IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kathy Hiler, Petitioner	:	
v.	:	
Workers' Compensation Appeal Board (US Airways Group, Inc.), Respondent	:	No. 2106 C.D. 2008
	:	Submitted: July 24, 2009

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: September 16, 2009

Kathy Hiler (Claimant) petitions for review of the order of the Workers' Compensation Appeal Board (Board) that affirmed: the Workers' Compensation Judge's (WCJ) determination of a reasonable contest on the part of U.S. Airways Group, Inc. (Employer); the calculation of Claimant's average weekly wage; and the denial of reimbursement for Claimant's counsel for travel expenses.

Claimant was employed as a flight attendant for Employer. On October 5, 2003, Claimant was assigned to a Columbus to Philadelphia flight aboard a Boeing 737. The plane encountered turbulence. As Claimant sat in the flight attendant "jump seat," "the plane just momentarily dropped and veered to the right, just a quick jut. And, when it did, it flipped me up and over and turned me . . . from facing forward to facing backwards over on the floor on all fours." Notes of Testimony, April 28, 2005, (N.T.) at 7; Reproduced Record (R.R.) at 75a. The

incident "definitely knocked the breath out of me. . . . But I was mostly concerned because my back was bleeding and I had grease on my shirt." N.T. at 8; R.R. at 76a. The next morning in Boston, Claimant completed an injury report and handed it to a supervisor. She had a bad headache and bruises. On October 8, 2003, Claimant began to treat with Novacare, Employer's medical care company. Claimant was discharged by Novacare after approximately ninety days. On February 18, 2004, Gregory D. Riebel, M.D. (Dr. Riebel), an orthopedic surgeon in Claimant's home state of Virginia, restricted Claimant from work as a flight attendant. Claimant never returned to work.

On April 21, 2004, Employer issued a notice of workers' compensation denial. Employer stated that Claimant did not suffer a disability and that Claimant's alleged disability as of February 28, 2004, was not causally related to the October 5, 2003, injury.

On January 21, 2005, Claimant petitioned for benefits and alleged that she suffered the following injuries:

> cervical spine, including but not limited to herniated discs at C5-6 and C6-7, multi-level disc bulging and radiculopathy; thoracic spine injury; contusion and abrasion at mid to lower back; chronic mild to moderate lower back pain; sacro-iliac joint dysfunction; multi level myofascial pain syndrome; right shoulder tendonitis and bursitis with impingement; injury to right trapezius; aggravation of migraines; aggravation of pre-existing asthma; mild bilateral frontal lobe disfunction [sic]; mild transcortical motor dysphasia; and very mild hyperprosodia; trauma related endodontic complications, and worsened eustacian tube dysfunction with increased ENT difficulties.

Claim Petition, January 21, 2005, at 1, 3; R.R. at 2a, 4a.

On March 18, 2005, Claimant petitioned for penalties and alleged that Employer violated the terms of the Workers' Compensation Act (Act)[1]:

> Though the Defendant/Employer acknowledges that the Claimant suffered a work-related injury, and that it is liable for, at a minimum, the payment of medical expenses, it has nonetheless failed and refused to file a proper Notice of Compensation Payable, in violation of Section 406.1 of the Act. Accordingly, the Claimant seeks a fifty (50) percent penalty under Section 435 of the Act, as well as attorney's fees for unreasonable contest under Section 440 of the Act.

Petition for Penalties, March 18, 2005, at 2; R.R. at 11a. The WCJ consolidated the two petitions.

Before the WCJ, Claimant testified she experienced "these headaches, actually horrendously. . . . And I still got the pain from . . . my neck and then a lot of pain down my right arm. It's the last two, three fingers. . . . And they tell me that I have this ligament in my right hip . . . and I think it's just loose." N.T. at 23-24; R.R. at 91a-92a. On cross-examination before the WCJ, Claimant explained that she took a voluntary furlough in early 2003. N.T. at 33; R.R. at 101a.

Claimant presented the deposition testimony of Dr. Riebel, a board-certified orthopedic surgeon and Claimant's treating physician. Dr. Riebel first examined Claimant on February 4, 2004. Dr. Riebel diagnosed Claimant with:

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

> an injury to her neck, her cervical discs, to her brachial plexus on the right side, and to her shoulder muscles, including the rotator cuff muscles on the right-hand side as a result of this kind of a direct trauma, but also stretching mechanism to the shoulder and neck area.

Deposition of Gregory D. Riebel, M.D., June 21, 2005, (Dr. Riebel Deposition) at 14; R.R. at 145a. Dr. Riebel opined that Claimant's condition was the result of the October 5, 2003, incident. Dr. Riebel Deposition at 15; R.R. at 146a.

Claimant also presented the deposition testimony of David W. Harrison, Ph.D. (Dr. Harrison), a psychologist board-certified by the American Board of Disability Analysts, the American Board of Psychological Specialties, and the American Board of Forensic Examiners. Dr. Harrison evaluated Claimant on July 23, and July 30, 2004. Dr. Harrison administered a neuropsychology interview, a neurobehavioral status exam for syndrome analysis, and several standardized tests. Dr. Harrison opined within a reasonable degree of neuropsychological certainty "my evaluation is consistent with a mild closed-head injury." Deposition of David W. Harrison, Ph.D., June 24, 2005, (Dr. Harrison Deposition) at 14; R.R. at 199a. Claimant could not return to work as a flight attendant because of her:

> perception of risk, especially in situations where there was a disruption of her routine or the structure in her typical task that she performs. Also I think she is potentially at risk with continuing pain and with disturbance or dizziness with sensation of spinning rightward that could alter her balance under dynamic conditions.

