IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bruce F. Stelma, Petitioner	:	
v.	:	No. 2121 C.D. 2011
	:	Submitted: April 20, 2012
Workers' Compensation Appeal Board (Jeld Wen Doors), Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED: September 7, 2012**

Petitioner Bruce F. Stelma (Claimant) petitions for review of an order of the Workers' Compensation Appeal Board (Board). The Board affirmed the decision of Workers' Compensation Judge Paul E. Walker (WCJ), denying Claimant's workers' compensation claim petition and related penalty petitions. We now affirm.

On May 29, 2008, Claimant filed a claim petition, alleging that he had suffered a "left upper extremity injury" from lifting exterior doors from a machine to a loading skid at Jeld Wen Doors (Employer). (Reproduced Record (R.R.) at 7a.) Through the claim petition, Claimant sought payment of partial disability, medical bills, and counsel fees. (*Id.* at 8a.) Concurrently with the claim petition, Claimant also filed a petition for penalties, alleging that Employer had failed to issue a notice of compensation payable (NCP) or notice of compensation denial

(NCD) within twenty-one days of the date of the alleged injury, as required under Section 406.1 of the Workers' Compensation Act (Act).[1] (*Id.* at 5a.) Employer filed timely answers to both petitions, denying all material averments. On June 2, 2008, Employer filed an NCD, denying benefits to Claimant on the basis that, despite an injury, Claimant is not disabled under the Act.[2] (*Id.* at 20a.) On December 8, 2008, Claimant filed another petition for penalties, alleging that Employer, despite the issuance of the NCD, recognizing an injury, refused to pay for Claimant's post-surgery treatments, because Employer's independent medical evaluation (IME) doctor attributed the cause of Claimant's injury to a prior injury. (*Id.* at 2a.) The matter was assigned to the WCJ, who conducted hearings.

At the hearing before the WCJ, Claimant testified that he began working as a packer on the production line for Employer sometime in August 2007. (*Id.* at 22a.) Sometime in February 2008, Employer promoted Claimant to forklift driver. (*Id.*) Occasionally, Employer would assign Claimant to fill in on the production line when short-staffed. (*Id.* at 23a, 40a.)

Claimant also testified that on May 6, 2008, he reported to Employer that his shoulder was hurting while he worked on the production line. At the time, Claimant had been lifting, with the help of another employee, exterior doors weighing between eighty and one hundred and twenty pounds. (*Id.* at 24a, 38a-39a.) Claimant further testified that Employer filled out an incident report and

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[1] Act of June 2, 1915, P.L. 736, added by the Act of February 8, 1972, P.L. 25, *as amended*, 77 P.S. § 717.1.

[2] Employer placed an "x" next to the following reason on the Workers' Compensation Bureau's (Bureau) NCD form for declining to pay Claimant's workers' compensation benefits: "4. Although an injury took place, the employee is not disabled as a result of this injury within the meaning of the [Act]." (Certified Record (C.R.), NCD.)

referred him to a panel physician, who took some x-rays and prescribed ibuprofen to Claimant. (*Id.* at 24a-25a.) The physician also ordered Claimant to apply ice on the affected shoulder. (*Id.* at 25a.) Thereafter, the physician sent Claimant for an MRI and referred him to Kenneth J. Brislin, M.D., an orthopedic surgeon, who reviewed the MRI. (*Id.*)

Claimant testified that Dr. Brislin ordered him to undergo physical therapy. (*Id.*) Claimant testified that he returned to light duty work, driving a forklift. (*Id.*) On August 18, 2008, Dr. Brislin performed surgery on Claimant's shoulder. (*Id.* at 74a.) Two months following the surgery, Claimant returned to work. (*Id.* at 76a.) He worked for only nine days, because he came to believe that he was unfit to continue working. (*Id.* at 76a-78a.) Thereafter, Claimant provided Employer with a note from Dr. Brislin, taking him out of work. (*Id.*) Claimant experienced pain at the top of his left shoulder. (*Id.* at 16a-17a.) He testified that his pain largely was reduced by not using his left shoulder. (*Id.* at 17a.)

