IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Peter R. Seamon, Petitioner	:	
v.	:	No. 2345 C.D. 2010
	:	Submitted: February 11, 2011
Workers' Compensation Appeal Board (Acker Associates, Inc.), Respondent	:	

OPINION NOT REPORTED

MEMORANDUM OPINION
PER CURIAM FILED: September 22, 2011

Peter R. Seamon (Claimant), *pro se*, petitions for review of an adjudication of the Workers' Compensation Appeal Board (Board) suspending Claimant's benefits and denying Claimant's request for penalties. In doing so, the Board affirmed the Workers' Compensation Judge's (WCJ) decision that Claimant did not make a case for penalties where there was a delay in entering Claimant's new address into the computer system and two compensation checks were later replaced. The WCJ suspended benefits because Claimant did not attend an independent medical examination (IME), as ordered. Concluding that Claimant is not entitled to relief under the Workers' Compensation Act (Act),[1] we affirm.

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

Prior Litigation

Claimant's litigation history, throughout which he has represented himself, is too lengthy to recite in full. We summarize only that prior litigation relevant to the present appeal.

Claimant sustained an injury to his right knee on August 19, 1992, while working in Pennsylvania for Acker Associates, Inc. (Employer). In June 1996, Claimant was awarded total disability benefits for his work injury in the amount of $227.50 per week. In September 1996, Claimant filed a modification petition, asserting that Employer had fraudulently withheld wage information from him and that his average weekly wage should be higher. After a hearing, the WCJ found an error in Claimant's average weekly wage, but the increase was too small to affect his compensation rate.[2] The Board affirmed, as did this Court. *Seamon v. Workers' Compensation Appeal Board (Acker Associates)*, (Pa. Cmwlth., No. 2312 C.D. 1999, filed August 11, 2000) (*Seamon I).* While his modification petition was being litigated, Claimant moved to Arizona. He requested reimbursement for his travel, including airfare, rental car and meals, to attend his modification hearing in Pennsylvania. However, in *Seamon I*, this Court held that such costs were not reimbursable under the Act.[3]

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[2] The compensation rate is "sixty-six and two-thirds per centum of the wages of the injured employe." Section 306(a)(1) of the Act, 77 P.S. §511(1). Thus, a small increase in the average weekly wage often results in no increase in the compensation rate.

[3] Section 440(a) of the Act states, in relevant part, as follows:

> [An 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[.]

77 P.S. §996(a). Section 440 was added by the Act of February 8, 1972, P.L. 25.

In the meantime, Employer has been attempting to secure an IME of Claimant since late 2001. Employer filed a physical examination petition and, by a decision dated October 29, 2001, WCJ Mark Peleak ordered Claimant to attend an IME.

Current Litigation

Employer filed another physical examination petition in April 2002 to compel Claimant to attend an IME. The petition alleged that Claimant failed to attend an IME scheduled for March 21, 2002, in Arizona. In response, Claimant filed penalty petitions in April 2002, alleging that Employer had knowingly submitted fraudulent wage evidence in the past, *i.e.*, *Seamon I*, and had deliberately sent his compensation payments to the wrong address. Claimant simultaneously filed a petition to modify his average weekly wage. The petitions of Employer and Claimant were consolidated and assigned to WCJ Peleak. A hearing was held on December 17, 2002.

In support of his penalty petitions, Claimant testified that on March 30, 2000, he moved to a different home in Arizona and so notified Employer's counsel. Nevertheless, Claimant's compensation checks continued to be delivered to his former address until July 20, 2000. Claimant acknowledged that he had received all of the checks sent to the wrong address. Nevertheless, he believed he was entitled to penalties because Employer's insurer, Penn Millers Insurance Co. (Insurer), had deliberately sent his checks to the wrong address. In support, he stated that Insurer had done surveillance at his new address, so it must have known his correct address.

Claimant then testified that two other compensation payments were missing: one in December 1998 and another in February 2000. Claimant testified

that he wrote to Insurer about the December 1998 check. In November 2000 and again in September 2001, Insurer wrote Claimant that the February 2000 check had not been cashed and asked Claimant either to cash it immediately or notify Insurer if he did not have it.

Employer's counsel confirmed that he received Claimant's address change notice and stated that he had, in turn, so notified Insurer. Employer's counsel could not explain the delay in updating Claimant's address, suggesting that it was a mix-up. Employer's counsel also told the WCJ that he would investigate the two missing checks.

Claimant presented no evidence in opposition to Employer's physical examination petition. He simply offered his view that Employer was "opinion shopping."

The next hearing was held on May 2, 2003. Employer presented Marcy Marra, Insurer's Workers' Compensation Claims Supervisor, who has been employed by Insurer since June 2002, to testify about Claimant's payment history. Marra confirmed that Claimant's file contained Claimant's letter to her predecessor, attorney Robin Davis, giving Claimant's new address.[4] The file did not show whether Davis had informed the accounting department, which is responsible for producing the compensation checks. Marra explained that Claimant's checks are on an "auto-pay cycle," meaning that the computer automatically issues them every two weeks. In mid-July, Claimant's correct address was put into the program. Marra could not explain why this change was not made sooner. Marra testified that, in any case, Insurer was sending Claimant's

[4] Employer did not present Davis as a witness because he had left his employment with Insurer and moved out of state.

checks one week earlier than they were due. She also denied that Insurer did any surveillance on Claimant at his new address.

With respect to the two missing checks in 1998 and in 2000, Marra testified that she personally contacted the bank. The bank confirmed that a check from December 1998 and another in February 2000 had not been cashed. Accordingly, Marra stopped payment on the missing checks and had Insurer issue two new checks to Claimant on January 16, 2003.

In October 2005, Employer, now represented by different counsel, filed a suspension petition. Employer sought a suspension of Claimant's benefits because he had refused to attend an IME despite being ordered to do so by the WCJ on October 29, 2001, in the prior litigation. The suspension petition was also assigned to WCJ Peleak.

On November 7, 2005, WCJ Peleak issued a decision and order. He denied Claimant's penalty petition because even though his compensation checks had been sent to his former address, Claimant had received them. The WCJ denied travel costs for the reason that *Seamon I* established that such costs were not reimbursable. The WCJ dismissed Claimant's modification petition and penalty petition regarding his average weekly wage as barred by *res judicata*. The WCJ granted Employer's physical examination petition and ordered Claimant to attend an IME.

With respect to Employer's pending suspension petition, the WCJ scheduled a hearing. The WCJ cautioned that if Claimant "fails to appear for the physical examination or fails to appear at the next hearing his benefits will be suspended." WCJ Decision, November 7, 2005, at 2; Conclusion of Law 5.

Employer scheduled an IME for December 1, 2005. On December 13, 2005, the suspension petition hearing took place, and both parties appeared.

Employer's counsel stated that Claimant did not attend the December 1, 2005, IME, as ordered by the WCJ in his November 7, 2005, decision. Claimant testified that he chose not to attend the IME for the stated reason that Employer was engaging in witness tampering and fraud by instructing the IME doctor to focus on Claimant's right knee. The WCJ explained to Claimant that his right knee was the only acknowledged work injury and that he had to attend the IME. The WCJ continued:

> I mean, you can go on the rest of your life saying no doctor is going to be honest therefore I'm never going to be examined, therefore [Employer has] to keep paying me. To me, that's ridiculous. That's why I say, *if the doctor examines you, you have every right in the world to come here and argue why the examination was done improperly* or poorly or his opinion should not be respected.... But I don't believe you have the right just not to go.... If you don't go I'm going to suspend your benefits and then you can appeal that ruling. It's as simple as that.... *[Y]ou [have] to go to an examination*....
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> * * *
>
> Mr. Seamon, I wish you would take my advice and follow through with the examination, because I just think you're looking at this thing all wrong.