Dr. Harrison Deposition at 15; R.R. at 200a.

Claimant next presented the deposition testimony of Howard Bruce Sherman, M.D. (Dr. Sherman), a board-certified neurologist and a treating physician of Claimant since April 2001. Dr. Sherman had evaluated Claimant on September 22, 2003, prior to the work-related incident. At that time, Claimant's neurologic exam was essentially normal. Deposition of Howard Bruce Sherman, M.D., August 2, 2005, (Dr. Sherman Deposition) at 7-9; R.R. at 304a-306a. When Dr. Sherman next treated Claimant on January 27, 2004, following the October 5, 2003, incident, Dr. Sherman diagnosed Claimant with some cervical strain and a possible right shoulder impingement syndrome. Dr. Sherman Deposition at 11; R.R. at 308a. From his evaluation of Claimant from January 2004, until July 6, 2005, Claimant suffered continued pain from the October 5, 2003, incident, particularly neck pain and increased headaches. Dr. Sherman Deposition at 14; R.R. at 311a. Dr. Sherman opined that Claimant's neck pain, shoulder pain "and the change in the headache character" were the result of the October 5, 2003, incident. Dr. Sherman Deposition at 14-15; R.R. at 311a-312a. Dr. Sherman believed Claimant never recovered from the October 5, 2003, incident. Dr. Sherman Deposition at 16-17; R.R. at 313a-314a.

Claimant also presented the deposition testimony of Deborah Thoren Mowery, M.D. (Dr. Mowery), a board-certified physical medicine and rehab specialist. Dr. Mowery first treated Claimant on October 12, 2004. Over the next six months, Dr. Mowery treated Claimant four more times in an attempt to reduce her pain. Dr. Mowery believed that Claimant could not work at more than a sedentary level. According to Dr. Mowery, Claimant reached maximum medical improvement but was not fully recovered from the October 5, 2003, incident.

Deposition of Deborah Thoren Mowery, M.D., October 31, 2005, at 20-21; R.R. at 621a-622a.

Employer presented the deposition testimony of Donald F. Leatherwood, M.D. (Dr. Leatherwood), a board-certified orthopedic surgeon. Dr. Leatherwood examined Claimant on May 17, 2005, took a history, and reviewed medical records. Dr. Leatherwood testified that based on Claimant's explanation of the October 5, 2003, incident Claimant suffered "contusion and sprain/strain injuries to the cervical spine, lumbar spine, right hip area, both using that in terms of the official hip as well as most patients' idea of the hip area of their body as well as the right shoulder." Deposition of Donald F. Leatherwood, M.D., September 12, 2005, (Dr. Leatherwood Deposition) at 21; R.R. at 368a. Dr. Leatherwood opined that Claimant was fully recovered from those injuries as of the date of the examination. Dr. Leatherwood Deposition at 21; R.R. at 368a.

Employer also presented the deposition testimony of Lawson F. Bernstein, Jr., M.D. (Dr. Bernstein), a board-certified neuropsychiatrist. Dr. Bernstein examined Claimant on August 15, 2005, took a history, and reviewed her medical records. Dr. Bernstein diagnosed Claimant with "a cognitive disorder not otherwise specified, mild in severity, and in my opinion, due to a pre-existing history of migraine headaches and attention deficit hyperactivity disorder. I also diagnosed her with a history of attention deficit hyperactivity disorder fully treated at the time that I saw hear [sic]." Deposition of Lawson F. Bernstein, Jr., M.D., November 29, 2005, (Dr. Bernstein Deposition) at 27; R.R. at 684a. Dr. Bernstein did not attribute Claimant's condition to the October 5, 2003, incident in any way.

Dr. Bernstein Deposition at 28; R.R. at 685a. Dr. Bernstein opined that Claimant could return to work in terms of her work injury. Dr. Bernstein Deposition at 31-32; R.R. at 689a-690a.

Employer also presented the deposition testimony of Norman Werther, M.D. (Dr. Werther), board-certified in family medicine. Dr. Werther, a panel physician for Employer, first treated Claimant on October 14, 2003. At that time Claimant had a headache on the right side of her head and neck and right shoulder pain. Her left knee and calf were bruised. Her lumbosacral and thoracic areas were sore. Deposition of Norman Werther, M.D., December 14, 2005, (Dr. Werther Deposition) at 11-12; R.R. at 771a-772a. Claimant suffered from cervical strain and sprain, right trapezius and shoulder strain and sprain, thoracic and lumbosacral strain and sprain, abdominus rectus strain, and left lower extremity contusions. Dr. Werther Deposition at 16; R.R. at 776a. Dr. Werther treated Claimant six or seven times between October 14, 2003, and January 12, 2004. By the January 12, 2004, examination, Dr. Werther diagnosed Claimant with degenerative disc disease and cervical arthritis. Dr. Werther Deposition at 30; R.R. at 790a. Dr. Werther did not believe that Claimant was incapable of working as a flight attendant at any time during his treatment. Dr. Werther Deposition at 33; R.R. at 793a.

Employer presented a statement of wages which included two quarters where Claimant had no earnings because she was on voluntary furlough. According to Employer's calculations Claimant's average weekly wage was $537.10. Statement of Wages, April 21, 2004, at 1; R.R. at 295a.