Finally, in his testimony, Claimant acknowledged that May 6, 2008, was not the first time that he had injured his shoulder. (*Id.* at 44a.) In fact, in 2001, Claimant sustained an injury to his left shoulder during the course and scope of his employment with Big Lots, Inc. (Big Lots), and, as a result, he underwent surgery on his rotator cuff.[3] (*Id.* at 44a-46a.) After his employment with Big Lots, Claimant worked as a construction worker for PP&L as well as a factory laborer. (*Id.* at 43a-44a.) Both of those jobs involved "fairly heavy" labor. (*Id.* at 44a.)

[3] Claimant settled all claims against Big Lots by entering into a Compromise and Release Agreement (C&R), which was approved by the WCJ who also presided over the current proceedings. (*Id.* at 84a.)

Claimant also presented the deposition testimony of Robert W. Mauthe, M.D., who is board-certified in physical medicine and in the subspecialty of pain medicine. Dr. Mauthe examined Claimant on August 8, 2008. (*Id.* at 152a.) Dr. Mauthe testified that, upon reviewing Claimant's medical history, he noticed that Claimant had undergone two prior surgeries on his left shoulder. (*Id.* at 153a.) Dr. Mauthe also testified that Claimant's first surgery occurred when he was diagnosed with "left shoulder impingement and a Bankart lesion;" his second surgery was necessitated by a reconstruction of that Bankart lesion and a resection of distal clavicle. (*Id.*) Notwithstanding the prior surgeries, Dr. Mauthe testified that he had diagnosed Claimant with work-related impingement syndrome and preexisting, non-work-related arthritis in his shoulder. (*Id.* at 156a-57a, 161a.) Dr. Mauthe also testified that he "would require [Claimant to adhere to] restrictions of no overhead repetitive work with the left arm, [with only ten] to [twenty] pounds of lifting." (*Id.* at 161a.) He further testified that Claimant's driving a forklift would be within the medical restrictions. (*Id.* at 169a.)

In opposition, Employer presented the deposition testimony of its IME physician and medical expert, Donald F. Leatherwood, II, M.D., who is board-certified in orthopedic surgery.[4] (*Id.* at 186a.) Dr. Leatherwood examined Claimant on October 30, 2008. (*Id.*) Dr. Leatherwood testified that, upon reviewing Claimant's medical records, he determined that Claimant had very significant past left shoulder problems, which thrice were surgically addressed. (*Id.* at 188a, 193a-196a.) At the time of the examination, however,

[4] We note that Employer's witness Khris Kuker testified before the WCJ, but his testimony is not of any relevance for purposes of the instant appeal.

Dr. Leatherwood testified that Claimant complained of left shoulder pain that was baseline, but worsened with overhead lifting. (*Id.* at 190a.) Dr. Leatherwood also testified that on July 14, 2003, Claimant underwent a Functional Capacity Evaluation (FCE), which restricted him to medium duty work. (*Id.* at 194a.) Dr. Leatherwood opined that heavy construction work in which Claimant engaged prior to his employment with Employer, as well as his lifting of exterior doors for Employer, exceeded the FCE restriction and, as such, would have been inadvisable based on his previous shoulder injury. (*Id.* at 194a-95a, 227a-29a.) Dr. Leatherwood testified that Dr. Brislin's surgery report reflected no intervening trauma since 2001. (*Id.* at 203a-04a.)

Dr. Leatherwood further testified that his October 30, 2008, examination of Claimant revealed that Claimant's "left shoulder had a very mild discrepancy in voluntary overhead motion and a very mild impingement type picture, but otherwise [Claimant's left shoulder] really was doing quite well considering it had been operated on multiple times." (*Id.* at 186a, 191a-92a.) He also testified that "[Claimant's] shoulder would be no different today whether he had engaged in activities at work or at home than it would be otherwise." (*Id.* at 226a-27a.) In particular, Dr. Leatherwood testified that "in light of those shoulder problems, if [Claimant] does a certain activity, it may cause pain, but that activity did [not] cause the underlying problem." (*Id.* at 200a.) Dr. Leatherwood, therefore, opined that it was common for Claimant to experience "flare-ups of symptoms over time." (*Id.* at 213a.) Specifically, "[r]e-tears of the rotator cuff are not just common, they [are] ubiquitous, almost to be expected." (*Id.* at 199a.) Ultimately, based on his examination of Claimant and his review of Claimant's medical records, Dr. Leatherwood opined that Claimant's lifting of exterior doors

on May 6, 2008, did not cause the impingement syndrome. (*Id.* at 200a.) In other words, he testified that Claimant's injury was caused "by his prior significant shoulder problems." (*Id.*)

By decision and order dated October 16, 2009, the WCJ denied Claimant's claim and penalty petitions. In so doing, the WCJ issued factual findings derived largely from the testimony of the witnesses. The WCJ also included credibility determinations in his decision. He found Claimant's testimony not credible. Specifically, the WCJ found Claimant not credible because his testimony regarding whether he had experienced pain in his left shoulder prior to May 6, 2008, was inconsistent with the content of his medical record.[5]

[5] We note that the WCJ found that Claimant failed to establish credibly that his injury arose on May 6, 2008, because Claimant did not specifically reference that day to the panel physicians, including Dr. Brislin, during his treatments. (WCJ's decision at 8-10.) In fact, the WCJ particularly reasoned:

> the absence of any indication in the May 7, 2008, treatment record that Claimant's discomfort *had just begun the previous day*, is [an] aspect of this [evidentiary] record, i.e., a circumstance more consistent with the opinion of Dr. Leatherwood that the Claimant's problems for which he sought treatment on May 7, 2008 and subsequent was a recurrence of his pre-existing shoulder problems.

(*Id.* at 9 (emphasis added).) The first time Claimant referenced that day to a physician was when he was examined by his expert Dr. Mauthe on August 8, 2008, ninety days after his first visit to the panel physician following the shoulder problems. (*Id.* at 8-10.) Dr. Mauthe testified that Claimant informed him that his injury had occurred in the course of his employment on May 6, 2008, "when he picked up a door and had shoulder pain." (R.R. at 153a-54a.) Despite Dr. Mauthe's testimony, the WCJ found that Dr. Mauthe's medical report did not include the May 6, 2008, date. (WCJ's decision at 12.) In particular, the WCJ found:

> (c) Dr. Mauthe's August 8, 2008, report contains no specific opinion that the "left shoulder impingement" is work related….
> (d) The August 8, 2008, report contains no medical opinion or explanation as to whether Dr. Mauthe believes that the Claimant's activity, which he believed generally occurred on May 6, 2008, had caused the "left shoulder impingement". . . .

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(WCJ's Decision at 8.) The WCJ also found the testimony of Dr. Leatherwood more credible than the testimony of Dr. Mauthe, because Dr. Leatherwood's medical explanation was more thorough and persuasive. (*Id.* at 15.) Based on his credibility determinations, the WCJ concluded that Claimant had failed to meet his burden of proving that he had sustained a new work injury on May 6, 2008. (*Id.* at 20.) Specifically, the WCJ concluded that "discomfort which . . . Claimant was experiencing as of May 6, 2008, was the result of a recurrence of his June 4, 2001 work injury." (*Id.*)

The WCJ also made findings of fact regarding the two petitions for penalty. As to the first penalty petition, the WCJ found that, at the time of filing its NCD, Employer had no knowledge of Claimant's disability. (*Id.* at 17.) Accordingly, the WCJ concluded that Claimant had failed to meet his burden of proof regarding Employer's violation of the Act in connection with its issuance of the NCD. (*Id.* at 21.) As to the second penalty petition, the WCJ found as follows:

> [Employer] had not violated any provision of the Act or Regulations by its refusal to pay for the MRI. Reasoning: As indicated by Finding 57 above, this Workers' Compensation Judge concludes that the Claimant did not sustain a work injury on May 6, 2008, and that the symptomatology which he was experiencing as of that time was a recurrence of his pre-existing shoulder condition related to the 2001 work injury. Furthermore, the Claimant has failed to meet his burden

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(*Id.*) Claimant, in his brief, attempts to take issue with the WCJ's findings that Claimant experienced pain in his shoulder prior to May 6, 2008, not as a result of a work injury. As will be discussed below, however, such an argument was not one of the arguments preserved by Claimant. Nevertheless, we note that, based upon the above, it appears that the WCJ's opinion sets forth the WCJ's reasoning for his credibility determination and that substantial evidence of record exists to support this finding. Thus, if we were to examine this issue, we would find no error.

> of proving that the [Bureau] forms were provided to the Employer or its Insurer in connection with Dr. Brislin's 'prescription' for a post-surgical MRI.

(*Id.* at 19.) The WCJ, therefore, concluded that Claimant had failed to meet his burden to prove that Employer violated the Act by refusing to authorize payment for the MRI.

