IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kurz-Hastings, Inc., Petitioner	:	
v.	:	No. 901 C.D. 2007
	:	Submitted: May 23, 2008
Workers' Compensation Appeal Board (Stefanowicz), Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE FLAHERTY FILED: July 25, 2008

Kurz-Hastings, Inc. (Kurz-Hastings) and GAB Robins (collectively, "Employer") petition for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of a Workers' Compensation Judge (WCJ) holding Employer liable for benefits following a work injury sustained on March 17, 2003. We affirm in part and reverse in part for the reasons stated below.

Arthur Stefanowicz (Claimant) initially sustained an injury to his low back in the course and scope of his employment with Kurz-Hastings on June 29, 2000. Kurz-Hastings, through its insurer at that time, Reliance Insurance Co., began paying weekly workers' compensation benefits at a rate of $611.00. Claimant's benefits were subsequently suspended effective December 17, 2001.

Claimant filed a Claim Petition on April 30, 2003 against Employer alleging he again sustained a lower back injury with accompanying shooting pain

in the course and scope of his employment on March 17, 2003. He sought ongoing total disability benefits. Claimant also filed a Reinstatement Petition alleging a recurrence of his prior injury and indicating that his medical bills have gone unpaid. Claimant further filed a Penalty Petition against Employer alleging that it violated the Pennsylvania Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§ 1 - 1041.4, 2501-2708, by failing to investigate his injury, refusing to allow him to treat with a panel provider, and for terminating his employment. Claimant sought fifty percent penalties for these alleged violations of the Act as well as an award of unreasonable contest attorney's fees. On August 14, 2003, Employer filed a Joinder Petition seeking to add Inservco Insurance Co. (Inservco) to the litigation.[1]

The WCJ issued an order pursuant to Section 410 of the Act (410 Order) directing the insurers to pay one half of Claimant's workers' compensation benefits based on Claimant's average weekly wage (AWW) for the 2000 injury.[2]

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[1] The Workers' Compensation Security Fund (Fund) is the successor in interest since the insurance carrier for the previous work related injury, Reliance, became insolvent. Inservco is the Fund's third-party administrator. Venezia Hauling v. Workers' Comp. Appeal Bd. (Inservco Ins. Servs.), 809 A.2d 459, 461 fn. 2 (Pa. Cmwlth. 2002).

[2] Section 410 of the Act, 77 P.S. § 751, provides in pertinent part:

> Whenever any claim for compensation is presented and the only issue involved is the liability as between the defendant or the carrier or two or more defendants or carriers, the referee of the department to whom the claim in such case is presented shall forthwith order payments to be immediately made by the defendants or the carriers in said case. After the department's referee or the board on appeal, render a final decision, the payments made by the defendant or carrier not liable in the case shall be awarded or assessed against the defendant or carrier liable in the case, as costs in the proceedings, in favor of the defendant or carrier not liable in the case.

In support of his Petitions, Claimant testified that he works for Employer as a special machine operator with job duties that require him to bend, stoop, climb ladders, and lift weights weighing between fifteen and seventy-five pounds. He acknowledged that he had a prior work-related back injury in June of 2000 that necessitated surgery.[3] Claimant stated he returned to full duty as of December 17, 2001 with no restrictions. According to Claimant, at no point from his return to work in 2001 through March 17, 2003 did he miss work because of his prior back injury. Moreover, he consistently performed overtime work. R.R. at 38, 39, 53, 54, 83.

Claimant stated that on March 17, 2003, he was pushing a cylinder cart weighing several hundred pounds when the wheels locked up and the cart would not turn. Claimant explained he tried to twist the cart to free it up when he felt a sharp pain go from his low back into his right leg. In the days that followed, he felt a burning sensation in his low back shooting down his leg as well as pressure in his right testicle. Claimant indicated that he did not experience pressure in his testicle following his prior back injuries. R.R. at 39, 40, 41, 42.

Claimant stated that his back was fine immediately prior to the March 17, 2003 incident. Currently, however, Claimant does not believe he can return to work due to the pain that he experiences. R.R. at 40, 49.

Claimant stated he never had back pain between his return to work and the incident on March 17, 2003. He later admitted he took Motrin for back pain during this period. He added that he had stiffness as well. Claimant clarified that he did have soreness and stiffness in his back from December 17, 2001 through March 17, 2003, but those problems were not severe enough to require

[3] Claimant also had a back injury in 1998. R.R. at 53.

him to miss work. Claimant agreed that from the date of his 1998 back injury through the present, he has never been pain free. R.R. at 64, 95, 96, 101, 102, 103.

Claimant presented the testimony of Sanford H. Davne, M.D., who first examined him on August 14, 2003. Claimant provided Dr. Davne a history of the March 17, 2003 incident and of his prior back problems. Dr. Davne explained that Claimant's current complaints were different than they were before, particularly involving pain in his right testicle. Following receipt of Claimant's history, a review of certain medical records, and conducting a physical examination, Dr. Davne diagnosed Claimant with "bulging of the L4-5 and L5-S1 disc and recurrent disc herniation at L5-S1." He opined that Claimant's current condition was a direct result of the injury that occurred on March 17, 2003. R.R. at 240, 241, 242, 248, 254.

According to Dr. Davne, he was unaware of any doctor's visits between December 2001 and March of 2003 where Claimant complained of pain. He clarified, however, that Claimant had visits with his family doctor where Claimant informed his physician that he had a little back pain. Dr. Davne stated Claimant had an excellent recovery from his prior back injury and although he had a couple of minor episodes of back pain, they did not have much significance and did not prevent him from working. Dr. Davne admitted that he did not record in his history what position Claimant's body was in when he was pushing the cart, how heavy the cart was, or if it hit a rut causing it to be more difficult to push. Dr. Davne was unaware that Claimant was recommended for handicapped vehicle license plates in May of 2001 or that he has sat at the picket line on Employer's premises since April of 2003. He believed, however, he had all the essential history and did not recant his opinions. R.R. at 269, 270, 282, 283, 286, 296, 302.

Dr. Davne explained that the term "recurrent disc herniation" refers to problems with a disc that has already been operated on whereby a portion of that disc was already previously removed. He elaborated that medically, the term means a new disc herniation. He added "It is my opinion, with a reasonable degree of medical certainty, that there is new damage to the L5-S1 disc which has caused new disc material [to herniate]. Even though we call it a recurrent disc herniation, it's material which has not previously herniated to herniate and press against the L5-S1 nerve, the S1-nerve." Dr. Davne did not believe Claimant was capable of returning to work. He agreed that Claimant's subjective complaints played a part in his determination. R.R. at 251, 253, 255, 264, 294.

Employer presented the testimony of Richard J. Mandel, M.D., board certified orthopedic surgeon, who examined Claimant on August 13, 2003. Dr. Mandel stated that Claimant never fully recovered from his prior back injury and surgeries. He stated that a review of the medical records indicated Claimant remained symptomatic. He did not believe Claimant sustained any significant new injury in March of 2003 or that Claimant was unable to work as a result of an incident occurring at that time. Dr. Mandel added that if Claimant did sustain an injury on March 17, 2003, such injury would have been a sprain or a strain and Claimant was fully recovered from the same. R.R. at 347, 348, 354, 355.

Dr. Mandel agreed that in his initial report, he indicated Claimant had a possible small recurrent disc herniation at L5-S1. In that report, he stated that if Claimant's history was accurate, he would consider Claimant's condition to be work-related and attributable to the March 17, 2003 incident. Dr. Mandel explained that he revised his opinion after reviewing additional medical records

that showed Claimant had continued complaints of back pain following his 2000 surgery. R.R. at 359, 360.

Employer further presented the testimony of Leonard A. Brody, M.D., board certified orthopedic surgeon, who examined Claimant on February 4, 2004. He opined Claimant had an S-1 radiculopathy in the right lower extremity. He opined Claimant's problem pre-dated any event occurring on March 17, 2003. According to Dr. Brody, Claimant did not sustain a new injury or an aggravation in March of 2003, but rather a recurrence of previous ongoing problems. In so finding, Dr. Brody noted Claimant's ongoing complaints of pain prior to the March 2003 incident. He acknowledged, however, that he did not have any medical records after November 2001 indicating Claimant had any ongoing complaints of pain. R.R. at 492, 491, 493, 510.

In a decision dated March 30, 2005, the WCJ credited Claimant's testimony and that of Dr. Davne. The WCJ rejected the testimony of Drs. Mandel and Brody. Based on his credibility determinations, the WCJ granted Claimant's Claim Petition filed against Employer. He awarded ongoing benefits of $662.00 per week to Claimant as of March 17, 2003 based on an AWW of $986.00. The WCJ further found that Claimant met his burden of proof in the Penalty Petition by establishing Employer failed to investigate his injury before issuing its Notice of Compensation Denial (NCD). He awarded twenty percent penalties on all indemnity benefits due from March 21, 2003 through April 12, 2004, the date the 410 Order was issued. The WCJ dismissed Claimant's Reinstatement Petition and Employer's Joinder Petition. The WCJ found Employer presented a reasonable contest. He awarded $4,978.90 in litigation costs. Both Inservco and Employer

appealed the WCJ's decision to the Board. On March 3, 2006, it remanded for clarification of certain findings.[4]

On July 28, 2006, the WCJ issued a new decision whereupon he issued brief findings clarifying his previous decision. The WCJ again granted Claimant's Claim Petition finding Claimant established he sustained a new injury in the nature of "bulging of the L4-5 and L5-S1 discs and a recurrent disc herniation of L5-S1" on March 17, 2003. He reiterated that Employer was responsible for Claimant's ongoing benefits. Specifically, the WCJ stated:

> The basis for this finding is the acceptance of Dr. Davne's opinions, the fact that the Claimant worked from December of 2001 through March 17, 2003 without restrictions or ongoing continuous treatments for back complaints, the results of the diagnostic studies and a change in the Claimant's symptoms after the March 17, 2003 work incident.

R.R. at 22.

The WCJ added that Employer is to reimburse Inservco for all benefits Inservco paid to Claimant pursuant to the 410 Order. The WCJ incorporated his earlier findings by reference. Employer appealed this decision to the Board which affirmed in an order dated April 11, 2007. This appeal followed.[5]

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[4] Claimant filed a new Penalty Petition while this matter was on remand. That Petition is not subject to this appeal.

[5] Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated. Sysco Food Serv. of Phila. v. Workers' Compensation Appeal Board (Sebastiano), 940 A.2d 1270 (Pa. Cmwlth. 2008). In reviewing a workers' compensation decision, we must view the evidence in a light most favorable to the party who prevailed before the WCJ. Birmingham Fire Ins. Co. v. Workmen's Compensation Appeal Board (Kennedy), 657 A.2d 96 (Pa. Cmwlth. 1995).

Employer argues on appeal that the WCJ erred in granting Claimant's Claim petition and holding it liable for benefits for a new injury sustained on March 17, 2003. We disagree.

If a compensable disability results directly from a prior injury but manifests itself on the occasion of an intervening incident that does not materially contribute to the physical disability, then the claimant has suffered a recurrence. Reliable Foods v. Workmen's Compensation Appeal Board (Horrocks), 660 A.2d 162 (Pa. Cmwlth. 1995). Conversely, where the intervening incident does materially contribute to the renewed physical disability, a new injury or aggravation has occurred. South Abington Twp. v. Workers' Compensation Appeal Board (Becker), 831 A.2d 175 (Pa. Cmwlth. 2003). Whether or not the intervening incident materially contributes to a claimant's disability is a question of fact to be determined by the WCJ. C.P. Martin Ford, Inc. v. Workmers' Compensation Appeal Board (Dzubur), 767 A.2d 1164 (Pa. Cmwlth. 2001).

It should be noted that the terms "recurrence" and "aggravation" are legal terms of art and not medical terms. Reliable Foods, 660 A.2d at 166. Therefore, a final determination is not based upon specific words used by the medical experts, but rather upon a careful review of the medical testimony to determine its substance rather than its form. Id. at 166-167.

Upon review, we see no error in the WCJ's determination that Claimant's 2003 injury was a new injury and that Employer was liable for the same. As indicated in Reliable Foods and Becker, whether Claimant sustained a new injury or a recurrence of his earlier back injury while working on March 17, 2003 turns on whether the incident wherein he was pushing a cylinder cart and a

wheel jammed, materially contributing to his renewed physical disability. This is a question of fact to be determined by the WCJ. Dzubur.

The WCJ found that the cart incident did materially contribute to Claimant's renewed disability. In so finding, the WCJ relied on Claimant's credible testimony that he was able to work a manual labor job, including overtime, without restrictions from December 17, 2001 through March 17, 2003 without missing work due to his earlier back injur(ies). The WCJ further relied on the credible testimony of Dr. Davne who explained that Claimant sustained new damage to the L5-S1 disc causing herniation and that his condition was directly attributable to the cart incident of 2003. Looking at the evidence in a light most favorable to the party prevailing below, as we are required to do pursuant to Kennedy, we cannot agree with Employer that there is not sufficient evidence of record to place liability upon it for a new injury.[6]

Employer nonetheless argues that the WCJ failed to properly address the inconsistencies in Claimant's testimony. Specifically, it points to Claimant's initial denial that he had back pain when he returned to work between December of 2001 and March of 2003 followed by his later admission that he had stiffness during this period and that he has not been pain free since 1998. Employer further references Claimant's statement that he did not have pressure in his right testicle following his previous back injuries followed by an admission that he complained of pain in his right testicle in June of 1998.

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[6] The claimant is required to establish the length of his disability. Innovative Spaces v. Workmen's Compensation Appeal Board (DeAngelis), 646 A.2d 51 (Pa. Cmwlth. 1994). The credible evidence of record establishes he continues to be disabled by his March 17, 2003 back injury.

A party may not challenge or second-guess the WCJ's reasons for the credibility determinations rendered. Dorsey v. Workers' Compensation Appeal Board (Crossing Constr. Co.), 893 A.2d 191 (Pa. Cmwlth. 2006). Indeed, determining the credibility of a witness is the quintessential function of the fact finder. It is not an exact science, and the ultimate conclusion comprises far more than a tally sheet of its various components. Id. at 195. Moreover, the WCJ is not required to give a line-by-line analysis of each statement made by each witness, explaining how a particular statement affected the ultimate decision. Acme Mkts., Inc. v. Workers' Compensation Appeal Board (Brown), 890 A.2d 21 (Pa. Cmwlth. 2006).

The WCJ credited Claimant's testimony. We cannot reweigh the credibility of this witness. Dorsey. In determining that Claimant's March 17, 2003 injury was a new injury, the WCJ considered the contrast in Claimant's physical condition before and after March 17, 2003. He apparently gave more weight to Claimant's ability to perform a manual labor job, plus work overtime, without restrictions, without ongoing continuous treatments for back complaints and without missing work for over a year following his return to work in 2001 in addition to the results of the diagnostic studies and the change in Claimant's symptoms after March 17, 2003. He apparently accorded lesser weight to Claimant's minor complaints of pain which were not disabling preceding the new injury. The evidence is substantial that the March 17, 2003 incident at work materially contributed to Claimant's renewed physical disability and as a result he sustained a recurrence of his prior work-related back injury.

While the WCJ may not have addressed Claimant's testimony as it relates to pain upon his return to work in 2001 and pain or pressure in his right

testicle to Employer's satisfaction, we note that consistent with Brown, the WCJ is not required to go over each bit of evidence and explain how it factored into his final determination. Nonetheless, we point out that the WCJ did discuss Claimant's back complaints prior to his March 17, 2003 work injury as well as the fact that as of that date, Claimant's pain became severe enough that he could not work. R.R. at 5.

Employer further argues that Dr. Davne's testimony is insufficient to support a finding that Claimant sustained a new injury on March 13, 2007 and that it is liable for his benefits. It points out that, *inter alia*, Dr. Davne did not know all of the circumstances concerning the cart pushing incident, that he was unaware of any medical visits Claimant had between December of 2001 and March of 2003 where he complained of back pain, that he did not know that Claimant walked or sat at the picket line at Employer's premises since April of 2003, and that he was unaware that Claimant discussed the possibility of getting handicapped plates in May of 2001.[7] It contends that Dr. Davne's testimony is incompetent.[8]

The purported deficiencies in Dr. Davne's testimony do not render his opinion incompetent. The opinion of a medical expert must be viewed as a whole.

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[7] Employer further asserts that Dr. Davne admitted that much of Claimant's physical examination revealed only subjective findings. This is not reflective of the contents of the record.

[8] Employer also contends that the WCJ failed to address its preserved objections. Section 131.66(b) of the Special Rules Before Workers' Compensation Judges dictates that objections made during a deposition shall be preserved in a separate writing and submitted prior to the close of the evidentiary record. 34 Pa. Code §131.66(b). Objections not preserved are deemed waived. Id; see also Degraw v. Workers' Compensation Appeal Board (Redner's Mkts., Inc.), 926 A.2d 997 (Pa. Cmwlth. 2007). There is no list of preserved objections contained in either the reproduced record filed with this Court or the certified record. Moreover, Employer fails to direct us as to when such a document was submitted. Consequently, its objections are waived.

American Contracting Enter. v. Workers' Compensation Appeal Board (Hurley), 789 A.2d 391 (Pa. Cmwlth. 2001). A medical expert's opinion is rendered incompetent if it is based on inaccurate or false information. Newcomer v. Workmen's Compensation Appeal Board (Ward Trucking Corp.), 547 Pa. 639, 692 A.2d 1062 (1997). The fact that a medical expert does not have all of the claimant's medical history goes to the weight to be given to that individual's testimony, not its competency. Sampson Paper Co. v. Workers' Compensation Appeal Board (Digiantonio), 834 A.2d 1221 (Pa. Cmwlth. 2003). Moreover, the fact that the medical expert does not know every detail of the alleged work incident that causes a claimant's complaints is also left to the WCJ when rendering his credibility determinations. Degraw, 926 A.2d at 1001. Answers given on cross-examination do not necessarily destroy the effectiveness of a physician's opinion given on direct examination. Hannigan v. Workmen's Compensation Appeal Board (Asplundh Tree Expert Co.), 616 A.2d 764 (Pa. Cmwlth. 1992).

Employer's arguments concerning the deficiencies in Dr. Davne's testimony do not suggest that this expert's testimony was based on any inaccurate information such as to render it incompetent as in Newcomer. Rather, its arguments concern facts that Dr. Davne was not aware of when rendering his diagnosis, finding Claimant's condition to be a new injury, and removing Claimant from work. In pointing to these facts, Employer is highlighting that Dr. Davne's opinion is based on an incomplete history. When an expert's opinion is based on an incomplete history, it is for the WCJ to take this into consideration. Digiantonio; Degraw. It may be true that the WCJ did not discuss the supposed shortcomings of Dr. Davne's testimony when summarizing his opinion or when rendering his credibility determinations. We reiterate, however, that consistent

with Brown, the WCJ is not required to go over each bit of evidence and explain how it factored into his final determination.[9]

Nonetheless, in support of its argument that Dr. Davne's opinion is incompetent because Dr. Davne was unaware of the specifics of the cart pushing incident, Employer cites Long v. Workers' Compensation Appeal Board (Integrated Health Serv., Inc.), 852 A.2d 424 (Pa. Cmwlth. 2004). In Long, this Court held that an opinion that is rendered where the medical professional does not have a complete grasp of the medical situation and/or the work incident *can* be deemed incompetent.

The claimant, in Long, injured herself in the course and scope of her employment when a mirror fell and struck her in the head. The employer's expert, Dr. Robinson, examined the claimant and in his initial report indicated she aggravated her pre-existing C5-6 herniated disc. Unsatisfied with this expert's opinion concerning the claimant's condition, the employer provided Dr. Robinson pictures of the bathroom mirror that allegedly fell upon the claimant. Subsequently, Dr. Robinson revised his opinion and issued a new report stating the mirror in the picture could not have caused the claimant's cervical spine injury, or any of the associated soft tissue injury. Dr. Robinson admitted at his deposition that he had no idea how much the mirror that struck the claimant weighed, what

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[9] Employer also argues Dr. Davne's testimony is incompetent because it is equivocal. Medical testimony will be deemed incompetent if it is equivocal. Coyne v. Workers' Compensation Appeal Board (Villanova Univ.), 942 A.2d 939 (Pa. Cmwlth. 2008). Medical testimony is equivocal if, after a review of a medical expert's entire testimony, it is found to be merely based on possibilities. Signorini v. Workmen's Compensation Appeal Board (United Parcel Serv.), 664 A.2d 672 (Pa. Cmwlth. 1995). Upon review of the record, we reject this argument. Dr. Davne's testimony is not equivocal as his opinion is not based on mere possibilities or probabilities.

material it was made from, the rate of speed it fell, or the distance it could have fallen. This Court held that Dr. Robinson's testimony was incompetent.

We noted, however, in that case that we were not concerned with the fact that the claimant provided an incomplete medical history to Dr. Robinson. Rather, we were concerned with the fact that Dr. Robinson recanted his original opinion that the claimant's injuries were work-related upon viewing a photo of the mirrors without knowing anything concerning the mechanics of the injury such as the mirrors weight and the speed it fell. Moreover, this Court was concerned by the conduct of the employer's counsel and what we perceived to be a near violation of the disciplinary code in attempting to assist a medical expert in testifying.

We do not believe Long entitles Employer to any relief in this instance. At the outset, we note that there is no allegation of any improper conduct by counsel in this case relating to the method in which Dr. Davne gave his testimony. Further, although Dr. Davne acknowledged he did not know all the intricate details surrounding the mechanics of Claimant's injury, he was still aware that the incident occurred while Claimant was pushing the cart and notwithstanding the presentation of further information concerning the incident, he maintained he believed he had all the history that was necessary. Dr. Davne did not recant his opinion on causation upon learning that the wheel was jammed without knowing or explaining the significance of this fact, which was the case in Long.[10]

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[10] Employer also directs our attention to Andraki v. Workmen's Compensation Appeal Board (Allied Eastern States Maintenance), 508 A.2d 624 (Pa. Cmwlth. 1986). That case also held that claimant's medical expert's incomplete grasp of her work situation precluded a finding that the expert's testimony was competent. That case is readily distinguishable. The claimant, in Andraki, was hired to work the day shift but was subsequently transferred to the night shift. Upon notification of the change, the claimant became distraught and had to leave work. The claimant thereafter filed a claim petition for "anxiety depression" relating to "shift of jobs and

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Employer further contends the WCJ erred in granting Claimant's Penalty Petition. We agree.

Penalties may be awarded for an employer's violation of the Act. Shuster v. Workers' Compensation Appeal Board (Pennsylvania Human Relations Comm'n), 745 A.2d 1282 (Pa. Cmwlth. 2000). Section 406.1(a) of the Act, added by Section 3 of the Act of February 8, 1972, P.L. 25, 77 P.S. §717.1, provides that "[t]he employer and insurer shall *promptly investigate* each injury reported or known…." Activities such as making an injury report, interviewing witnesses, and reviewing any available medical records constitute an investigation for the purposes of Section 406.1 of the Act. Coyne, 942 A.2d at 958.

Claimant presented the testimony of Vicki D. McAdams, claims adjuster, who stated that on March 17, 2003, she received an e-mail from her supervisor indicating that he had received a telephone call from an individual stating that Claimant had planned to perpetrate a fraud on Employer. The caller indicated that the union was going to strike and Claimant had suggested that he was planning to go on workers' compensation for the duration of the strike. Ms. McAdams interviewed Claimant on April 10, 2003. For strategic purposes, she did not mention what she had heard about his plan to seek benefits while on strike. According to Ms. McAdams, she also reviewed a report that discussed Claimant's

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turn assignments." The claimant's medical expert, however, was unaware of the shift change. Because the claimant alleged that her mental injury resulted from the shift change and her medical expert was unaware of that change, we found the expert's testimony incompetent. Here, however, Dr. Davne's supposed lack of knowledge surrounding Claimant's March 17, 2003 injury is much less egregious. He was definitely aware of the cart incident that served as the basis for the opinion that Claimant sustained a new injury.

visit with a panel doctor on March 21, 2003. That report stated that Claimant sustained an acute lumbar strain and the panel doctor imposed restrictions. Ms. McAdams did not issue a Notice of Compensation Payable or a Notice of Temporary Compensation Payable in this case. She issued an NCD on April 10, 2003. R.R. at 131, 132, 155, 159, 160, 182, 184, 185.

The WCJ, as stated above, granted Claimant's Penalty Petition and awarded twenty percent penalties. In so doing, he found that Claimant met his burden of proving that Employer violated the Act by failing to investigate the claim before issuing the denial of benefits. Notably, he stated "[Employer] failed to substantiate its denial." R.R. at 9.

Coyne instructs that activities such as making an injury report, interviewing witnesses, and reviewing any available medical records make up an investigation. Here, Ms. McAdams reviewed the report of the panel physician and interviewed Claimant prior to issuing the NCD. She also took into consideration the fact that her supervisor was notified that Claimant may be attempting to fraudulently seek workers' compensation benefits while his union went on strike. Although the WCJ may have preferred a more thorough investigation, he erred as a matter of law in finding that no investigation was performed under these circumstances. We must reverse the Board's affirming the WCJ's awarding penalties for a violation of Section 406.1 of the Act.

To the extent the panel physician's report did indicate that Claimant sustained a work-related injury, such a fact goes to whether Employer presented an unreasonable contest, not whether it violated the Act. See Johnstown Housing Auth. v. Workers' Compensation Appeal Board (Lewis), 865 A.2d 999 (Pa. Cmwlth. 2005)(unreasonable contest of claim petition where the employer, at the

time it filed its answer, had no basis to dispute occurrence of work injury, even though parties disagreed as to length of the claimant's disability); Waldameer Park, Inc. v. Workers' Compensation Appeal Board (Morrison), 819 A.2d 164 (Pa. Cmwlth. 2003)(unreasonable contest of claim petition where the employer did not issue an NCP even though it knew the claimant suffered a work injury, which forced the claimant to litigate the occurrence of work injury); and Lemansky v. Workers' Compensation Appeal Board (Hagan Ice Cream Co.), 738 A.2d 498 (Pa. Cmwlth. 1999)(unreasonable contest of claim petition where the employer never debated occurrence of the claimant's work injury; insurer's internal policy not to acknowledge liability for compensation in "medical only" cases did not provide a reasonable basis not to acknowledge occurrence of work injury).

Employer next argues that the WCJ erred in awarding litigation costs. Section 440(a) of the Act, 77 P.S. §996, provides that if an employer contests liability it will be liable for the claimant's costs, including counsel fees, if the matter is resolved in whole or in part in the claimant's favor. That section specifies, however, that attorney's fees may be excluded if the employer presents a reasonable contest.

Issues that are not raised in the petition for review are deemed waived. Associated Town "N" Country Builders v. Workmen's Compensation Appeal Board (Marabito), 505 A.2d 1358 (Pa. Cmwlth. 1986), aff'd, 515 Pa. 564, 531 A.2d 425 (1987). Employer does not allege any error concerning litigation costs in its petition for review filed with this Court. It raises this argument solely in brief. Consequently, it is deemed waived.[11]

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[11] We nonetheless point out that, in its brief, Employer specifically argues that the WCJ erred in awarding unreasonable contest attorney's fees. In his March 30, 2005 decision, the WCJ
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Employer further argues that the WCJ's decision was unreasoned because the WCJ failed to adequately explain the basis for his credibility determinations.

Section 422(a) of the Act, 77 P.S. §834, provides that all parties to an adjudicatory proceeding are entitled to a reasoned decision. Where the fact-finder has had the advantage of seeing the witnesses testify live and the opportunity to assess their demeanor, a mere conclusion as to which witnesses he deems credible is sufficient to render the decision adequately "reasoned." Daniels v. Workers' Compensation Appeal Board (Tristate Transp.), 574 Pa. 61, 828 A.2d 1043 (2003). In instances where credibility assessments cannot be tied to inherently subjective circumstances, *i.e.* when a witness appears via deposition, some articulation of an actual objective basis for a credibility determination must be offered for the decision to be considered a "reasoned" one. Id., 574 Pa. at 78, 828 A.2d at 1053.

We disagree that the WCJ failed to issue a reasoned decision. Claimant testified live and via deposition. The WCJ credited Claimant's testimony based on his manner and demeanor while testifying live before him. He further noted Claimant's testimony was consistent with the credible testimony of Dr. Davne. The WCJ credited Dr. Davne because it was consistent with Claimant's credible testimony and the diagnostic studies done before and after March 17,

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found employer presented a reasonable contest. In his July 28, 2006 decision on remand, the WCJ incorporated this finding and further stated Claimant's attorney is "hereby awarded counsel fees in the amount of twenty (sic) (20%) of Claimant's compensation, *chargeable to Claimant's share*." Unreasonable contest attorney's fees were not awarded in the WCJ's decision(s). Nonetheless, Claimant's counsel was still entitled to her fee, agreed upon in the fee agreement, to be deducted from Claimant's compensation. That is what the WCJ's decision(s) indicate.

2003. The WCJ rejected the testimony of both Dr. Mandel and Dr. Brody because these witnesses overemphasized Claimant's complaints of pain following his return to work in December of 2001 as it was uncontested that Claimant returned to his pre-injury job at that time and was able to work uninterrupted until his work injury of March 17, 2003. The WCJ further noted Dr. Mandel offered contradictory opinions. We are satisfied that the WCJ complied with the Act's reasoned decision requirement. There is sufficient explanation, when necessary, to support the WCJ's credibility determinations based on the Supreme Court's holding in Daniels.[12]

We do, therefore, reverse the order of the Board only with respect to the awarding of penalties and affirm the order in all other respects.

JIM FLAHERTY, Senior Judge

[12] In the text of Employer's argument in its brief concerning a reasoned decision, Employer contends that the WCJ's decision is not a "reasoned" one because Claimant should not be entitled to total disability benefits. It suggests that if Claimant is entitled to benefits, he should receive partial disability because he earned money by sitting on the picket line. This argument that Claimant should be entitled to partial disability as opposed to total disability has nothing to do with whether the WCJ met the reasoned decision requirement in Section 422(a) of the Act. Moreover, this issue is not mentioned in Employer's petition for review. Consistent with Marabito, this issue is waived.

Employer further seeks a credit for all payments made to Claimant and "also to the extent that [Employer] is to reimburse Reliance/Inservco." Petitioner's Brief at 27. We presume that, at least in reference to Claimant, that Employer seeks a credit for benefits paid pursuant to the 410 Order. Nonetheless, although the WCJ did not expressly state that Employer is entitled to a credit for all benefits received pursuant to the 410 Order, we do not read the WCJ's decision to provide for double recovery. Because Section 410 of the Act, directs the liable insurer to reimburse the non-liable insurer once a WCJ makes a determination of liability, it is unclear what Employer's argument is in reference to Inservco. Again, however, this issue is not raised in the petition for review and is waived. Marabito.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kurz-Hastings, Inc.,	:	
Petitioner	:	
	:	
v.	:	No. 901 C.D. 2007
	:	
Workers' Compensation Appeal Board	:	
(Stefanowicz),	:	
Respondent	:	

O R D E R

AND NOW, this 25th day of July, 2008, the Order of the Workers' Compensation Appeal Board is reversed to the extent it finds no error in the WCJ's award of penalties. The Board's order is affirmed in all other respects.

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JIM FLAHERTY, Senior Judge