Finally, Claimant's counsel requested reimbursement for expenses to attend the deposition of Dr. Werther in the amount of $93.15 for 230 miles at $.405/mile and $9.50 for Pennsylvania Turnpike tolls. Claimant's counsel also requested reimbursement to attend the deposition of Dr. Leatherwood in the amount of $88.29 for 218 miles at $.405 per mile and $9.50 for Pennsylvania Turnpike tolls. Claimant's counsel also requested reimbursement for expenses to attend Dr. Bernstein's deposition in the amount of $166.05 for mileage for 410 miles at $.405/mile, in the amount of $142.61 for lodging for the nine a.m. deposition, $22.00 in tolls, $10.00 in parking, and $6.83 in meals.

The WCJ granted Claimant's claim petition and ordered Employer to pay Claimant temporary total disability benefits at the rate of $358.07 per week as of February 18, 2004, together with statutory interest based on an average weekly wage of $537.10. The WCJ granted Claimant's penalty petition and ordered Employer to pay a twenty percent penalty to Claimant on her compensation benefits from February 18, 2004, through June 16, 2006, the date of the decision. The WCJ found Claimant, Dr. Riebel, Dr. Sherman, Dr. Mowery, and Dr. Harrison credible and persuasive. The WCJ rejected the opinion of Dr. Werther where it conflicted with Claimant's experts. The WCJ accepted Dr. Leatherwood's testimony only to the extent that Claimant suffered injuries to her neck, right shoulder, and low back on October 5, 2003, and that Claimant continued to have complaints in these areas after Dr. Leatherwood's examination on May 17, 2005. The WCJ accepted Dr. Bernstein's diagnosis of "cognitive disorder not otherwise specified" and Dr. Bernstein's testimony of Claimant's various complaints, and his determination that Claimant could not return to work due to dizziness. The WCJ

rejected the remainder of Dr. Bernstein's testimony. The WCJ also found that even though Claimant reported her work injury on October 6, 2003, Employer waited until April 21, 2004, to issue a Notice of Workers' Compensation Denial. The WCJ found that Employer offered no excuse for the delay. With respect to litigation costs, the WCJ made the following finding of fact:

> 69. The following litigation costs are not reimbursable under the circumstances of this case.
> U.S. Postal Service $13.65
> (Express mail travel voucher to Claimant)
> Travel/Lodging Expenses $347.47
> (Deposition of Dr. Bernstein in Pittsburgh)
> Travel/Lodging Expenses $200.44
> (Depositions of Drs. Werther & Leatherwood in Philadelphia area)

WCJ's Decision, June 16, 2006, (Decision), Finding of Fact No. 69 at 14; R.R. at 956a.

Claimant appealed to the Board and contended that finding of an average weekly wage of $537.10 and that Finding No. 69 were not supported by substantial evidence. Claimant asserted that the WCJ did not issue a reasoned decision as he failed to explain why Employer's contest was reasonable. Employer appealed to the Board and contended that Claimant failed to establish that she was disabled and the award of penalties was erroneous.

The Board affirmed in part. However, the Board remanded to the WCJ to make findings concerning the reasonableness of Employer's contest.

On remand, the WCJ made the following relevant findings of fact:

> 3. As to the Claim Petition, this Judge finds that there was a reasonable contest. Although defendant [Employer] acknowledged that claimant sustained a work injury on October 5, 2003, it vigorously denied that any disability, as defined by the Act, stemmed from the October 5, 2003 episode. Had defendant's [Employer] medical evidence been found to be credible, defendant [Employer] would have prevailed on the merits. Therefore, defendant [Employer] engaged in a reasonable contest.
>
> 4. With regard to the penalty petition, this Judge finds that there was a reasonable contest because there has been persistent confusion in the law as to the employer's obligations in a case, which it characterizes as a 'medical only' case. This Judge finds that the defendant [Employer] could have reasonably believed at the time that it was not obligated to file either a Notice of Compensation Payable or Notice of Compensation Denial within 21 days of October 5, 2003.

WCJ's Decision, February 6, 2008, Findings of Fact Nos. 3-4 at 1; R.R. at 984a.

Claimant again appealed to the Board which affirmed.

Claimant contends that the WCJ erred as a matter of law or abused his discretion when he determined that Employer met its burden of proving a reasonable contest, when he adopted Employer's statement of wages which, due to Claimant's one time furlough, contained two quarters of zero wages and a third partially completed quarter, and when he refused to award certain travel expenses incurred by Claimant's counsel to attend depositions. Claimant further asserts the

WCJ did not issue a reasoned decision with respect to the average weekly wage and the travel expenses.[2]

I. Reasonable Contest.

Initially, Claimant contends that the WCJ erred as a matter of law or abused his discretion when he determined that Employer met its burden of proving a reasonable contest.

Section 440(a) of the Act, 77 P.S. §996(a)[3], provides:

> In any contested case where the insurer has contested liability in whole or in part, including contested cases involving petitions to terminate, reinstate, increase, reduce or otherwise modify compensation awards, agreements or other payment arrangements or to set aside final receipts, the employe . . . in whose favor the matter at issue has been finally determined in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for attorney's fee, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceedings: Provided, that cost for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or the insurer.

An employer's contest is reasonable if the contest was brought to resolve a genuinely disputed issue, not merely to harass the claimant. Dworek v.