Claimant appealed the WCJ's decision to the Board, challenging the WCJ's findings of fact and conclusions of law. In particular, Claimant disagreed with the WCJ's conclusion that his injury was a recurrence of a prior injury as opposed to a new injury. The Board affirmed the WCJ's decision. First, the Board determined that the WCJ did not err in denying Claimant's claim petition, because Claimant had not met his burden to prove a new injury. (Board's opinion at 7.) In so doing, the Board concluded that "there was substantial, competent evidence in the nature of Dr. Leatherwood's testimony to support the WCJ's finding that Claimant's shoulder complaints were a recurrence of his prior work injury." (*Id.* at 8.) Second, the Board concluded that the WCJ did not err in dismissing Claimant's penalty petitions. Specifically, the Board held that, "[b]ecause there was no award by a WCJ holding [Employer] liable for Claimant's medical expenses, [Employer] could not be subject to penalties." (*Id.*) Finally, the Board concluded that Claimant was not entitled to an award of unreasonable contest attorney's fees because they were only granted to successful litigants and Claimant did not prevail on his claim petition or penalty petitions. (*Id.* at 8-9.) Claimant petitioned this Court for review.

On appeal,[6] Claimant argues that: (1) the WCJ erred as a matter of law in denying Claimant's claim petition when Employer issued an NCD accepting liability for the work injury; (2) the WCJ erred in his analysis and application of *Morrison v. Workers' Compensation Appeal Board (Rothman Institute)*, 15 A.3d 93 (Pa. Cmwlth. 2010), *appeal denied*, ___ Pa. ___, 24 A.3d 364 (2011); (3) the WCJ erred in accepting the testimony of Dr. Leatherwood as the basis for his decision when Dr. Leatherwood did not acknowledge the work injury listed in the NCD; and (4) the WCJ and Board erred in concluding that Employer did not violate Section 406.1 of the Act when Employer failed to issue the NCD in a timely fashion.[7]

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[6] Our standard of review in workers' compensation appeal 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.

[7] Claimant presented these arguments in his petition for review, although not in the order set forth above. We observe that the first two issues appear to be related. We also note that Claimant, however, presented only the first and fourth issues from his petition for review in the statement of questions involved portion of his brief, despite the requirement of Pa. R.A.P. 2116 that "[t]he statement of the questions involved must state concisely the issues to be resolved," and the provision that "[n]o question will be considered unless it is stated in the statement of questions involved or is fairly suggested thereby." Furthermore, Claimant failed to divide his argument into separate parts addressing each question raised, despite the requirement of Pa. R.A.P. 2119 that "[t]he argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part . . . the particular point treated therein, followed by such discussion and citation of authorities." In addition, throughout his brief, Claimant attempted to address additional issues not set forth in his petition for review. In accordance with Pa. R.A.P. 1513(a), where a claimant fails to include an issue in his petition for review, but addresses the issue in his brief, this Court has declined to consider the issue, because

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At the outset, we note that it is well settled that in a claim petition, the claimant bears the burden of proving all elements necessary for an award. *Inglis House v. Workmen's Comp. Appeal Bd. (Reedy)*, 535 Pa. 135, 141, 634 A.2d 592, 595 (1993). Pursuant to Section 301(c)(1) of the Act, 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) (emphasis added). Further, an employee must demonstrate that he is disabled as a consequence of the work-related injury. *Inglis House*, 535 Pa. at 138, 634 A.2d at 593. 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).

First, we will address Claimant's argument that the WCJ erred as a matter of law in denying Claimant's petition when Employer issued an NCD accepting liability for the work injury. In essence, Claimant takes the position that the WCJ, when issuing his findings of fact, capriciously disregarded the NCD, which Claimant contends contains Employer's acknowledgement of injury. We previously have held that a capricious disregard only occurs when the WCJ deliberately ignores relevant, competent evidence. *Capasso v. Workers' Comp. Appeal Bd. (RACS Assocs., Inc.)*, 851 A.2d 997 (Pa. Cmwlth. 2004). Capricious

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it was not raised in the stated objections in the petition for review, nor fairly comprised therein. *Tyler v. Unemployment Comp. Bd. of Review*, 591 A.2d 1164 (Pa. Cmwlth. 1991). The additional issues interspersed throughout Claimant's brief, therefore, are waived. Despite the short-fallings of Claimant's brief, we generously will attempt to construe Claimant's brief as addressing the issues presented in his petition for review. We admonish Claimant's counsel to familiarize himself with the Pennsylvania Rules of Appellate Procedure when practicing before this Court in the future.

disregard of evidence is a deliberate and baseless disregard of apparently reliable evidence. *Id.* In *Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe)*, 571 Pa. 189, 812 A.2d 478 (2002), our Supreme Court noted that "[w]here substantial evidence supports an agency's findings, and the findings in turn support the conclusions, it should remain a *rare* instance where an appellate court disturbs an adjudication based on capricious disregard." *Wintermyer*, 571 Pa. at 203-04 n.14, 812 A.2d at 487-88 n.14 (emphasis added).

