ erred when she determined that Employer's contest was reasonable and, therefore, Claimant is entitled to an award of attorneys' fees. An award of attorneys' fees under the Act is appropriate where the defendant (in this case, Employer) has failed to meet its burden to establish facts sufficient to provide a reasonable basis for the contest. The reasonableness of an employer's contest depends upon whether the contest was prompted to resolve a genuinely disputed issue or merely to harass the employee. *See Elite Carpentry Contractors v. Workmen's Compensation Appeal Board (Dempsey)*, 636 A.2d 250 (Pa. Cmwlth. 1993).

In this case, there were several genuinely disputed issues, namely, whether Claimant's May 4, 2005 injury was an aggravation of a pre-existing condition, whether Claimant had provided notice of a separate shoulder injury in September 2005, and ultimately, whether Claimant was able to perform the job offered to him in the July 31, 2006 letter. Because Employer had more than sufficient reason to contest those issues, an award of attorneys' fees under the Act would be inappropriate, and the WCJ committed no error.

V.

Claimant's final argument is that the WCJ erred in dismissing his penalty request because the Employer violated the Act[8] when, in August 2005, Employer filed a notice stopping temporary payment along with a notice of denial after issuing a temporary notice of compensation payable.[9] However, nothing precludes an employer from issuing a denial of compensation after it has issued a notice of temporary compensation.

Section 406.1(d)(1) of the Act,[10] 77 P.S. §717.1(d)(1), provides that: "[i]n any instance where an employer is uncertain whether a claim is compensable under this act or is uncertain of the extent of its liability under this act, the

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[8] Where a claimant files a petition seeking an award of penalties, the claimant bears the burden of proving a violation of the Act occurred. *Sims v. Workers' Compensation Appeal Board (School District of Philadelphia)*, 928 A.2d 363 (Pa. Cmwlth. 2007). Under Section 435(d)(i) of the Act, 77 P.S. §991(d)(i), a penalty of up to 50 percent of the compensation due may be assessed against an employer if there is a violation of the Act or its regulations. The WCJ has discretion to determine whether a penalty should be imposed and the amount of the penalty. *Galizia v. Workers' Compensation Appeal Board (Woodloch Pines, Inc.)*, 933 A.2d 146 (Pa. Cmwlth. 2007). As such, a WCJ's penalty order should not be reversed on appeal absent an abuse of discretion. *Brenner v. Workers' Compensation Appeal Board* (*Drexel Indus.)*, 856 A.2d 213 (Pa. Cmwlth. 2004). Significantly, a claimant need not suffer economic harm before penalties may be imposed to ensure compliance with the Act. *Hough v. Workers' Compensation Appeal Board (AC&T Cos.)*, 928 A.2d 1173 (Pa. Cmwlth. 2007).

[9] Claimant did not file a formal penalty petition but asserted his request for penalties directly in his claim petition. It is within the discretion of the WCJ to allow a request for penalties to proceed with hearings on the merits, but the claimant must produce evidence of a violation of the Act. *Sanders v. Workers' Compensation Appeal Board (Marriott Corp.)*, 756 A.2d 129 (Pa. Cmwlth. 2000). Claimant also contends that penalties should be awarded because Employer contested his petition. However, just because an employer contests a petition, even unreasonably, it is not the basis for finding a violation of the Act.

[10] Added by the Act of February 8, 1972, P.L. 25, *as amended*.

employer may initiate compensation payments without prejudice and without admitting liability pursuant to a notice of temporary compensation payable as prescribed by the department." Under the Act, an employer is allowed to initiate compensation payments within 90 days without admitting liability, but to stop such payments, it must file a notice stopping temporary compensation and a notice of denial. If an employer does not issue either a notice of compensation payable or a notice of denial, a claimant may need to file a claim petition or enter into an agreement with his employer or receive a notice of compensation payable from his employer to ensure continuation of compensation payments.

In this case, the notice stopping temporary compensation payable and notice of denial were issued after Claimant had returned to work in August 2005 through September 21, 2005. On November 10, 2005, the parties entered into a supplemental agreement in which it was agreed that on September 21, 2005, Claimant's disability recurred. Because the filing of a notice stopping temporary compensation and notice of denial is permitted, there was no violation of the Act justifying the award of penalties.

Accordingly, for the foregoing reasons, we affirm the Board's order.

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DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jose Berdecia-Cortes,	:	
Petitioner	:	
	:	
v.	:	No. 1636 C.D. 2008
	:	
Workers' Compensation Appeal Board (Delaware Valley Lift Truck and Nationwide Mutual Insurance Company),	:	
Respondents	:	

O R D E R

AND NOW, this 3rd day of December, 2008, the order of the Workers' Compensation Appeal Board at No. A07-2565 is affirmed.

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DAN PELLEGRINI, JUDGE