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[2] This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

[3] This Section was added by the Act of February 8, 1972, P.L. 25.

Workmen's Compensation Appeal Board (Ragnar Benson, Inc.), 646 A.2d 713 (Pa. Cmwlth. 1994). The imposition of attorney fees is a question of law reviewable by the Board and this Court. McGoldrick v. Workmen's Compensation Appeal Board (Acme Markets, Inc.), 597 A.2d 1254 (Pa. Cmwlth. 1991).

Claimant asserts that Employer did not engage in a reasonable contest with respect to both the claim petition and the penalty petition. First, Claimant argues that all of the medical experts who testified on behalf of Employer acknowledged that Claimant suffered a work-related injury which resulted in different periods of disability. Employer, however, never sought to amend its answer to the claim petition and allege it was contesting the claim on the basis of the duration of Claimant's disability rather than the compensability of any wage loss.

The WCJ found that Employer's contest was reasonable because it contested disability. Dr. Werther testified that at no time during his treatment was Claimant incapable of working as a flight attendant. Dr. Leatherwood testified that while Claimant suffered a work-related injury, she was fully recovered by the date of his examination on May 17, 2005. Dr. Bernstein testified that Claimant's cognitive disorder was unrelated to the October 5, 2003, incident. All of these medical witnesses testified as to the lack of work-related disability. The WCJ failed to find these witnesses credible on this issue.[4] If the WCJ had found these

[4] The WCJ, as the ultimate finder of fact in workers' compensation cases, has exclusive province over questions of credibility and evidentiary weight, and is free to accept or reject the testimony of any witness, including a medical witness, *in whole or in part*. General

(Footnote continued on next page…)

witnesses credible, Employer would have prevailed. This Court has held that "where medical evidence is conflicting or subject to contrary inferences on a material issue and where there is no evidence that the contest was frivolous or made for purposes of harassment, an employer's contest is reasonable." Gunther v. Workers' Compensation Appeal Board (Pontiac), 444 A.2d 1342, 1344 (Pa. Cmwlth. 1982). This Court agrees with the Board that Employer's contest was reasonable.

With respect to the contest of the penalty petition, Claimant initially asserts that because Employer violated the Act, a finding of reasonable contest was precluded. The WCJ found that the contest was reasonable because the law was not clear cut in cases where an employer classifies an injury as "medical only" and contests disability. Under Section 406.1 of the Act, 77 P.S. §717.1, an employer is required to acknowledge or deny compensability within twenty-one days.

In Bates v. Workers' Compensation Appeal Board (Titan Construction Staffing, LLC), 878 A.2d 160 (Pa. Cmwlth. 2005), *petition for allowance of appeal denied*, 588 Pa. 752, 902 A.2d 1243 (2006), this Court addressed whether a violation of the Act was *per se* an unreasonable contest:

> Furthermore, we do not read the cases relied upon by claimant to establish a *per se* rule that any time a claimant demonstrates a violation of the act, however slight or unintentional, or succeeds to any extent in a

(continued…)

Electric Co. v. Workmen's Compensation Appeal Board (Valsamaki), 593 A.2d 921 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 529 Pa. 626, 600 A.2d 541 (1991).

> penalty petition, the employer's contest must be deemed unreasonable as a matter of law. . . . Each case must be decided on its own facts in order to determine whether an employer's contest of a petition asserting a violation of the Act is reasonable. Otherwise, the language in Section 440(a) of the Act that, 'attorney fees may be excluded when a reasonable basis for the contest has been established by the employer' would be nullified with respect to all penalty petitions.

Bates, 878 A.2d at 164-165.

Following Bates, this Court must reject Claimant's contention that a violation of the Act creates a *per se* unreasonable contest.

However, Claimant also asserts that the WCJ erred when he determined that the contest was reasonable because of Employer's confusion over the correct procedure in a "medical only" controversy.

In Orenich v. Workers' Compensation Appeal Board (Geisinger Wyoming), 863 A.2d 165 (Pa. Cmwlth. 2004), *petition for allowance of appeal denied*, 584 Pa. 682, 880 A.2d 1242 (2005), this Court addressed the issue of penalties and unreasonable contest when an employer fails to comply with Section 406.1 of the Act. On November 29, 2000, Barbara Orenich (Orenich) suffered a work-related injury when she and three other nurses in the employ of Geisinger Wyoming Valley Medical Center (Geisinger) attempted to move a patient's position in bed. Later that day, Orenich experienced neck pain. The next week Orenich notified her supervisor of the neck pain and filed an injury report. Geisinger did not issue a notice of compensation payable but paid Orenich's medical expenses up to the insurance contract threshold. In May of 2001,

Geisinger issued a notice of compensation denial and refused to pay certain medical expenses it believed were unrelated to the work injury. On June 26, 2001, Orenich petitioned for benefits and alleged that she suffered an injury to the right side of her neck and arm as a result of the incident on November 29, 2000, and requested that Geisinger pay her medical bills and counsel fees. Geisinger answered and denied all allegations. Orenich, 863 A.2d at 167.