Notes of Testimony (N.T.), December 13, 2005, at 15-16, 18-19 (emphasis added).[5]

Claimant responded that he understood. Claimant testified that he was going to remain in Pennsylvania over the holidays and gave the WCJ the

[5] We cite to the certified record because there is no reproduced record.

address where he would be staying. Employer's counsel stated that he was going to schedule an IME in Pennsylvania during Claimant's visit. The WCJ then told Claimant that he must attend, stating:

> [Y]ou are going to be here for two weeks…. *I'm ordering you to attend whatever physical examination they schedule*, because they are trying to schedule it here for your convenience.

N.T., December 13, 2005, at 33, 34 (emphasis added).

On December 21, 2005, the WCJ issued a decision on Employer's suspension petition. The WCJ found that because Claimant refused to attend the IME on December 1, 2005, in violation of the WCJ's November 7, 2005, order, Employer was entitled to a suspension. However, because Employer had agreed at the December 13th hearing to schedule another IME, the WCJ allowed Claimant's benefits to continue in order "to give him one final opportunity to attend." WCJ Decision, December 21, 2005, at 2; Conclusion of Law 3. The WCJ specified that if Claimant did not attend the next IME, Employer's suspension petition would be automatically granted and Claimant's benefits would be "suspended without any further litigation." *Id*.; Order.

Employer scheduled an IME in Pennsylvania for December 23, 2005, and Claimant did not attend. Therefore, Claimant's benefits were suspended in accordance with the WCJ's December 21, 2005, order.

Claimant appealed the WCJ's November 7, 2005, decision and December 21, 2005, decision. The Board addressed both in one opinion. The Board affirmed the WCJ's denial of Claimant's modification petition and his penalty petition based on the delay in correcting Claimant's address. The Board remanded because the WCJ had not ruled on whether the two missing checks, replaced in January 2003, entitled Claimant to penalties. The Board affirmed the

WCJ's grant of Employer's physical examination petition, but it remanded on the suspension. It held that the WCJ could not order an automatic suspension that became effective "without further litigation." There had to be a hearing to determine that, in fact, Claimant had failed to appear for the December 23, 2005, IME. Nevertheless, the Board did not vacate the suspension, and Claimant's benefits remained in suspension status.

While this litigation was pending, Claimant filed new petitions that were assigned to a new workers' compensation judge, WCJ Patrick Cummings. Claimant filed a penalty petition alleging fraud and conspiracy by Insurer, Employer's counsel and WCJ Peleak. Claimant also filed a reinstatement petition, alleging that Employer had unilaterally suspended his benefits even though he had not received notice of the IME scheduled for December 23, 2005. WCJ Cummings directed Employer to schedule another IME and directed Claimant to give at least seven days notice if he was not going to attend. Employer scheduled an IME for June 22, 2006, in Arizona. Claimant informed the WCJ he would not attend because his attendance might moot his pending appeal.[6]

WCJ Cummings denied all of Claimant's petitions, and the Board affirmed. This Court also affirmed. *Seamon v. Workers' Compensation Appeal Board (Acker Associates, Inc.)*, (Pa. Cmwlth., No. 2375 C.D. 2008, filed July 20, 2009) (*Seamon II*). We held, first, that Claimant did not prove a violation of the Act or fraud or a conspiracy or misconduct by WCJ Peleak. We then held that Claimant was not entitled to a reinstatement because Employer had suspended his

[6] This Court has held that a pending appeal does not give a claimant an excuse for not attending an IME. *McCormick v. Workers' Compensation Appeal Board (City of Philadelphia)*, 734 A.2d 473, 477-78 (Pa. Cmwlth. 1999).

benefits under authority of WCJ Peleak's December 2005 order and Claimant did not attend the June 2006 IME. We observed that despite being procedurally convoluted, the solution was simple: Claimant has only to attend an IME to have his compensation resume.

We return to the litigation on appeal here, *i.e.*, the November and December 2005 decisions of WCJ Peleak and the Board's affirmance, in two adjudications, of both decisions of the WCJ. On January 29, 2009, WCJ Peleak held the remand hearing. On the penalty petition, Employer's counsel acknowledged that two checks totaling $910 were paid late to Claimant in January 2003. On this penalty petition, Claimant again requested the WCJ to award associated litigation costs, including his airfare, rental car, meals, gas and parking costs.

On the suspension petition, Employer presented evidence on the December 23, 2005, IME. Employer offered a copy of the written notice dated December 14, 2005, informing Claimant of the time and location for the December 23, 2005, IME. Employer also provided a copy of a certified mail notice sent to the Pennsylvania address provided by Claimant at the December 13, 2005, hearing as well as a copy of the receipt showing that the certified mail was returned as unclaimed. In addition, Marra testified that the notice of the IME was sent to Claimant both by certified mail and by regular mail. Marra testified that Insurer paid Claimant's benefits through December 22nd, and suspended them as of December 23rd when he did not attend the IME.

Claimant testified that he had received notice of a December 1, 2005, IME and did not attend. Claimant acknowledged that the WCJ told him at the December 13, 2005, hearing that he had to attend the next IME Employer

scheduled to take place in Pennsylvania during Claimant's holiday visit. Claimant denied receiving notice of a December 23, 2005, IME. When shown the envelopes, Claimant agreed that they bore the address he had provided to Employer. Claimant testified that he did not pick up the certified mail.

Claimant argued that Employer should not have scheduled the IME on December 14, 2005, before the WCJ issued his December 21, 2005, decision on the suspension. Claimant argued that the WCJ had to issue an order; the parties had to receive it; and only then could Employer schedule an IME. Claimant acknowledged that WCJ Cummings found that Claimant did not attend the June 22, 2006, IME in Arizona. Claimant stated that he was seeking payment of his benefits from December 23, 2005, until June 22, 2006. Claimant acknowledged that as of the date of the hearing, January 29, 2009, he still had not attended an IME.

On August 31, 2009, the WCJ issued a decision on the remanded petitions. Again, the WCJ granted Employer's suspension petition effective December 23, 2005. The WCJ found that Claimant had been notified that his benefits would be suspended if he did not attend the next IME but Claimant chose not to attend. Further, Claimant did not have any legitimate reason why he had not attended any of the scheduled IME's.[7]

The WCJ denied Claimant's remanded penalty petition. The WCJ found that two workers' compensation checks totaling $910, dating back to

[7] With regard to the remanded suspension petition, the WCJ noted that this Court had touched on the issue in our 2009 opinion dealing with Claimant's reinstatement petition. There, we had pointed out that WCJ Peleak made it clear at the December 13, 2005, hearing that Employer was going to schedule an IME while Claimant was in Pennsylvania and that Claimant had to attend or have his benefits suspended.

December 1998 and February 2000, had been sent to Claimant but never cashed. They were reissued on January 16, 2003. The WCJ found that as only two compensation checks were late over the course of many years, penalties were not warranted. The WCJ also rejected Claimant's claim for travel expenses to Pennsylvania.

Claimant appealed and the Board affirmed. Claimant then petitioned this Court for review.[8]

Appeal

On appeal, Claimant raises several issues for our consideration.[9] Claimant asserts that each petition decision was flawed. The WCJ's findings of fact are not supported by substantial evidence, and the decisions contain errors of law. Claimant then argues that he was denied due process because the WCJ allowed Employer to suspend his benefits "without further litigation" and refused to allow Claimant to present more evidence. Finally, Claimant argues that the WCJ's decisions were procured by fraud, coercion and other improper conduct.[10]

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[8] Our scope of review is limited to determining whether findings of fact are supported by substantial evidence, whether an error of law was committed and whether constitutional rights were violated. *Polis v. Workers' Compensation Appeal Board (Verizon Pennsylvania, Inc.)*, 988 A.2d 807, 811 n.4 (Pa. Cmwlth. 2010).

[9] We have reordered Claimant's arguments.

[10] Claimant suggests that the Board either did not address all of his arguments or so inaccurately reframed his arguments that he was denied meaningful review. He does not explain this complaint. We note, however, that throughout the litigation and in his appeal documents, Claimant discusses numerous extraneous matters, some of which go back more than a decade. It is neither possible nor necessary to address all of these things. The Board ably addressed all issues relevant to the litigation before us; we endeavor to do the same.

Claimant has made appellate review a daunting task. A petitioner must raise all issues in the petition for review, and also in the statement of questions and in the argument section of his brief. If not, they will be considered waived. *Riley v. Workers' Compensation Appeal Board*

(Footnote continued on the next page . . .)

We begin with a review of each petition and then turn to the issues that affect all petition decisions.

Employer's Suspension Petition

An employer is entitled to have a claimant undergo an IME from time to time. Section 314 of the Act authorizes a WCJ to order the claimant to submit to any physical examination that the WCJ finds reasonable and necessary.[11] Section 314 further provides that if the claimant then refuses to attend the IME "without reasonable cause or excuse" he will be deprived of "the right to compensation" so long as he continues to refuse or neglect to attend an IME. 77 P.S. §651. *See also Maranc v. Workmen's Compensation Appeal Board (Bienenfeld)*, 628 A.2d 522, 524 (Pa. Cmwlth. 1993). The WCJ has broad discretion in determining whether the claimant has to attend an IME and whether the claimant has a reasonable excuse for not attending. *Pancoast v. Workers' Compensation Appeal Board (City of Philadelphia)*, 734 A.2d 52, 54 (Pa. Cmwlth.

(continued . . .)

(DPW/Norristown State Hospital), 997 A.2d 382, 390 n.14 (Pa. Cmwlth. 2010). We do not address issues that appear solely in the petition for review or solely in the brief. As one example, in his brief Claimant argues that the WCJ failed to issue a reasoned decision, but he did not raise this in the petition for review or the statement of questions. It is waived. Notably, were we to address this issue, we would determine that the WCJ's decision is, in fact, reasoned.

[11] Section 314 states, in relevant part, as follows:

> The workers' compensation judge may at any time after such first examination or expert interview, upon petition of the employer, order the employe to submit himself to such further physical examinations or expert interviews as the workers' compensation judge shall deem reasonable and necessary…. The refusal or neglect, without reasonable cause or excuse, of the employe to submit to such examination or expert interview ordered by the workers' compensation judge … shall deprive him of the right to compensation, under this article, during the continuance of such refusal or neglect….

77 P.S. §651.

1999). "Nothing less than a manifest abuse of discretion by a WCJ will justify interference by this Court with a WCJ's decision on this matter." *Id*.

Here, Claimant argues that the suspension was improper because he did not receive the WCJ's December 21, 2005, suspension decision until after the IME date had already passed. Claimant contends that until the WCJ issued a written order, Claimant did not have to attend an IME.[12] In support, Claimant cites *Strawbridge & Clothier v. Workers' Compensation Appeal Board (McGee)*, 777 A.2d 1194 (Pa. Cmwlth. 2001). In *Strawbridge*, the WCJ issued a bench order approving a compromise and release agreement but later vacated the bench order in a written decision. This Court held that because the bench order was not a final order, the WCJ was free to change it in his written decision. *Strawbridge* is distinguishable.

When the December 13, 2005, hearing occurred, there was a November 7, 2005, written decision and order directing Claimant to attend an IME. At the December 13th hearing, Claimant admitted that he received notice of the December 1, 2005, IME and chose not to attend. On that admission, the WCJ could have suspended benefits as of December 1, 2005. However, Employer was willing to schedule another IME, so the WCJ gave Claimant "one last chance." On that basis, the WCJ deferred a suspension. However, WCJ Peleak told Claimant at the hearing, in no uncertain terms, that he had to go to an IME and that Employer

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[12] The Workers' Compensation Judge Rules state, in relevant part, as follows:

> Following the close of the evidentiary record and the hearing of oral argument, if any, … the [WCJ] will issue a written decision, which will contain findings of fact, conclusions of law and an appropriate order based upon the entire evidentiary record.

34 Pa. Code §131.111(a).

was going to schedule it before the end of December in Pennsylvania. Claimant replied that he understood.[13]

The WCJ never retracted his verbal bench order, which is why *Strawbridge* is distinguishable. What the WCJ did was delay the effective date of the suspension, proved by Employer at the December 13, 2005, hearing from December 1, 2005, to December 23, 2005.[14] On remand, the factual basis to the later suspension date was established.

Claimant also argues that Employer did not prove that it notified Claimant of the second IME scheduled in December. We disagree. Under the mailbox rule, proof that a required notice was properly mailed raises a presumption that it was, in fact, received. *Sheehan v. Workmen's Compensation Appeal Board (Supermarkets General)*, 600 A.2d 633, 636 (Pa. Cmwlth. 1991). Merely denying receipt of the mailed item does not, by itself, nullify the presumption that the letter was received. *Id*. Here, the WCJ credited Employer's evidence offered to show both a certified and first-class mailing of the notice of the IME. This is substantial evidence, and it is irrelevant that Claimant chose not to claim the certified mailing.

In sum, there is no merit to Claimant's challenge to the suspension of benefits on December 23, 2005. Indeed, the evidence proved an earlier date, *i.e.*, December 1, 2005.

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[13] Claimant's testimony shows that, as far back as 2002, he knew he had to attend an IME. He told the WCJ:

> The fact of the matter is I know, as I stated earlier, that eventually you're going to make the ruling that I have to see the IME.

N.T., December 17, 2002, at 31.

[14] Claimant is simply wrong that he had to receive an order on Employer's suspension petition before he had to attend an IME. His duty to attend the IME was established in the WCJ's November order.

Claimant's Penalty Petition – Wrong Address

With respect to the mis-addressed checks, Claimant argues that Marra's testimony constitutes unsubstantiated hearsay because she did not work for Insurer in 2000 and because Employer did not submit into evidence any of the business records about which she testified. Claimant argues that the delay in correcting his address was not clerical. Claimant's evidence showed that Employer's counsel also continued to send correspondence to Claimant's old address. This, Claimant argues, shows that Employer's defense to his penalty petition was a "charade" and a "fraud."

Section 435(d) of the Act authorizes the WCJ to assess a penalty for a violation of the Act or its rules or regulations.[15] In order for a penalty to be appropriate, the violation must appear in the record. *Farance v. Workers' Compensation Appeal Board (Marino Brothers, Inc.)*, 774 A.2d 785, 789 (Pa. Cmwlth. 2001). Even so, the WCJ is not required to assess a penalty for a violation; penalties are discretionary. *Shaffer v. Workmen's Compensation Appeal Board (Avon Products, Inc.)*, 692 A.2d 1163, 1167 (Pa. Cmwlth. 1997). This

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[15] Section 435(d) was added by the Act of February 8, 1972, P.L. 25. It states, in relevant part, as follows:

> 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.

77 P.S. §991(d).

Court will not overturn a WCJ's penalty decision absent an abuse of discretion by the WCJ. *Carroll v. Workers' Compensation Appeal Board (US Airways)*, 898 A.2d 1210, 1212-13 (Pa. Cmwlth. 2006).

Claimant is correct that the WCJ erroneously found that Marra had been employed by Insurer for 17 years, which was not correct. Marra testified that she began working for Insurer in 2002 and that she had no personal knowledge of the several-month delay in correcting Claimant's address in 2000. Claimant is also correct that Employer did not place the file that Marra discussed into evidence. In the end, these "errors" are not especially relevant.

It is undisputed that Insurer was informed of Claimant's address change in early April 2000 and that Insurer continued to send Claimant's compensation checks to his former address for the next four months. Marra could offer no explanation for the delay in entering Claimant's new address into the system. However, Claimant testified that he got all of the checks in question, and he did not allege that there was any delay in receiving the checks. Claimant's pay receipts, which he placed into evidence, confirmed that Insurer was issuing Claimant's compensation checks a week early. Claimant's Exhibits C-4 and C-5. No violation was proved by Claimant.

Claimant relies on *McConway & Torley v. Workmen's Compensation Appeal Board (Feliciano)*, 659 A.2d 1076 (Pa. Cmwlth. 1995), in support of his argument that he is entitled to penalties. In that case, the WCJ imposed penalties where the WCJ found that the employer purposefully sent three compensation checks to an incorrect address. This Court affirmed the imposition of a penalty, emphasizing that substantial evidence supported the WCJ's factual finding that the employer had acted improperly.

McConway & Torley does not support a reversal here. The only issue in *McConway & Torley* was whether there was substantial evidence to support the WCJ's finding that the employer had intentionally sent checks to the claimant's wrong address. That is not the case here. Further, *McConway & Torley* did not establish the principle that each and every time a compensation payment is sent to the wrong address, a violation is proved or that the WCJ must award penalties.

Penalty Petition – Missing Checks

With respect to the two missing checks from 1998 and 2000, Employer stipulated that two of Claimant's workers' compensation checks had not been cashed. The parties agreed that the maximum penalty that could be assessed would be $455, *i.e.*, 50 percent of the total replacement amount. The WCJ, relying on Marra's testimony, found that the "checks were originally sent when they were supposed to be sent and, for whatever reason, were then reissued when it was determined that they were never cashed." WCJ Decision, August 31, 2009, at 3; Finding of Fact 16. In short, it was not proved that the fault was Employer's.

Claimant argues that the WCJ and the Board confused his two penalty petitions. There is no evidence of that. Although the WCJ originally neglected to address the missing checks in his November 2005 decision, on remand the WCJ made the appropriate findings about the missing checks.

Claimant challenges the WCJ's statement that "for whatever reason" the checks were not reissued immediately. Claimant asserts that the WCJ ignored the fact that Insurer only reissued the two checks after Claimant filed a penalty petition.

The WCJ's phrase "for whatever reason" describes the fact that the two checks "were never cashed," not why they were reissued. No one was able to

explain to the WCJ what had happened to the two missing checks or why they were never cashed. Insurer contacted Claimant on two occasions to find out about a missing check, a point ignored by Claimant.[16] Further, Marra immediately investigated and issued the new checks within a month of being told that two checks were missing. In any case, the WCJ declined to award a penalty because there were only two missing checks over the course of many years, and we cannot say he abused his discretion in doing so.

Litigation Costs

Claimant argues that the WCJ erred in not awarding him his litigation costs. According to Claimant, he was successful in the litigation because Insurer reissued the two missing checks in response to Claimant's filing of a penalty petition. We reject this argument for two reasons. First, Claimant's penalty petition was denied and, therefore, he was not successful. Second, in *Seamon I*, this Court ruled, in 2000, that litigation costs for airfare, rental cars, parking costs and meals are not the type of litigation costs that are reimbursable under Section 440(a) of the Act, added by the Act of February 8, 1972, P.L. 25, 77 P.S. §996(a). This is binding precedent.

Claimant's Modification Petition

Claimant challenges the dismissal of his petition to modify his average weekly wage. Claimant takes issue with Employer's statement of wages, which he states was not filed until 1997, and argues that his highest earnings

[16] Although Claimant claims that there is no evidence that Insurer tried to investigate the missing checks, he himself submitted into evidence the two letters Insurer sent him in 2000 and 2001 inquiring whether he had received the checks. Claimant's Exhibit C-9.

quarter was never taken into account. The issue of his average weekly wage has been fully litigated and addressed by this Court in *Seamon I*. The doctrine of *res judicata* provides that when there is a final judgment on the merits, future litigation between the parties on the same cause of action is prohibited. *Henry v. Workers' Compensation Appeal Board (Keystone Foundry)*, 816 A.2d 348, 352 (Pa. Cmwlth. 2003). The WCJ correctly concluded that Claimant's current modification petition is barred by *res judicata*.[17]

Due Process

Claimant argues that the WCJ violated his due process rights by allowing Employer to suspend his benefits "without further litigation" in his December 21, 2005, decision. Even though the Board set aside this holding of the WCJ by ordering a remand, Claimant argues that the Board has left this "new law" intact. Claimant's Brief at 4. Claimant is mistaken. There is no "new law" that benefits can be automatically suspended by unilateral action of the WCJ. The Board ruled that the WCJ had erred in that regard, and its remand cured the problem.

Claimant also argues that the WCJ violated his right to a full and fair hearing by closing the record on his modification petition at the May 2, 2003, hearing over Claimant's objections. At the May 2, 2003, hearing, Claimant told the WCJ that he wished to submit more evidence about his average weekly wage, stating that it would be his last piece of evidence and that he wanted to submit more evidence regarding his airfare and litigation costs. Claimant also claims that

[17] Claimant suggests that some of his evidence is new and could not have been discovered previously. He does not elaborate. New evidence is not an exception to *res judicata.*

the WCJ never formally admitted his average weekly wage submission into evidence. The evidence proffered by Claimant was irrelevant. The average weekly wage issue was litigated in *Seamon I,* and it cannot be relitigated.

Claimant also argues a denial of due process because the WCJ ignored requests he sent to the WCJ asking to present rebuttal evidence. Although Claimant is not very specific, it appears that he wanted to submit evidence about his average weekly wage; the results of previous IME's; and evidence to show that Employer's former counsel told numerous untruths. The admission of evidence is a matter within the sound discretion of the WCJ. *Washington v. Workers' Compensation Appeal Board (Pennsylvania State Police)*, 11 A.3d 48, 59 (Pa. Cmwlth. 2011). The WCJ is permitted to exclude evidence that is irrelevant, confusing, misleading, cumulative or prejudicial. *Id.* None of Claimant's proffered evidence is relevant or would have changed the outcome of this litigation.

In short, the record shows that Claimant was given ample opportunity to submit all relevant evidence.

Conspiracy and Bias

Claimant argues that WCJ Peleak was biased and conspired with Employer to put Claimant out of court. He asserts that the WCJ made a false finding of fact that Marra was competent to testify about Insurer's business records when they were never entered into evidence. Claimant further argues that Employer's former counsel engaged in fraud, perjury and subornation of perjury. Claimant asserts that Employer's former counsel sent correspondence to Claimant's old address for years after being notified of Claimant's new address. This shows, according to Claimant, that Employer's entire case is a sham.

Allegations against Employer's former counsel are not relevant. With respect to WCJ Peleak, as we noted in *Seamon II*, there was no evidence of bias, a conspiracy or fraud. Claimant has also made similar allegations in prior litigation against WCJ Grady and WCJ Cummings, who have also been involved in Claimant's case over the years.

Failure to prevail in litigation does not evidence a conspiracy. The WCJ made findings of fact and conclusions of law consistent with the evidence and the law. As explained to Claimant by WCJ Peleak, despite what Claimant believes to be a long-standing fraud and conspiracy among Employer, Insurer and the workers' compensation authorities, he was paid compensation benefits until he made the choice not to attend the December 23, 2005, IME.

Conclusion

Employer is entitled to an IME, and Claimant must attend. His stated reasons for not attending the IME do not provide him a legally cognizable excuse to refuse. Claimant's proffered reasons may provide a basis, in the future, to challenge the outcome of the IME. However, in the meantime, so long as he refuses to attend the IME, his benefits must remain suspended.

Accordingly, the order of the Board is affirmed.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Peter R. Seamon, Petitioner	:	
v.	:	No. 2345 C.D. 2010
Workers' Compensation Appeal Board (Acker Associates, Inc.), Respondent	:	

PER CURIAM **ORDER**

AND NOW, this 22nd day of September, 2011, the order of the Workers' Compensation Appeal Board in the above captioned matter is hereby AFFIRMED.