Based on our review of the record, we cannot conclude that the WCJ capriciously disregarded the NCD. Here, Claimant and Employer both presented testimonial and documentary evidence regarding the Claimant's injury, including the NCD. The WCJ considered the NCD in its entirety, as evidenced in his findings of fact. Indeed, the WCJ found that an NCD "was issued on or about June 2, 2008, and received by the Bureau on June 5, 2008." (WCJ's decision at 10.) The WCJ also found that Employer wrote in its NCD, specifically in the "Description of Injury" section, that "[Claimant] *alleges* [an] injury from lifting exterior doors off the assembly line and placing them onto a pallet." (*Id.* at 10 (emphasis added).) Consequently, the WCJ found that, "although [the NCD] essentially acknowledges that an 'injury took place,' [it] does not acknowledge that it was a work injury." (*Id.*) The WCJ, thus, found the injury acknowledgement contained in the NCD of limited probative value. The WCJ reasoned as follows:

> [T]he injury information on the form is under the heading 'ALLEGED INJURY INFORMATION'. The manner in which the form is completed essentially acknowledges that an 'injury' occurred. [However,] when the form is read in its totality, it clearly indicates that the employer/insurer is responding to an 'alleged injury' and the overall effect of the form is that the Employer is denying liability for the injury which the Claimant may have sustained on May 6, 2008. . . .

(*Id.* at 11.) Thus, it is clear from the findings of fact that the WCJ did not ignore the NCD, but rather he specifically considered the NCD, noting that it referred to an "alleged injury" for which Employer denied liability. Thus, we cannot conclude that the WCJ capriciously disregarded the NCD, the primary purpose of which is to deny liability, when he found that Employer had not accepted Claimant's alleged work-related injury.[8] For those reasons, we will not disturb the WCJ's adjudication on account of capricious disregard.

Next, we will address Claimant's argument that the WCJ erred in his analysis and application of *Morrison*. In that case, the claimant, Shawn Morrison (Morrison), argued that the WCJ erred in denying his claim petition because employer's NCD was untimely and acknowledged that he had suffered a work injury. In *Morrison*, we concluded that while the NCD recognized an injury, Morrison failed to establish that the injury caused a disability or that it was work-related. *Morrison*, 15 A.3d at 97-98. In establishing the parties' respective burdens of proof, we held that even "when an employer issues [an NCD], which acknowledges an injury but disputes disability, the claimant *maintains* the burden to prove he is entitled to benefits." *Morrison*, 15 A.3d at 98 (emphasis added). Indeed, we recently reaffirmed our holding in *Morrison* in our decision in *Zuchelli v. Workers' Compensation Appeal Board (Indiana University of Pennsylvania)*, 35 A.3d 801, 804 (Pa. Cmwlth. 2012), noting that whenever a claimant files a claim petition alleging a work injury, he retains the burden of proving all aspects of his claim, irrespective of whether an employer files a NCD recognizing an injury.

[8] Moreover, a review of the NCD reveals that the above finding of fact is supported by substantial evidence of record, as the NCD requests information regarding an "alleged injury."

Claimant contends that the WCJ misapplied our decision in *Morrison*, because the instant case is factually distinguishable from *Morrison*. Claimant specifically notes that, here a panel physician examined Claimant, and Employer accommodated Claimant's condition by providing Claimant with light-duty work prior to issuing the NCD. To the extent that the facts are distinguishable, the differences are of no consequence to our analysis, because the focus of *Morrison* was that the claimant maintained the burden to prove he was entitled to benefits when an NCD is issued. An employer should not be prohibited from challenging the work-relatedness of an injury simply because it accommodates an employee's medical condition prior to determining whether it is work-related and issuing an NCD. With that said, the legal principal of *Morrison* is applicable to the case at hand, and we must conclude that the WCJ did not err in his application of *Morrison.*

Next, we will address Claimant's argument that the WCJ erred in accepting the testimony of Dr. Leatherwood as the basis for his decision.[9] Specifically, Claimant contends that the WCJ should not have relied on Dr. Leatherwood's testimony as a basis for his decision, because it was incompetent or equivocal. The question of whether expert medical testimony is unequivocal and, thus, competent evidence to support factual determinations is a question of law subject to our review. *Somerset Welding & Steel v. Workmen's Comp. Appeal Bd.*

[9] Claimant also appears to argue that the WCJ erred in finding Dr. Leatherwood's testimony credible. In support of that argument, Claimant points to other medical testimony of record, which he contends supports a contrary conclusion. We interpret this argument as nothing more than a challenge to the WCJ's credibility determinations. It is well established that determinations as to weight and credibility are solely for the WCJ as fact-finder. *Cittrich v. Workmen's Comp. Appeal Bd. (Laurel Living Ctr.)*, 688 A.2d 1258, 1259 (Pa. Cmwlth. 1997). Accordingly, this argument is without merit.

(Lee), 650 A.2d 114, 117 (Pa. Cmwlth. 1994), *appeal denied*, 540 Pa. 652, 659 A.2d 990 (1995). In such cases, we review the testimony as a whole and may not base our analysis on a few words taken out of context. *Id*. "Taking a medical expert's testimony as a whole, it will be found to be equivocal if it is based only upon possibilities, is vague, and leaves doubt." *Kurtz v. Workers' Comp. Appeal Bd. (Waynesburg College)*, 794 A.2d 443, 449 (Pa. Cmwlth. 2002). "[M]edical testimony is unequivocal if a medical expert testifies, after providing foundation for the testimony, that, in his professional opinion, he believes or thinks a fact exists." *O'Neill v. Workers' Comp. Appeal Bd. (News Corp., Ltd.)*, 29 A.3d 50, 58 (Pa. Cmwlth. 2011). In other words, the medical witness's testimony must establish more than a mere possibility that the alleged injury arose as a consequence of a work-related cause, but rather demonstrate that, in the medical expert's opinion, to a reasonable degree of medical certainty, a causal connection exists between a claimant's disability and his employment. *Sears, Roebuck & Co. v. Workmen's Comp. Appeal Bd.*, 409 A.2d 486, 488 (Pa. Cmwlth. 1979).

In addition to this requirement that medical expert testimony be unequivocal, in order to be competent, a medical expert's testimony also must reflect an expert's adequate understanding of the facts. *Id.* at 490. In reviewing an expert's testimony on this basis, we must consider whether the expert "had sufficient facts before him upon which to express" his medical opinion. *Id*. An expert is permitted to express an opinion based upon facts of which he has no personal knowledge so long as those facts are supported elsewhere in the record. *Newcomer v. Workmen's Comp. Appeal Bd. (Ward Trucking Corp.)*, 547 Pa. 639, 692 A.2d 1062 (1997). Unless a medical opinion is based upon such personal knowledge or record support, the opinion will be deemed to have no value.

Lookout Volunteer Fire Co. v. Workmen's Comp. Appeal Bd., 418 A.2d 802, 805 (Pa. Cmwlth. 1980). Nevertheless, a medical expert's opinion will be held to be incompetent only when the opinion is based solely on inaccurate or false information; when the record as a whole contains factual support for an expert's opinion, the evidence is not incompetent. *Am. Contracting Enter., Inc. v. Workers' Comp. Appeal Bd. (Hurley)*, 789 A.2d 391 (Pa. Cmwlth. 2001).

To begin, Claimant argues that Dr. Leatherwood's testimony is incompetent because it failed to acknowledge that the NCD established that Claimant suffered a work-related injury on May 6, 2008. For the reasons discussed above, however, Claimant's premise that the NCD established a work-related injury is unsupported by law. Thus to the extent that Claimant argues that Dr. Leatherwood's opinion is incompetent on that basis, we reject his argument.

We now consider whether Dr. Leatherwood's testimony is otherwise incompetent or equivocal. We note that Dr. Leatherwood is a board-certified orthopedic surgeon who has written at least one article regarding repetitive trauma disorders of the upper extremity. (WCJ's decision at 14-15.) He based his testimony on his personal examination of Claimant as well as his review of Claimant's medical records, including reports of Claimant's three prior surgeries. (R. R. at 193a-94a.) In his testimony, Dr. Leatherwood unequivocally stated that he believed, within a reasonable degree of medical certainty and based on his examination of Claimant and Claimant's medical history, that Claimant had not sustained a new work injury. (*Id.* at 212a.) Specifically, Dr. Leatherwood noted that Dr. Brislin's surgery report reflected that Claimant's left shoulder had suffered no intervening trauma since 2001. Dr. Leatherwood, therefore, testified that

Claimant had "sustained a recurrence[10] of his previous injury from 2001." (*Id.* at 212a-13a.) In explaining his diagnosis, Dr. Leatherwood credibly testified that "it would be predictable for a person with the very significant shoulder history that [Claimant] has to have flare-ups of symptoms over time." (*Id.* at 213a.) We conclude that Dr. Leatherwood had sufficient facts before him to examine and diagnose Claimant and to clearly articulate his medical opinion in a non-contradictory manner. Accordingly, we hold that Dr. Leatherwood's testimony was unequivocal and competent and that the WCJ properly had relied upon it.[11]

Finally, Claimant argues that the WCJ erred in denying Claimant's penalty petition despite Employer's failure to issue the NCD[12] within

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[10] We note that it is the WCJ who must make the factual determination of whether a disability is an aggravation or a recurrence. *Pope & Talbot v. Workers' Comp. Appeal Bd. (Pawlowski)*, 949 A.2d 361, 369 (Pa. Cmwlth. 2008). When a later incident materially contributes to a pre-existing condition, it is an aggravation—*i.e.*, a new injury; if not, it is a recurrence of a prior injury. *Id.* In case of a recurrence of a prior injury, the employer at the time of the initial injury will be held liable. *Id.* When there is an aggravation of a pre-existing condition, the employer at the time of the new aggravation will be responsible for workers' compensation benefits. *Id.*

[11] We also note that the WCJ particularly found that Dr. Mauthe was equivocal in his testimony, because he testified throughout the deposition that it would be "difficult to tell how much [of the injury] is new and how much is old." (WCJ's decision at 14, 16; R.R. at 154a-56a, 158a, 164a-67a.)

[12] Claimant also argues that Employer violated the Act by issuing an NCD, untimely or otherwise, when it was aware of his injury. We must disagree. In *Armstrong v. Workers' Compensation Appeal Board (Haines & Kibblehouse, Inc.)*, 931 A.2d 827 (Pa. Cmwlth. 2007), we explained:

> An employer may properly file an NCD when, although it acknowledges that a work-related injury has occurred, there is a dispute regarding the claimant's disability. On the NCD form prescribed by the Department . . . the employer is given the option of acknowledging the occurrence of a work-related injury but

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twenty-one (21) days as required under Section 406.1 of the Act. Specifically, Claimant argues that the WCJ should have awarded him a penalty in the amount of fifty percent (50%) of all outstanding benefits due. The WCJ, however, denied claimant's penalty petition, in part, on the implication that Employer's filing of the NCD was not late under the Act, because, at the time of filing, Employer had no knowledge of Claimant's disability. (WCJ's decision at 17.)

As we held in *Brutico v. Workers' Compensation Appeal Board (US Airways, Inc.)*, 866 A.2d 1152 (Pa. Cmwlth.), *appeal denied*, 584 Pa. 679, 880 A.2d 1240 (2005), "regardless of whether an employer acknowledged an injured but not disabled employee's injuries by paying his or her medical bills, the employer was still required to issue either an NCP or NCD pursuant to Section 406.1(a) of the Act." *Brutico* 866 A.2d at 1155. In relevant part, Section 406.1(a) of the Act provides:

> The employer and insurer shall promptly investigate each injury reported or known to the employer and shall proceed promptly to commence the payment of compensation due either pursuant to an agreement upon the compensation payable or a notice of compensation payable as provided in section 407. . . on forms prescribed by the department and furnished by the insurer. The first installment of compensation shall be paid not later than the *twenty-first day after the employer has notice* or knowledge of the employe's disability. . . .

(continued…)

> declining to pay workers' compensation benefits because the employee is not disabled as a result of his injury within the meaning of the Act.

Armstrong, 931 A.2d. at 829-30. We, therefore, conclude that Employer properly filed an NCD, despite the fact that Employer ultimately disputed not only its causal relationship to Claimant's employment but also the attendant disability.

(Emphasis added.) Similar to the employer in *Brutico*, Employer's failure in this case to issue a NCP or NCD within the required twenty-one-day period after receiving notice of Claimant's injury on May 6, 2008, may have been cause for the WCJ to impose a penalty. Awarding a penalty for violation of the Act, however, is something that occurs at the discretion of the WCJ. *Lakomy v. Workers' Comp. Appeal Bd. (Dep't of Envtl. Res. and Pimco)*, 720 A.2d 492, 495 (Pa. Cmwlth. 1998). In other words, it is neither mandatory nor perfunctory. *Id.*

> Additionally, Section 435(d) of the Act provides, in pertinent part:
>
> (d) The department, the board, or any court which may hear any proceedings brought under this act shall have the power to *impose penalties as provided herein for violations of the provisions of this act* or such rules and regulations or rules of procedure;
> (i) Employers and insurers may be penalized a sum not exceeding ten per centum of *the amount awarded* and interest accrued and payable: Provided, however, That such penalty may be increased to fifty per centum in cases of unreasonable or excessive delays. Such penalty shall be payable to the same persons to whom the compensation is payable.

Section 435 of the Act of June 2, 1915, P.L. 736, added by the Act of February 8, 1972, P.L. 25, *as amended*, 77 P.S. § 991(d) (emphasis added). "[A] violation of the Act or its regulations must appear in the record for a penalty to be appropriate." *Shuster v. Workers' Comp. Appeal Bd. (Pa. Human Relations Comm'n)*, 745 A.2d 1282, 1288 (Pa. Cmwlth. 2000), *appeal denied*, 566 Pa. 654, 781 A.2d 151 (2001). In seeking a penalty, a claimant bears the burden of proving a violation of the Act. *City of Philadelphia v. Workers' Comp. Appeal Bd. (Andrews)*, 948 A.2d 221, 228 (Pa. Cmwlth. 2008). Just like awarding a penalty, the amount of a penalty is also within the sound discretion of the WCJ. *City of Philadelphia v. Workers' Comp. Appeal Bd. (Sherlock)*, 934 A.2d 156, 160-61 (Pa. Cmwlth. 2007). A penalty,

however, cannot be awarded, even when there is a violation of the Act, where a claimant does not prevail on the underlying claim petition. *Brutico*, 866 A.2d at 1156.

The WCJ's decision regarding an assessment of a penalty will not be overturned on appeal absent an abuse of discretion. *Id.*; *Dep't of Pub. Welfare v. Workers' Comp. Appeal Bd. (Overton)*, 783 A.2d 358, 360 (Pa. Cmwlth. 2001), *appeal denied*, 573 Pa. 717, 828 A.2d 351 (2003). "An abuse of discretion is not merely an error of judgment but occurs . . . when the law is misapplied in reaching a conclusion." *Westinghouse Electric Corp. v. Workers' Comp. Appeal Bd. (Weaver)*, 823 A.2d 209, 213-14 (Pa. Cmwlth. 2003), *appeal denied*, 581 Pa. 694, 864 A.2d 531 (2004).

Here, the WCJ did not impose a penalty, because he concluded that Employer had not violated the Act when it issued the NCD on June 2, 2008, after learning of Claimant's alleged injury on May 6, 2008. Specifically, the WCJ suggested that the Act only applied to disabilities, not injuries. As noted above, however, the term disability is synonymous with a loss of earning power, which includes injured employees under Section 406.1 of the Act. *Brutico*, 866 A.2d at 1156. We conclude that, because there was a violation of the Act when Employer did not issue an NCP or an NCD within the twenty-one-day period, penalties could have been awardable had Claimant prevailed on his claim petition. Nonetheless, because the WCJ properly denied Claimant's claim petition in this case, Claimant was not entitled to compensation under the Act. The WCJ, therefore, did not err in refusing to award penalties.

Accordingly, the order of the Board is affirmed.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bruce F. Stelma, Petitioner	:	
v.	:	No. 2121 C.D. 2011
Workers' Compensation Appeal Board (Jeld Wen Doors), Respondent	:	

O R D E R

AND NOW, this 7th day of September, 2012, the order of the Workers' Compensation Appeal Board is hereby AFFIRMED.

P. KEVIN BROBSON, Judge