There the Workers' Compensation Judge (Hearing Judge) granted the claim petition and determined that Orenich was fully recovered on November 12, 2001. The Hearing Judge ordered Geisinger to pay Orenich's medical bills but did not award penalties or counsel fees for unreasonable contest even though Geisinger failed to issue a notice of compensation payable within twenty-one days after it received notice of her injury. The Board affirmed. Orenich petitioned for review with this Court. Orenich, 863 A.2d at 168. This Court determined that Geisinger violated the Act and remanded for a determination of whether penalties should be awarded. Orenich, 863 A.2d at 171. Orenich also contended the Hearing Judge erred when he failed to find that Geisinger engaged in an unreasonable contest where Geisinger acknowledged that Orenich had sustained a work-related injury but did not issue a notice of compensation payable, which forced Orenich to file a claim petition. This Court determined that the Hearing Judge abused his discretion when he failed to award attorney fees:

> Employer [Geisinger] acknowledged that Claimant [Orenich] suffered a work-related injury by paying Claimant's [Orenich] medical expenses up to the insurance contract threshold, and in its February 27, 2001, letter to Claimant [Orenich] advising her that she was currently a 'medical only' claim but that if she anticipated losing time at work because of the injury she

> should contact them so they could implement workers' compensation lost wage benefits on her behalf. Well after those acknowledgements, Employer [Geisinger] alleges it issued an NCD [notice of compensation denial] in May of 2001. Because Employer [Geisinger] issued the NCD refusing to pay certain medical bills, Claimant [Orenich] was forced to file a claim petition against Employer [Geisinger] requesting that Employer [Geisinger] pay her medical bills and counsel fees. Then, Employer [Geisinger] filed an answer denying *all* allegations set forth in the claim petition *including* those pertaining to notice and the injury. Because of this charge, Claimant [Orenich] was forced to incur attorneys' fees to litigate whether the injury even occurred, and whether Employer [Geisinger] had sufficient notice of the injury when Employer [Geisinger] clearly knew the injury occurred because it treated Claimant [Orenich] for the injury, paid for her medical bills, and acknowledged the injury in its February 27, 2001 letter to Claimant [Orenich]. Since Employer [Geisinger] forced Claimant [Orenich] to litigate the issue of the occurrence of her injury and notice of the injury, which it had previously acknowledged, it was an abuse of discretion for the WCJ not to award attorneys' fees. . . . [Citation and footnotes omitted] [Emphasis in original].

Orenich, 863 A.2d at 171-172.

In Brutico v. Workers' Compensation Appeal Board (US Airways, Inc.), 866 A.2d 1152 (Pa. Cmwlth. 2004), *petition for allowance of appeal denied*, 584 Pa. 679, 880 A.2d 1240 (2005), this Court again addressed the issue of reasonable contest. Beth A. Brutico (Brutico) was injured at work on January 5, 2001. She informed her supervisor the next day. Brutico treated with a panel physician. She was instructed to undergo physical therapy and prescribed medication to treat cervical, thoracic, and lumbosacral strains. Brutico's employer, US Airways, Inc. (US Air) paid for Brutico's medical bills. Approximately one

and one-half months after the conclusion of physical therapy Brutico informed US Air of ongoing back pain. On August 22, 2001, Brutico returned to the panel physician and complained that her low back symptoms increased in late April or early May of 2001. On August 24, 2001, US Air issued a notice of workers' compensation denial which acknowledged that Brutico suffered a work injury but declined to pay benefits on the ground the injury was not disabling. Brutico filed a claim petition on January 28, 2002, and alleged that she suffered injuries to the cervical upper back, to the low back radiating into her legs, and a disc herniation. She also filed a penalty petition because US Air's notice of compensation denial was not issued until over seven months after she was injured. Brutico, 866 A.2d at 1153-1154.

The Workers' Compensation Judge (Hearing Judge) determined that Brutico did not suffer a herniated disc and also determined that US Air did not violate Section 406.1 of the Act, 77 P.S. 717.1, because it was only required to issue a notice when an employee suffered a disability and not just an injury, and Brutico did not allege a period of disability. The Hearing Judge also found that US Air engaged in a reasonable contest. The Board affirmed. Brutico, 866 A.2d at 1154-1155.

Brutico petitioned for review. This Court determined that US Air did violate the Act because Section 406.1 applied to not only disabled employees but injured employees as well. However, because Brutico did not prevail on the claim petition, no penalties could be awarded. Brutico, 866 A.2d at 1156. Brutico also contended that the Hearing Judge's determination that US Air engaged in a

reasonable contest was in error when US Air acknowledged that Brutico sustained a work-related injury but did not issue a medical only notice of compensation payable which forced her to file a claim petition. Brutico, 866 A.2d at 1156. This Court affirmed:

> In this case, Claimant [Brutico] would have had to hire an attorney regardless of whether Employer [US Air] filed a timely NCP or NCD when she was first injured because the nature of her injuries had changed. She originally suffered cervical, thoracic and lumbosacral strains, but was alleging in her claim petition that she now had 'cervical upper back, low back radiating into both legs' and that she had not recovered from the 'disc herniation resulting from the work injury.' Unlike in Waldameer Park [Inc. v. Workers' Compensation Appeal Board (Morrison), 819 A.2d 164 (Pa. Cmwlth. 2003)], the filing of an NCP or NCD at the time of Claimant's [Brutico] original injury would not have saved Claimant [Brutico] the money of hiring an attorney or the time from litigating the claim. Her alleged injuries were distinctly different from those originally claimed for which the Employer [US Air] admitted were work-related. Therefore, even if an NCP had been issued within 21 days, she still would have had to file a claim petition to amend the NCP. . . . At the hearing, Employer [US Air] presented medical evidence that Claimant [Brutico] was not suffering from a disc herniation as she had alleged, and the WCJ found that medical evidence credible. Because there was a genuinely disputed issue before the WCJ on the purported new injuries, she did not err in determining that Employer [US Air] presented a reasonable contest. (Citation omitted).

Brutico, 866 A.2d at 1157.

After scrutinizing Brutico and Orenich, it appears that the key factor in determining a reasonable contest when an employer neither issues a notice of compensation payable nor a notice of compensation denial is whether the claimant

would be forced to file a claim petition and hire an attorney even if the employer complied with the Act. Here, the parties disagreed over the description and extent of Claimant's injuries. Claimant would have had to hire an attorney and litigate these issues even if Employer issued a timely notice of compensation denial. This Court finds no error on the part of the WCJ.

II. Average Weekly Wage.

Claimant next contends that the WCJ erred when he adopted Employer's Statement of Wages which contained two quarters of zero wages and a third partially completed quarter. Alternatively, Claimant argues that the WCJ did not render a reasoned decision with respect to Claimant's average weekly wage.

Employer's Statement of Wages yielded an average weekly wage of $537.10. Claimant presented two Statements of Wages.[5]

Claimant asserts that the Statement of Wages prepared by Employer does not reasonably or accurately represent the economic reality of her earning experience with Employer because it included the period when she was furloughed

[5] The first one used Claimant's wages for the calendar quarter from July 8, 2003, through October 5, 2003, with wages of $11,643.78 divided by thirteen for an average weekly wage of $895.68. The second statement of wages listed four periods: 1) April 8, 2002, through July 7, 2002, with wages of $9,578.43 divided by thirteen for a period weekly wage of $736.80; 2) from July 8, 2002, through October 6, 2002, with wages of $9,103.80 divided by thirteen for a period weekly wage of $700.29; 3) from October 7, 2002, through July 6, 2003, with wages of $9,741.43 divided by thirteen for a period weekly wage of $749.34; and 4) from July 7, 2003, through October 5, 2003, with wages of $9,623.61 divided by thirteen for a period weekly wage of $740.28. The sum of the three highest period weekly wages equaled $2,226.42 for an average weekly wage of $742.14.

and that was the only time in her twenty-five year career with Employer that she was furloughed.

In Reifsnyder v. Workers' Compensation Appeal Board (Dana Corporation), 584 Pa. 341, 883 A.2d 537 (2005), our Pennsylvania Supreme Court addressed the computation of the average weekly wage during periods of layoffs. Three injured employees[6] of Dana Corporation (Dana) who had worked for Dana for at least fifteen years maintained a continuing employment with Dana but were subject to periodic layoffs. All three had layoffs in each of the four quarters immediately preceding the current work injuries. The Workers' Compensation Judge (Hearing Judge) determined that the periods of time when the employees earned no wages due to layoffs be included in the calculation of their average weekly wages pursuant to Section 309(d) of the Act, 77 P.S. §582. The Board affirmed. This Court reversed and concluded that layoffs resulted in the employees working less than a single completed period of thirteen weeks in the previous year and that the Average Weekly Wage must be calculated pursuant to Section 309(d.2), which allows a prospective calculation of Average Weekly Wage by multiplying the worker's hourly rate by his expected weekly work hours. Reifsnyder, 584 Pa. at 344-345, 883 A.2d at 539.

Our Pennsylvania Supreme Court reversed:

> [T]he statute does not specifically address the work scenario presented; *i.e.*, there is no explicit mention in the statute of whether and how, in the calculation of AWW [average weekly wage], to account for periods when a

[6] Their appeals were consolidated.

worker was laid off in the previous year, much less how to account for such layoffs if they are a common occurrence in a long-term employment relationship. Nevertheless, we believe that the structure and plain language of the statute clearly indicate that Section 309(d), not subsection 309(d.2), controls the calculation and also provides an accurate measure of such a type of worker's economic reality and earning capacity. As previously stated, Section 309(d) and subsections (d.1) and (d.2) address work/employment relationships of differing lengths. Section 309(d) governs employees with the longest work/employment histories—*i.e.*, employees who have been employed for at least four consecutive periods of thirteen calendar weeks. Subsections (d.1) and (d.2) address progressively shorter employment relationships: (d.1) governs employees employed for at least one, but less than three consecutive periods of thirteen calendar weeks; while (d.2) addresses cases of recent hires, *i.e.* employees who worked less than a single complete period of thirteen calendar weeks at the time they suffered a work injury.[7]

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[7] Section 309 of the Act, 77 P.S. §582, provides in pertinent part:

> Wherever in this article the term 'wages' is used, it shall be construed to mean the average weekly wages of the employe, ascertained as follows:
>
> . . . .
>
> (d) If at the time of the injury the wages are fixed by any manner not enumerated in clause (a), (b) or (c), the average weekly wage shall be calculated by dividing by thirteen the total wages earned in the employ of the employer in each of the highest three of the last four consecutive periods of thirteen calendar weeks in the fifty-two weeks immediately preceding the injury and by averaging the total amounts earned during these three periods.
>
> (d.1) If the employe has not been employed by the employer for at least three consecutive periods of thirteen calendar weeks in the fifty-two weeks immediately preceding the injury, the average weekly wage shall be calculated by dividing by thirteen the total wages earned in the employ of the employer for any completed

(Footnote continued on next page…)

> The structure of the statute strongly indicates that subsection (d.2) was not intended to apply to employees, such as Claimants here, with long-term employment relationships with their employer, who happen to have been subject to layoffs. Both (d) and (d.1) include look-back periods encompassing the preceding fifty-two weeks, in search of 'completed' thirteen-week periods; in contrast, subsection (d.2) has no such long-term focus, and indeed, it provides for a **prospective** calculation of potential earnings. By its terms, (d.2) contemplates persons for whom there is little work history with the employer upon which to calculate the AWW. Viewing the interrelationship of these subsections, we deem it unlikely in the extreme that the General Assembly intended (d.2) to supplant (d) or (d.1) anytime a long-term employment relationship happens to involve periods with a 'work' cessation. Instead, we conclude that subsection (d.2) was intended for instances that it plainly covers; *i.e.* those instances of work injuries to recently hired employees for whom there was, by definition, no accurate measure of AWW other than taking the existing hourly wage and projecting forward on the basis of the hours of work expected under the employment agreement. (Emphasis in original).

Reifsnyder, 584 Pa. at 356-357, 883 A.2d at 546-547.

Our Pennsylvania Supreme Court further reasoned that the claimants all returned to work after their layoffs which evidenced an ongoing employment

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(continued…)

> period of thirteen calendar weeks immediately preceding the injury and by averaging the total amounts earned during such periods.
>
> (d.2) If the employe has worked less than a complete period of thirteen calendar weeks and does not have fixed weekly wages, the average weekly wage shall be the hourly wage rate multiplied by the number of hours the employe was expected to work per week under the terms of employment.

relationship despite a period of inactivity. The Supreme Court stated, "Notably, the general rule set forth in Section 309(d) does not speak in terms of the continuity of 'work' but rather, the continuity of the employment relationship. The fact that Claimants were not 'working' during the periods when they were laid off does not mean that their long-term 'employment relationship' was severed." Reifsnyder, 584 Pa. at 357, 883 A.2d at 547.

More recently, in Elliott Turbomachinery Company v. Workers' Compensation Appeal Board (Sandy), 898 A.2d 640 (Pa. Cmwlth. 2006), this Court applied Reifsnyder. Delbert Sandy (Sandy) suffered a work-related hearing loss from his employment with Elliott Turbomachinery Company (Elliott). One of the issues centered on the calculation of Sandy's average weekly wage. Sandy had worked for Elliott for approximately thirty-five years with some layoffs in that time. The Workers' Compensation Judge awarded benefits pursuant to Section 309(d.1) because Sandy's employment was not continuous over the fifty-two weeks prior to the injury because Sandy had been laid off for three periods of approximately one week, two weeks, and two months and had not been required to be in contact with Elliott during that time. The Board affirmed. Elliott appealed to this Court. Elliott, 898 A.2d at 642, 645-646.

This Court reversed and determined that Sandy's average weekly wage must be calculated under Section 309(d). The Court based its decision in part on Reifsnyder:

> The term 'employ' or 'employed' is not limited to actual days an employee performs work, but encompasses the period of time that an employment relationship is

> maintained between the parties. . . . In each case, the critical fact that determines whether there is an employment relationship is whether there is the communication between employer and the claimant. Accord, Reifsnyder.
>
> Here, the evidence is that for the first quarter, February 26, 2001 through May 26, 2001, claimant [Sandy] worked ten of the thirteen weeks as he was voluntarily laid off for three weeks. In the second quarter, May 26, 2001 through August 26, 2001, claimant [Sandy] worked five of the thirteen weeks, as he was voluntarily laid off for eight consecutive weeks. Claimant [Sandy] worked the entire third and fourth quarters prior to his injury. Claimant [Sandy] testified that he accepted the lay off in part because it meant that younger employees were not laid off. . . . Claimant's [Sandy] testimony is that he is offered the choice of whether to accept a layoff, and the choice is offered based on seniority. . . . That testimony evidences a continuing employer/employee relationship, and based on that relationship, i.e., seniority, claimant [Sandy] decides whether or not to work. That testimony, standing alone, supports a finding that an employment relationship is maintained. (Citations omitted).

Elliott, 898 A.2d at 648-649.

Because there was a continuing employer/employee relationship in the four quarters preceding the injury, this Court approved the application of Reifsnyder and determined that Section 309(d) applied. Elliott, 898 A.2d at 649.

This case is similar to Reifsnyder and Elliott.[8] Claimant is a long-term employee of Employer who had a period of layoff in the relevant look back

[8] Claimant argues that her calculation of the average weekly wage is consistent with Colpetzer v. Workers' Compensation Appeal Board (Standard Steel), 582 Pa. 295, 870 A.2d

(Footnote continued on next page…)

period. On cross-examination, Claimant testified that the furlough was offered to her and she took it because her mother had died shortly before the offer and she needed some time. N.T. at 33-34; R.R. at 101a-102a. Claimant further testified regarding her seniority before the injury. It was clear that she did not lose her seniority due to the layoff. As in Reifsnyder and Elliott, Claimant and Employer maintained an employment relationship during her layoff. Claimant's average weekly wage was computed pursuant to Section 309(d) of the Act. This Court finds no error in the computation.[9]

(continued…)

875 (2005). However, our Pennsylvania Supreme Court in Reifsnyder explicitly stated that Reifsnyder was consistent with Colpetzer.

[9] Claimant also contends that the WCJ did not issue a reasoned decision with respect to the computation of Claimant's average weekly wage.

> Section 422(a) of the Workers' Compensation Act, 77 P.S. §834, provides:
>
> > Neither the board nor any of its members nor any workers' compensation judge shall be bound by the common law or statutory rules of evidence in conducting any hearing or investigation, but all findings of fact shall be based upon sufficient competent evidence to justify same. All parties to an adjudicatory proceeding are entitled to a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached. The workers' compensation judge shall specify the evidence upon which the workers' compensation judge relies and state the reasons for accepting it in conformity with this section. When faced with conflicting evidence, the workers' compensation judge must adequately explain the reasons for rejecting or discrediting competent evidence. Uncontroverted evidence may not be rejected for no reason or for an irrational reason; the workers' compensation judge must identify that evidence and

(Footnote continued on next page…)

III. Expenses.

Finally, Claimant contends that the WCJ abused his discretion when he refused to award travel expenses incurred by Claimant's counsel to attend depositions scheduled by Employer more than one hundred miles from the hearing location. In the alternative, Claimant contends that the WCJ failed to render a reasoned decision on the excluded litigation costs.

Here, Claimant's counsel sought an award of $547.47 in travel expenses, tolls, and lodging for expenses in conjunction with the depositions of Employer's medical witnesses. The WCJ declined to grant the award. Section 131.67(a) of the Special Rules of Administrative Practice and Procedure before

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(continued…)

> explain adequately the reasons for its rejection. The adjudication shall provide the basis for meaningful appellate review.

In Daniels v. Workers' Compensation Appeal Board (Tristate Transport), 574 Pa. 61, 78, 828 A.2d 1043, 1053 (2003), our Pennsylvania Supreme Court stated that "absent the circumstance where a credibility assessment may be said to have been tied to the inherently subjective circumstance of witness demeanor, *some articulation of the actual objective basis for the credibility determination must be offered* for the decision to be a 'reasoned' one which facilitates effective appellate review." (Footnote omitted and emphasis added). Our Pennsylvania Supreme Court further explained in Daniels that "where the fact-finder has had the advantage of seeing the witnesses testify and assessing their demeanor, a mere conclusion as to which witness was deemed credible, in the absence of some special circumstance, could be sufficient to render the decision adequately reasoned." Id. at 77, 828 A.2d at 1053.

Here, the determination of an employee's average weekly wage is a question of law. This Court's review of that determination is plenary. Gartner v. Workers' Compensation Appeal Board (Kmart Corporation), *petition for allowance of appeal denied*, 572 Pa. 713, 813 A.2d 846 (2002). Although the WCJ failed to explain why he chose Employer's Statement of Wages over Claimant's, there is no credibility determination at issue. This Court must review the determination of the average weekly wage to see if it was legally accurate.

Judges, 34 Pa.Code §131.67(a), provides: "If a deposition is to be taken more than 100 miles from where the hearing is or would be scheduled, the judge may order the payment of reasonable expenses of attorneys, not including counsel fees, to attend the deposition."

The three depositions were all more than one hundred miles from the hearing location. The WCJ concluded that the travel and lodging expenses were not reimbursable. Prior to the deposition of Dr. Leatherwood, the WCJ entered an interlocutory order stating that expenses would not be reimbursed. Employer points out that Claimant's counsel had the option of conducting the depositions by telephone.

The use of the word "may" in the Special Rules is determinative. In Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Board (Sadvary), 524 Pa. 235, 570 A.2d 84 (1980), our Pennsylvania Supreme Court explained the use of the term, "may" in the Act:

> While we are cognizant of the principle of law set forth in Hotel Casey v. Ross, 343 Pa. 573, 579, 23 A.2d 737, 740 (1942), that "where a statute directs the doing of a thing for the sake of justice, the word 'may' means the same as the work 'shall'", we are bound by principles of statutory construction in interpreting any statute. In particular, we have long been guided by the principle that when enacting legislation, the legislature does not intend to violate any constitutional provisions. 1 Pa.C.S. § 1922(3). Furthermore, common usage of a word is appropriate unless specified otherwise. 1 Pa.C.S. § 1903(a). Finally, if language is not ambiguous, then we cannot ignore its plain meaning to reach a desired result. 1 Pa.C.S. § 1921(b).

Bethenergy, 524 Pa. at 238-239, 570 A.2d at 85. Our Pennsylvania Supreme Court determined that because the word "shall" was used elsewhere in the Act, the two words were not interchangeable and that the term "may" was discretionary.

Here, the Special Rules are not part of the Act but implement the Act. Further, a review of other special rules reveals that the words "may" and "shall" are used in the same rule which indicates that the two words were not used interchangeably. Under the same analysis employed by our Supreme Court in Bethenergy, it is clear that the WCJ had discretion to award costs. He chose not to do so based upon the fact that the depositions could have been conducted by telephone. Claimant's counsel was aware, due to the interlocutory order, that the costs would not be paid for the one deposition, yet he attended anyway. There was no abuse of discretion on the part of the WCJ.[10]

BERNARD L. McGINLEY, Judge

[10] Once again, Claimant asserts that the WCJ did not issue a reasoned decision with respect to the denial of these expenses. Whether to grant the request for the expenses was within the WCJ's discretion. It was not a matter of choosing one witness over another.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kathy Hiler,	:	
Petitioner	:	
	:	
v.	:	
	:	
Workers' Compensation Appeal	:	
Board (US Airways Group, Inc.),	:	No. 2106 C.D. 2008
Respondent	:	

O R D E R

AND NOW, this 16th day of September, 2009, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge