IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Platform Services, Inc., Petitioner	:	
v.	:	
Worker's Compensation Appeal Board (Kordelski), Respondent	:	No. 676 C.D. 2009
	:	Submitted: October 2, 2009

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: January 5, 2010

Platform Services, Inc. (Employer) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of the Workers' Compensation Judge's (WCJ) denial of Employer's termination and suspension petitions and grant of Kevin Kordelski's (Claimant) penalty petition.[1]

I. Termination Petition.

On August 7, 2006, Employer petitioned to terminate benefits and alleged that Claimant fully recovered from his work-related injury in the nature of a "herniated disc left L4-5." Petition to Terminate Compensation, August 7, 2006, at 3; Reproduced Record (R.R.) at 14a. Claimant did not file an answer.

[1] There are three petitions before this Court on appeal and this Court shall address each seriatim.

In support of termination, Employer presented the medical deposition of Thomas DiBenedetto, M.D. (Dr. DiBenedetto), board-certified in orthopedic surgery. Dr. DiBenedetto previously examined Claimant on April 20, 2001, and again on October 24, 2001, for a "prior work injury" in the nature of "a right-sided L5S1 disk herniation." Deposition of Dr. Thomas DiBenedetto (Dr. DiBenedetto Deposition), September 18, 2006, at 7; R.R. at 281a. Dr. DiBenedetto stated that a MRI conducted in 2001 indicated an "annular tear at L4-5 and some bulging, but not a frank herniation." Dr. DiBenedetto Deposition at 7; R.R. at 281a. In conclusion as to the 2001 work injury, Dr. DiBenedetto stated that Claimant's "history and his [Dr. DiBenedetto's] physical findings and so on were consistent with the right-sided disk herniation . . . he had pain down his right leg, he had some deficits . . . [s]o I mean the L4-5 changes were not clinically significant at that time." Dr. DiBenedetto Deposition at 8; R.R. at 282a.

As to the present injury, Dr. DiBenedetto examined Claimant on July 28, 2006, took a history and reviewed medical records. Dr. DiBenedetto stated:

> He was in no acute distress. He had tenderness in his lower lumbar spine, meaning when I pushed he said there was pain. There was no spasm. He could heel and toe walk without difficulty. That's a sign of normal strength and position sense.
>
> . . . He had a positive straight leg raising [on the right side] at 90 degrees in the sitting position . . . [which] means that he had some tension on his right side of his sciatic nerve . . . [and] you would think that they would have some lesion on their right side that would be pinching a nerve to cause that.

Dr. DiBenedetto Deposition at 12-13; R.R. at 286a-87a. Dr. DiBenedetto concluded that there was "no positive findings on the left side . . . the stipulated

work injury . . . left L4-5 disk herniation . . . . Dr. DiBenedetto Deposition at 15; R.R. at 289a. Dr. DiBenedetto opined that Claimant "was fully recovered from that work injury because he had no positive physical findings on his left side and it was a left-sided disk herniation . . . [h]e also had a post-operative study after his second surgery that showed that there was no recurrent disk herniation at L4-5." Dr. DiBenedetto Deposition at 17; R.R. at 291a. Dr. DiBenedetto stated that Claimant could return to his pre-injury job without any medical restrictions. Dr. DiBenedetto Deposition at 17-18; R.R. at 291a-92a.

Claimant testified that he continues to experience pain symptoms:

> My hips, across both sides of my hips. Down the back of my legs in general, my calves and the back part of my thighs.
> . . . .
> My calves, now that I had surgery, I have heat coming along with the - - - like prickly, almost-asleep kind of a feel.
> . . . .
> Above [the buttocks], on both sides and across my hips . . . [s]ome times it's like a burning kind of pain . . . [f]or the most part, it just feels like my hips are kind of like wanting to lock.
> . . . .
> My legs . . . down the back part of my legs, my calves . . . [m]y right calf is still kind of sleepy now, and my left calf is doing the same thing, like a prickly sensation, like asleep.
> . . . .
> [As to the back] [j]ust the same as I've always had, like that dull kind of a pain.

Notes of Testimony, December 11, 2006, (N.T. 12/11/06) at 8-9; R.R. at 395a-96a.

Claimant stated that physically he did not fully recover and that he was unable to perform his pre-injury job. Notes of Testimony, September 22, 2006, (N.T. 9/22/06) at 57; R.R. at 367a.

Claimant introduced the medical deposition of Scott Naftulin, M.D. (Dr. Naftulin), board-certified in osteopathic and allopathic medicine, rehabilitation, and pain medicine. Dr. Naftulin first examined Claimant on June 29, 2006, at which time Claimant's "chief complaint was of low back and bilateral leg pain and paresthesias or tingling-like sensations, which he related to a work injury on or about August 22, 2005." Deposition of Dr. Scott Naftulin (Dr. Naftulin Deposition), December 15, 2006, at 12; R.R. at 417a. Dr. Naftulin diagnosed Claimant's condition:

> Status post L4-5 discectomy and probable foraminotomy; status post work injury of 2005, which I felt was related to the work injury of 2005; history of an L5-S1 discectomy and right lumbar radicular pain which was pain which was preexisting and unrelated to the work injury of 2005; and lastly, chronic low back pain related to the work injury of 2005.

Dr. Naftulin Deposition at 15; R.R. at 420a. Claimant underwent bilateral nerve blocks on July 21, 2006, "to determine if there was a significant contribution of his pain coming from the zygapophyseal joints . . . [a]nd the results were suggestive, in fact, that being the case." Dr. Natulin Deposition at 16-17; R.R. at 421a-22a. Dr. Naftulin performed "a percutaneous radio frequency neurotomy or rhizotomy[2] on [Claimant's] . . . right side on August 28, 2006, and the left side on October 24,

[2] Rhizotomy is defined as "a treatment to essentially cut the nerves using a special type of precise heating mechanism." Dr. Natulin Deposition at 17; R.R. at 422a.

2006." Dr. Naftulin Deposition at 18; R.R. at 423a. Dr. Natulin opined that Claimant had not fully recovered:

> The mechanism of injury and his presentation thereafter were consistent with an acute disc herniation related to the incident in question. He had appropriate medical and surgical treatment including the disectomy by Dr. Daneshoost. He did have excellent improvement in his leg, radicular pain, but unfortunately, has had ongoing back pain and intermittent leg discomfort bilaterally.
> . . . .
> He had appropriate post-operative rehabilitation, attempted to return to his preinjury occupation, but after three days was clearly incapable of doing that ongoing. Again, consistent with a persistent problem and not a new problem or recurrent problem or some type of other degenerative condition.

Dr. Naftulin Deposition at 21-22; R.R. at 426a-27a. Dr. Naftulin concluded that Claimant "cannot go back to that occupation, at least temporarily" because of "the initial injury with the L4-5 disc herniation." Dr. Naftulin Deposition at 24; R.R. at 429a.

> The WCJ made the following pertinent findings of fact:
> . . . .
> 3. The parties agreed claimant sustained a work related left L4-5 disc herniation on August 22, 2005. Exhibit D-1.
> . . . .
> 12. . . . After surgery for his current work injury on November 5, claimant attempted to return to work on April 3 and April 4. He worked long hours and felt pain similar to the pain he had at the time of the injury (N.T. 30, 33). At the time of the hearing, claimant still had pain across the hips and down both legs (N.T. 34, 56) . . . . Claimant had no problem performing all aspects of his regular duty job before August 22, 2005 (N.T. 64). (emphasis added).

> 13. Claimant's testimony is entirely credible.
>
> . . . .
>
> 17. I find the following portions of Dr. DiBenedetto's testimony credible: a) the annular tear at L4-5 seen on 2001 MRI was not clinically significant at that time; and b) claimant's Waddell signs were negative, meaning claimant had no symptoms magnification. I reject as lacking in credibility Dr. DiBenedetto's opinion that claimant is fully recovered for the following reasons: a) Dr. DiBenedetto acknowledges claimant had positive findings on physical examination, but attributes those findings to claimant's previous disc herniation at L5-S1. The doctor believes claimant has a recurrent right-sided disc herniation at that level. However, in discussing the March 3, 2006 MRI, Dr. DiBenedetto did not discuss any finding of a recurrent L5-S1 disc herniation (N.T. 17, 21-23); and b) claimant credibly testified that he has ongoing symptoms and the doctor reported claimant had negative Waddell testing. (emphasis added).
>
> 18. Dr. Naftulin's opinion that claimant is not fully recovered from the work injury, but is capable of full time sedentary work with the ability to change position every 30-60 minutes is credible and persuasive. Dr. Naftulin cogently explained that the annular disruption in the disc is still present and that facet joint degeneration is a direct result of the disc herniation . . . . [T]aking the doctor's testimony as a whole, I find it was offered within a reasonable degree of medical certainty . . . . (emphasis added).
>
> 19. Based upon credible evidence of record, I find claimant is not fully recovered from the work injury. (emphasis added).

WCJ's Decision, February 28, 2007, (Decision 2/28/07) Findings of Fact (F.F.) Nos. 3, 12-13, and 17-19 at 4, 6-7, and 9-10; R.R. at 544a, 546a-47a, and 549a-50a. The Board affirmed the denial of the termination petition and concluded:

> After carefully reviewing the record . . . the WCJ did not err in denying Defendant's [Employer's] Termination Petitions . . . Defendant [Employer] had the burden to

> prove that claimant's disability has ceased or that any current disability is unrelated to his work injury, and because the WCJ rejected Defendant's [Employer's] medical evidence, it was unable to meet this burden . . . . Defendant's [Employer's] argument is rejected. No error was committed. (citations and footnotes omitted).

Opinion of the Board, October 25, 2007, (Opinion 10/25/07) at 6-7; R.R. 564a-65a.

A. Whether The Board Erred When It Affirmed the WCJ's Denial of Employer's Petition To Terminate?

Initially, Employer contends that the WCJ capriciously disregarded material competent testimony[3] when she rejected the opinion of Employer's medical expert. Specifically, Employer asserts that Dr. Naftulin's opinion that Claimant was not fully recovered from his work-related injury was equivocal.

The employer bears the burden of proof in a termination proceeding to establish that the work injury has ceased or that any current disability is unrelated

[3] This Court's review is limited to a determination of whether constitutional rights were violated, whether an error of law was committed and whether necessary findings of fact are supported by substantial evidence. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991). This Court also notes that our Pennsylvania Supreme Court's decision in Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002) determined 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." Leon E. Wintermyer, Inc., 571 Pa. at 203, 812 A.2d at 487.

Here, the WCJ did not capriciously disregard Dr. DiBenedetto's medical testimony and opinion. First, the WCJ summarized Dr. DiBenedetto's testimony and found portions of his testimony which included the clinical insignificance of the annular tear at the L4-5 level on the 2001 MRI and that Claimant's Waddell's signs were negative indicated no "symptom magnification" as credible. See WCJ's F.F. No. 17 at 9-10; R.R. at 549a-50a. Second, the WCJ rejected Dr. DiBenedetto's opinion that Claimant fully recovered. Specifically, the WCJ found that Dr. DiBenedetto's opinion that Claimant's symptoms were based upon a recurring disc herniation at the L5-S1 level was not supported by the March 3, 2006, MRI. See WCJ's F.F. No. 17 at 9-10; R.R. at 549a-50a.

to the claimant's work injury. Jones v. Workers' Compensation Appeal Board (J.C. Penney Co.), 747 A.2d 430 (Pa. Cmwlth.), appeal denied, 564 Pa. 718, 764 A.2d 1074 (2000). Where the claimant complains of continued pain, this burden is met when an employer's medical expert unequivocally testifies that, in his opinion, within a reasonable degree of medical certainty, the claimant is fully recovered, can return to work without restrictions and that there are no objective medical findings which either substantiate the claims of pain or connect them to the work injury. Udvari v. Workmen's Compensation Appeal Board (US Air, Inc.), 550 Pa. 319, 327, 705 A.2d 1290, 1293 (1997). The question of whether medical testimony is equivocal is a question of law and reviewable by this Court. In conducting a review of medical testimony, the entire testimony of the medical witness must be taken as a whole and a final decision should not rest on a few words taken out of the entire testimony's context. Lewis v. Commonwealth of Pennsylvania, 508 Pa. 360, 498 A.2d 800 (1985).

Here, Employer essentially argues that Dr. Naftulin's use of the term "more likely than not" when referring to the residuals of Claimant's work-related injury rendered his medical testimony equivocal. This Court disagrees.

First, Dr. Naftulin acknowledged that Claimant had a pre-existing back problem which was surgically repaired at L5-S1 and which was unrelated to the August 22, 2005, work injury. Dr. Naftulin Deposition at 15; R.R. at 420a. Second, Dr. Naftulin also stated that Claimant continued to experience pain from that back problem. Third, Dr. Naftulin unequivocally opined that Claimant was not recovered from his August 22, 2005, work-related injury in the nature of a L4-

5 disc herniation.[4] Fourth, the WCJ specifically found that Dr. Naftulin's medical testimony was unequivocal "within a reasonable degree of medical certainty" and cited to seven places in his testimony to support this finding. See WCJ's Decision 2/28/07, F.F. No. 18 at 10; R.R. at 550a. The Board did not err.

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[4] Michael W. Cardamone, Esq., Claimant's attorney, to Dr. Naftulin:

> **Q**: Doctor, based upon the histories that you were given by the claimant, your review of the medical records and the various transcripts in this case, as well as your own physical examination and the procedures that you performed, are you able to form an opinion within a reasonable medical certainty as to whether the claimant in this case fully recovered from his accepted L4-5 left sided disc herniation? (emphasis added).
>
> **A**: Yes, I have an opinion.
>
> **Q**: And what is that opinion?
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> **A**: That he's not fully recovered. (emphasis added).
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> . . . .
>
> **Q**: And how is it that you conclude that his current symptoms are related to the L4-5 disc as opposed to the L5-S1 which was injured in another incident?
>
> **A**: Well, there are certain factors that circumstantially suggest that . . . [h]e described having some intermittent soreness or backache that he related to the rigors of his occupation. This a complaint that we frequently hear from people in these types of jobs, but he was able to continue working without restrictions and without significant difficulty based on the history he gave me and records I reviewed. And only after this specific incident when he developed radiculopathy and document disc herniation did he develop a more severe disabling problem. And, again, I believe that leads us to be [sic] a credible argument that the L4-5 disc is the new problem. (emphasis added).

Dr. Naftulin Deposition at 21 and 23; R.R. at 426a and 428a.

II. Suspension Petition.

On December 18, 2006, Employer petitioned for a suspension of benefits and alleged that "Mr. Kordelski [Claimant] testified on September 22, 2006 that he has been employed telemarketing insurance products from his home since about September 01 [of 2006]." Petition to Suspend Compensation Benefits, December 18, 2006, at 1; R.R. at 27a. Claimant again did not file an answer.

Claimant testified that he was presently employed as a sales representative for Ameriplan Health as of September 1, 2006. N.T. 9/22/06, at 21; R.R. at 331a. Claimant stated Ameriplan Health was located in Plano, Texas and that he found the job when he "was browsing on the internet . . . I made contact with my niece . . . she sent me this [information] . . . [a]nd I looked at it and checked it out with the Better Business Bureau and was pleasantly surprised that they have a number one rating . . . ." N.T. 9/22/06 at 24; R.R. at 334a. Claimant stated that he performs this job "out of my home" and "at my leisure." N.T. 9/22/06 at 23; R.R. at 333a. "I actually made my first two sales . . . [o]ne was on the 15th and one was on the 16th [September]." N.T. 9/22/06 at 23; R.R. at 333a. Claimant received his first commission check in the amount of $24.99. N.T. 9/22/06 at 24; R.R. at 334a. Claimant continued that "[i]f I make regional sales manager, which is six health benefit sales and four independent business sales, I make regional sales director . . . and that would increase my commission after a six-month period." N.T. 9/22/06 at 58; R.R. at 368a. Claimant stated that he is not an employee of Ameriplan Health but an independent contractor. N.T. 9/22/06 at 56; R.R. at 366a. Finally, Claimant stated that he did not look for other outside work "[b]ecause I'm limited to the 20 pounds of lifting vis-à-vis through my doctor

. . . [and] I'm scheduled for surgery next month on the 24th." N.T. 9/22/06 at 25-26; R.R. at 335a-36a.

> The WCJ made the following pertinent findings of fact:
> . . . .
> 7. Defendant [Employer] submitted into evidence a Notice of Ability to Return to Work, which was provided to claimant's counsel at the hearing (Hrg. 9/22/06 N.T. 13-14; Exhibit D-3). (emphasis added).
> . . . .
> 9. Defendant [Employer] submitted no evidence of job availability. Rather, defendant's [Employer's] argument for suspension is that claimant voluntarily removed himself from the work force by engaging in home employment rather [sic] finding a more traditional type of employment. None of the cases cited by defense counsel are applicable here. It is clear that claimant, with no assistance from defendant [Employer], actively sought out some form of employment. Based upon claimant's credible testimony, I find that he has not voluntarily removed himself from the work force. I find defendant's [Employer's] contest on this petition entirely unreasonable. (emphasis added).
>
> 10. . . . Claimant has not looked for "outside work" because of his limitations and because of upcoming surgery . . . . (emphasis added).

WCJ's Decision 2/27/08, F.F. Nos. 7 and 9-10 at 4-7; R.R. at 544a-45a. WCJ denied Employer's petition to suspend benefits. The Board affirmed and concluded that "[b]ecause Defendant [Employer] offered no evidence that Claimant had voluntarily removed himself from the workforce, Defendant [Employer] was unable to meet its burden." Opinion of the Board 10/25/07 at 8; R.R. at R.R. at 566a.

B. Whether The Board Erred When It Affirmed The WCJ's Denial Of Employer's Petition to Suspend?

Employer next contends that because Claimant failed to seek suitable work as approved by Dr. Naftulin he voluntarily withdrew from the work force.

"Generally, to obtain a suspension of benefits, the employer must demonstrate suitable employment was made available to a claimant." County of Allegheny v. Workers' Compensation Appeal Board (Weis), 872 A.2d 263, 265 (Pa. Cmwlth. 2005), citing Kachinski v. Workmen's Compensation Appeal Board (Vepco Construction Co.), 516 Pa. 240, 532 A.2d 374 (1987). However, this requirement is inapplicable where a claimant voluntarily leaves the labor market. Kasper v. Workers' Compensation Appeal Board (Perloff Brothers, Inc. and Sedgwick James & Company), 769 A.2d 1243, 1245 (Pa. Cmwlth. 2001). In Shannopin Mining Co. v. Workers' Compensation Appeal Board (Turner), 714 A.2d 1153 (Pa. Cmwlth. 1998), this court stated:

> We recognize that there may be circumstances where a claimant may be forced to retire from his or her time of injury job due to a work-related injury, but may not be disabled from other type of work. In that situation, the claimant must show that he or she has not voluntarily withdrawn from the entire labor market and is open to employment with his or her physical capabilities in order to be entitled to benefits under the [Act]. (emphasis added and in original).

Id. at 1155 n.5.

Here, Claimant testified that he was unable to seek regular employment because of his pain and Dr. Naftulin's recommendation of a three week medical restriction after each injection procedure performed on Claimant by

Dr. Naftulin. As a result, Claimant applied for employment with Ameriplan Health on September 1, 2006, because he could work at home while medically restricted. In fact, Dr. Naftulin did not release Claimant for work when he began work for Ameriplan Health and also when Employer issued a notice of ability to return work[5] at the September 22, 2006, hearing. It was not until December 14, 2006, that Dr. Naftulin released Claimant to full-time sedentary duty with the ability to change positions.

This Court concurs with the Board's determination that Claimant did not voluntarily withdraw from the labor force:

> Defendant [Employer] had the burden to establish that Claimant's current disability is unrelated to his work injury by establishing that he had retired. Dugan [v. Workmen's Compensation Appeal Board (Fuller), 569 A.2d 1038 (Pa. Cmwlth. 1990)]. Because Defendant [Employer] offered no evidence that Claimant had voluntarily removed himself from the workforce, Defendant [Employer] was unable to meet its burden . . . .[6]

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[5] Section 306(b)(3) of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §513(3), provides that "[i]f the insurer receives medical evidence that the claimant is able to return to work in any capacity, then the insurer must provide prompt written notice, on a form prescribed by the department, to claimant, which states . . . [t]hat employe has an obligation to look for available employment . . . ."

[6] The Board also rejected Employer's argument that "Claimant has retired, and that therefore under Hepler v. W.C.A.B. (Penn Champ/Bissel, Inc.), 890 A.2d 1126 (Pa. Cmwlth. 2006) (holding that, in the context of a suspension petition where an employee has retired, he must show that he is seeking employment or that his work injury forced him out of the entire labor market)." Board's Opinion 10/25/07 at 8 n.8; R.R. at 566a. "Claimant had the burden to establish that he has not voluntarily withdrawn from the workforce. . . [o]n the contrary, the Hepler rule is not applicable to this case because Claimant has not retired, as the WCJ found that Claimant works twenty to twenty-five hours per week. . . . Defendant's [Employer's] argument is rejected." (emphasis added). Board's Opinion 10/25/07 at 8 n.8; R.R. at 566a.

Board's Opinion 10/25/07 at 12; R.R. at 566a. The WCJ properly denied Employer's petition to suspend compensation benefits, and the Board did not err on review.

III. Penalty Petition.

On September 11, 2006, Claimant filed a penalty petition and alleged that "Defendant [Employer] failed to pay back compensation owed to Claimant and pursuant to the Stipulation[7] of the parties approved by the Judge on July 31, 2006 . . . [and that] Defendant [Employer] has unilaterally stopped Claimant's weekly TTD [Temporary Total Disability] . . . Penalties and attorneys [sic] fees of 50% are demanded." Petition for Penalties, September 11, 2006, at 2; R.R. at 17a. Employer filed an answer and "denied that there has been any violation of the Pennsylvania Workers' Compensation Act or of any Rule or Regulation

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[7] Claimant and Employer stipulated to the following:

> . . . .
> (8) Defendant [Employer] shall pay Claimant Temporary Total Disability benefits at the rate of $458.90 from August 22, 2005 and continuing. Defendant [Employer] shall pay Claimant the difference of $458.90, the amount owed per week since August 22, 2005 minus the amount paid, $376.02 per week until they effectuate the change in the TTD rate, with interest to be paid on the past due benefits, ($458.90-376.02=$82.88). Statutory interest shall be paid on any past due benefits.
> (9) There was a reasonable basis to contest these petitions. Defendant [Employer] shall deduct 20% of the past due benefits between the two rates and send same directly to Claimant's counsel, ($82.88 x 20%=$16.57).
> (10) Claimant's counsel incurred litigation expenses in the amount of $330.12, which Defendant [Employer] will reimburse to Claimant's counsel.

Stipulation, July 27, 2006, Paragraphs 8-10 at 3; R.R. at 272a.

promulgated thereunder warranting the imposition of a financial penalty [and that] . . . [n]o averment, no answer is required." Answer to Petition for Penalties, September 15, 2006, at 1; R.R. at 19a.

At a September 22, 2006, hearing, the following discussion took place between Jeffrey D. Snyder (Attorney Snyder), Employer's attorney, Rochelle D. Quiggle (Attorney Quiggle), Claimant's attorney, and the WCJ:

> **Attorney Snyder**: The Penalty Petition is correct in terms of the lack of payment pursuant to the stipulation. It was due to administrative error. My first notice of a problem was my receipt of the Penalty Petition, which was six days after it was dated, which was something like the 14th. Between the 14th of this month and today, I've been out of town for some extent. I got with the adjuster and said you need to pay immediately. The payments have been overnighted, and I suspect received.
>
> . . . .
>
> **WCJ**: All right. And now that payment has been made, are you going to continue to pursue the Penalty Petition, Ms. Quiggle?
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> **Attorney Quiggle**: Yes.
>
> . . . .
>
> **WCJ**: . . . [D]o you have anything that you really want to submit at this point?
>
> **Attorney Snyder**: Well, I can submit the payment. What they did, Judge, they don't have a Pennsylvania program for the interest, so they actually overpaid him. They put just a straight ten percent on, which is too much. But that's fine.

N.T. 9/22/06 at 6 and 8-9; R.R. at 316a and 318a-19a. The WCJ found Employer "violated the Act by making late payment of benefits pursuant to an Order . . . a ten percent . . . penalty is assessed for this violation of the Act" and that "[t]he sum of

$1,500.00 is reasonable as counsel fees for litigating the Penalty Petition and the Suspension Petition . . . ." WCJ Decision 2/28/07, F.F. Nos. 20 and 26 at 10-11; 531a-32a. The Board affirmed the WCJ and concluded that the WCJ did not err in granting the penalty petition. However, the Board also concluded the "WCJ erred in awarding $1,500.00 in unreasonable contest attorney's fees without having received a quantum meruit bill of costs from Claimant's counsel." Board's Opinion 10/25/07 at 14; R.R. at 572a. The Board remanded to the WCJ so that Claimant's attorney could introduce a quantum meruit bill of cost.

After remand, the WCJ made the following pertinent findings of fact:

> 1. Claimant's counsel submitted into evidence an exhibit including an itemized list of services on the Suspension and Penalty Petitions as well as counsel's Curriculum Vitae . . . .
>
> 2. At the hearing on February 27, 2008, defense counsel objected to the itemized list of services for two reasons: a) claimant's counsel billed in quarter hour increments; and b) claimant's counsel charged a rate of $200.00 per hour. Defense counsel's objections were overruled. However, defense counsel was given the opportunity to submit evidence at another hearing to demonstrate that claimant's counsel's billing practice and her billing rate is not in accordance with the usual and customary rates and practices in the Lehigh Valley. Defense counsel chose not to present such evidence, as doing so would not have been 'cost effective.' (emphasis added).
>
> 3. Claimant's counsel has been in the private practice of law since 1993, and has had experience handling workers' compensation cases since that time. Given her expertise in the area of workers' compensation, and in the absence of evidence to the contrary, I find her hourly rate of $200.00 reasonable.

> 4. Although defense counsel objected to claimant's counsel's quarterly hour increments, he submitted no evidence that this is not the accepted practice within the Lehigh Valley. Therefore, I find claimant's counsel's Quantum Meruit submission in the amount of $1,930.00 is entirely reasonable considering the time and effort spent in litigating the Suspension and Penalty Petitions and considering claimant's counsel's expertise in the field of workers' compensation. (emphasis added).

WCJ's Decision, March 19, 2008, (WCJ's Decision 3/19/08), F.F. Nos. 1-4 at 3-4; R.R. at 594a-95a. The Board did not err when it affirmed.

C. Whether The WCJ Abused Her Discretion When She Granted Claimant's Penalty Petition Based Upon An Unreasonable Contest?

Employer contends the WCJ erred when it found an unreasonable contest because Claimant never disclosed his current employment and because Claimant's counsel never contacted Employer concerning Employer's oversight.

Section 440 of the Act, 77 P.S. § 996(a), provides that "[i]n any contested case where the insurer has contested liability in whole or in part . . . the employe . . . in whose favor the matter at issue has fully been determined . . . shall be awarded . . . a reasonable sum for . . . attorney fees" unless the employer's contest is reasonably based. Whether an employer's contest is reasonable is a question of law. Costa v. Workers' Compensation appeal Board (Carlisle Corporation), 958 A.2d 596, 601-02 (Pa. Cmwlth. 2008). The employer bears the burden of proving facts sufficient to establish a reasonable contest. Essroc Materials v. Workers' Compensation Appeal Board (Braho), 741 A.2d 820 (Pa. Cmwlth. 1999). A genuine issue over a legal question may also be considered a basis for a reasonable contest. Chichester School District v. Workmen's Compensation Appeal Board (Fox), 592 A.2d 774 (Pa. Cmwlth. 1991).

Here, the evidence established there was no reasonable contest. First, a July 31, 2006, order was issued approving the stipulation between the parties. At that time, Claimant was receiving total TTD benefits that were inaccurately low.[8] Claimant testified that on or about August 15, 2006, he received his last TTD check and did not receive any money until the September 22, 2006, hearing on Claimant's penalty petition. Second, Employer has failed to direct this Court to the appropriate section of the Act that places a duty on either an employee or his counsel to notify Employer when court ordered payments are stopped. Third, the WCJ assessed a ten percent penalty against Employer on the amount of $4,949.12 or approximately $494.00 where pursuant to the Act she could have assessed a fifty percent penalty. Last, this Court concurs with Board:

> Here, Defendant [Employer] had no sound basis in the Act for filing its Suspension Petition on the basis that Claimant had withdrawn from the labor force, because Defendant [Employer] acknowledged in its Suspension Petition that Claimant was working. Furthermore, while it appeared from a reading of its Suspension Petition that Defendant was seeking a suspension on the basis that Claimant did not offer a reason why he 'failed to attempt to secure a position paying a wage,' Claimant had no duty to be seeking employment at that time, because he was receiving ongoing benefits pursuant to an award . . . . (citations omitted and emphasis added).

Board's Opinion 10/25/07 at 12; R.R. at 570a. Here, Employer's contest was not reasonably based and the appropriate penalty was properly assessed. Neither the WCJ nor the Board erred.

[8] Pursuant to the Stipulation, Claimant was to be paid the difference between his correct weekly wage and the incorrect weekly that he was receiving in TTD benefits. See Stipulation, Paragraph 8 and 9 at 3; R.R. at 272a.

D. Whether The WCJ Exceeded The Scope Of Remand When She Awarded Attorney Fees In The Amount Of $1,930.00?

Employer also contends that the WCJ simply accepted Claimant's attorney fee despite the lack of consistency between the attorney's hourly rate and the amount of time she expended on various tasks. This Court again disagrees.

Initially, the WCJ awarded Claimant attorney fees in the amount of $1,500.00. On appeal, the Board remanded to the WCJ to determine the issue of attorney fees and to allow Claimant's attorney the opportunity to present a quantum meruit bill in support of her fee.

> 34 Pa. Code § 131.55 provides:
>
> . . . .
>
> (b) Claimant's counsel may file an application for quantum meruit fees at or before the filing of proposed findings of fact, proposed conclusions of law and briefs requested . . . at or before the close of the record. The application shall detail the calculation of the fee requested, shall itemize the services rendered and time expended and shall address all factors enumerated in section 440 of the act (77 P.S. § 996) in support of the application. (emphasis added).
>
> (c) Within 15 days after service of the application for quantum meruit fees, an opposing party may file a response to the application detailing the objections to the fee requested.

In the present controversy, Claimant's attorney submitted an itemized bill of cost in the amount of $1,930.00 which the WCJ found to be entirely reasonable and the Board agreed on appeal:

> Claimant's counsel submitted her CV indicating that she handled workers' compensation cases since 1993, and an Itemized List of Services she rendered on his behalf with regard to the Suspension and Penalty Petitions. [Exhibit C-1]. Claimant's counsel billed three to six minutes (.05 to .10) each for the review of letters and notices. [Id.]. She billed 15 minutes (.25) each for telephone calls, preparation and filing of Penalty Petition, presentation of evidence for the Penalty Petition at hearing, questioning the basis for Defendant's [Employer's] Suspension Petition at hearing, and review of the Suspension Petition it filed and related correspondences and attachments, and waiting for its counsel to appear at hearing. [Id.] She billed one hour for preparation of Findings and Brief regarding the Suspension and Penalty Petitions. [Id.] Also, Claimant's counsel billed three hours travel time, to and from two separate hearings. Claimant's billable hours were 9.65 and she claimed an hourly rate of $200.00 for a total of $1930.00.
>
> . . . .
>
> On review, we see no error in the WCJ's determinations. Claimant's counsel met the burden of proving her costs based on quantum meruit . . . . Despite being given the opportunity to produce evidence to support his objections to the hourly rate and the quarter hour billing increments, Defendant chose not to do so. Accordingly, there is no indication in the record that the requested hourly rate is excessive or that counsel's billing practices are inappropriate. (emphasis added).

Opinion of the Board, April 6, 2009, (Opinion 4/6/09) at 5-6; R.R. at 628a-69a. The Board properly concluded that Claimant's attorney was entitled to legal fees in the amount of $1,930.00.[9]

[9] Employer also asserts that the WCJ exceeded her authority on remand when she increased Claimant's attorney fees from $1,500.00 to $1930.00. The WCJ was ordered to reopen the record so that Claimant could introduce a quantum meruit bill of costs. The Board did not require the WCJ to cap the bill of costs on remand. The WCJ was only required to remain within the boundaries of the remand order.

IV. Reasoned Decision.

E. Whether The WCJ Failed To Issue A Reasoned Decision?

Essentially, Employer contends that the WCJ failed to issue a reason decision because she failed to consider the equivocal nature of Dr. Naftulin's testimony and to properly explain why she rejected Dr. DiBenedetto's testimony.[10]

> Section 422(a) of the 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 . . . . (emphasis added).

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[10] Specifically, the Board recited Employer's arguments:

> [The WCJ] failed to discuss the appellate opinions cited by Defendant [Employer], failed to find that Claimant did not have a reason for not seeking full-time work, failed to consider Claimant's current employment as an 'attempt to strengthen weak proofs', failed to find that Claimant's herniation no longer exists, failed to find that Claimant concealed his pre-existing back condition, and failed to admit Defendant's [Employer's] evidence submitted as an attachment to Dr. DiBenedetto's deposition.

Board's Opinion 12/25/07 at 8-9 n.9; R.R. at 566a-67a.

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 circumstances where a credibility assessment may be said to have been tied to the inherently subjective circumstances 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, 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 WCJ set forth concise findings of fact concerning the testimony of Claimant, Dr. DiBenedetto, and Dr. Naftulin and explained the basis of her findings and credibility determinations. See WCJ Decision, 2/28/07, F.F. Nos. 10-14, and 16-18 at 5-10; R.R. at 526a-31a. The WCJ also evaluated Claimant's employment with Ameriplan Health and found that Claimant did not voluntarily remove himself from the work force. See WCJ Decision, 2/28/07, F.F. No. 9 at 4-5; R.R. at 525a-26a. Last, the WCJ rejected Employer's attempts to introduce "Employer's Report of Occupational Injury or Disease" "under Section 438(c) of the Act . . . [because] . . . the record reflects that these Employer's Reports of Occupational Injury or Disease form are being offered by a different

employer than the one who completed them . . . ." WCJ Decision, 2/28/07, F.F. No. 15 at 8; R.R. at 529a.

As our Pennsylvania Supreme Court noted "a decision is 'reasoned' for purposes of Section 422(a) if it allows for adequate review by the WCAB without further elucidation and if it allows for adequate review by the appellate courts under applicable reviewable standards . . . [a] reasoned decision is no more, and no less." (emphasis added). Id. at 76, 828 A.2d at 1053. This Court finds no error by either the WCJ or the Board.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Platform Services, Inc., Petitioner	:	
v.	:	
Worker's Compensation Appeal Board (Kordelski), Respondent	:	No. 676 C.D. 2009

O R D E R

AND NOW, this 5th day of January, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge