**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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| Tyrone Moreland, | : | |
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| Petitioner | : | |
| | : | |
| v. | : | No. 2198 C.D. 2012 |
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| Workers' Compensation Appeal Board (SEPTA), | : | Submitted: June 7, 2013 |
| | : | |
| | : | |
| Respondent | : | |

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION**
**BY JUDGE COHN JUBELIRER** **FILED: August 19, 2013**

Tyrone Moreland (Claimant) petitions for review of the November 2, 2012 Order of the Workers' Compensation Appeal Board (Board) that affirmed the Decision of Workers' Compensation Judge Bowers (WCJ Bowers) denying Claimant's Petition for Penalties (Penalty Petition) claiming that SEPTA (Employer) violated the Workers' Compensation Act[1] (Act) by improperly calculating attorney's fees after taking a pension offset and credit for sick and accident benefits (sick pay). On appeal, Claimant now argues that the Board erred

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

in affirming WCJ Bowers' Decision because, as subsequently held by this Court in SEPTA v. Workers' Compensation Appeal Board (Moreland) (Pa. Cmwlth., No. 1298 C.D. 2011, filed March 1, 2012) (Moreland I), Employer did not establish its entitlement to either a pension offset or a credit for sick pay; therefore, Employer should be subject to penalties under Section 435(d)(i) of the Act.[2] For the following reasons, we affirm.

Although the underlying facts in this matter are undisputed, the timing of the various orders and appeals may have led to the situation before this Court. Claimant worked for Employer as a cleaner and general helper at various bus depots for 35 years, during which he was exposed to high levels of diesel fumes. Claimant developed lung cancer, became totally disabled as of May 15, 2008, and learned about the connection between his work and his cancer in February 2009. Claimant filed a Claim Petition, which Employer timely denied. On May 19, 2010, WCJ Devlin issued a decision and order (WCJ Devlin's Decision) granting the Claim Petition, but permitting Employer to take a pension offset, to the extent that Employer funded the pension, for the pension benefits Claimant received from Employer. Employer appealed to the Board, challenging the granting of the Claim Petition and also arguing, in relevant part, that WCJ Devlin did not make sufficient findings of fact pertaining to the pension offset and its request for a credit for the sick pay it paid to Claimant.[3] Employer sought supersedeas, which the Board

[2] Added by Section 3 of the Act of February 8, 1972, P.L. 25, as amended, 77 P.S. § 991(d)(i).

[3] Claimant also appealed to the Board, but his appeal is not relevant to the outcome of the present matter.

denied. After supersedeas was denied, Employer paid wage loss compensation after applying the pension offset and credit for sick pay, and Claimant's Counsel's 20% fee was deducted from the amount distributed *following* the credits. It was this action of Employer about which Claimant filed the Penalty Petition that is now before us.

On August 18, 2010, while the appeals from WCJ Devlin's Decision were ongoing, Claimant filed the Penalty Petition, which asserted that Employer failed to calculate Claimant's attorney's fees prior to taking any credits and, therefore, failed to pay the appropriate amount of workers' compensation (WC) benefits and attorney's fees. (Penalty Petition at 2, R.R. at 6a.) Employer filed a timely answer denying Claimant's allegations, and the matter was assigned to WCJ Bowers for a hearing. In a decision dated April 27, 2011, WCJ Bowers found, in pertinent part, that WCJ Devlin granted Employer a credit for the pension benefits it paid to Claimant, to the extent the pension was funded by Employer; Employer presented evidence that it funded 95.53 percent of Claimant's pension; and Employer submitted evidence reflecting sick payments it made to Claimant after he stopped working. (WCJ Bowers Decision, Findings of Fact (FOF) ¶ 1.) WCJ Bowers also found that, pursuant to WCJ Devlin's Decision, Employer paid Claimant wage loss benefits plus interest. (WCJ Bowers Decision, FOF ¶ 3.) In calculating the amount due to Claimant, Employer applied the pension offset, took credit for the sick pay, and then deducted a 20 percent attorney's fee. (WCJ Bowers Decision, FOF ¶ 3.) WCJ Bowers rejected Claimant's argument that the "attorney's fee should have been calculated without regard to the offset" because

> Claimant's attorney was not entitled to fees on that portion of the award Claimant was required to return to Employer as reimbursement

> for pension benefits and sick pay [because] Employer is self-insured . . . [and] therefore Employer did not receive a pecuniary benefit to which it would not have been entitled to had the Claimant Petition been denied.

(WCJ Bowers Decision, FOF ¶¶ 4, 6.) Therefore, WCJ Bowers concluded that Employer did not violate the Act or WCJ Devlin's Decision in calculating the amount due to Claimant and his attorney and denied the Penalty Petition. (WCJ Bowers Decision, Conclusions of Law (COL) ¶ 2.)

Claimant appealed WCJ Bowers' Decision to the Board on May 2, 2011, challenging only four of WCJ Bowers' Findings of Fact and asserting that WCJ Bowers "failed to acknowledge case law that supports the claimant's position concerning how the offset for sickness and accident benefits is to be calculated. The [WCJ's] Decision is not a reasoned decision." (Claimant's Appeal from Judge's Findings of Fact and Conclusions of Law (Appeal from Bowers Decision) at 1, R.R. at 10a.) Claimant did not specifically challenge the fact that Employer had applied a pension offset, which appeared to be permitted by WCJ Devlin's Order; instead Claimant appeared to challenge that the 20% attorney's fee had been calculated on the amount provided to Claimant after the offset had been taken instead of before the offset was taken. In its opinion dated November 2, 2012 (2012 Board Opinion), the Board noted that Claimant's appeal was based on his interpretation of Ford Aerospace v. Workmen's Compensation Appeal Board (Davis), 478 A.2d 507 (Pa. Cmwlth. 1984), and Workmen's Compensation Appeal Board v. General Machine Products Co., 353 A.2d 911 (Pa. Cmwlth. 1976), which Claimant asserted stood for the proposition that attorney's fees should be calculated on the entire amount awarded rather than on what a claimant would

receive after deductions were made. The Board concluded, however, that subsequent case law held that where an employer is self-insured and/or there is no pecuniary benefit to the insurer that resulted from the grant of a claim petition, the claimant's attorney's fee is calculated on the reduced amount of WC benefits, not the full amount. (2012 Board Op. at 2-3 (citing LTV Steel Co. v. Workmen's Compensation Appeal Board (Morrow), 690 A.2d 1316, 1320 (Pa. Cmwlth. 1997); Acme Markets, Inc. v. Workmen's Compensation Appeal Board (Chisom), 644 A.2d 259, 261-62 (Pa. Cmwlth. 1994)).) Citing WCJ Bowers' findings that Employer was self-insured for both WC and non-occupational disability benefits, (WCJ Bowers Decision, FOF ¶ 6), and funded 95.53 percent of the pension plan, (WCJ Bowers Decision, FOF ¶ 1), the Board held that Employer did not violate the Act by calculating Claimant's attorney's fee on the reduced benefit amount and, therefore, WCJ Bowers did not err in denying the Penalty Petition. (2012 Board Op. at 3.)

Claimant had appealed WCJ Bowers' denial of the Penalty Petition to the Board on May 2, 2011; however, the appeal of WCJ Devlin's Decision granting the Claim Petition was also wending its way through the appellate process. In an opinion dated June 13, 2011 (2011 Board Opinion), the Board rendered its decision on the merits of Employer's appeal from WCJ Devlin's Decision affirming the granting of the Claim Petition, but finding that, because Employer did not present actuarial testimony about how much it contributed to the pension, it did not meet its burden of proof for taking an offset and, therefore, Employer could not take a pension offset. The Board further concluded that Employer did not meet its burden of proving its entitlement to a credit for the sick pay. (WCJ Devlin Decision, COL

¶ 4; 2011 Board Op. at 10-13 & n.4.) Employer appealed to this Court and, upon Employer's request, we granted Employer's application for supersedeas by order dated September 7, 2011. Ultimately, on March 1, 2012, this Court affirmed the Board on both issues. Moreland I, slip op. at 3-7. Subsequently, Employer paid all of the amounts due to Claimant pursuant to our March 1, 2012 Order, including attorney's fees.[4] The Penalty Petition regarding the attorney's fees remains in dispute.

In the current appeal,[5] Claimant argues that the Board erred in affirming the denial of the Penalty Petition because Employer did not satisfy its burden of proving its entitlement to such offsets or credits and was not entitled to take *any* offset or credit for the pension benefits and sick pay Claimant received as stated in Moreland I. Without mentioning the portion of WCJ Devlin's Decision that permitted the pension offsets, Claimant asserts that WCJ Devlin's Decision established Employer's liability to pay Claimant WC benefits, and Employer's unilateral reduction of those benefits by taking a pension offset and a credit for sick pay, and the corresponding reduction of Claimant's attorney's fee, violated the

[4] Claimant acknowledges that, following this Court's decision in Moreland I, Employer paid "the back due amounts owing for the sick pay credit and pension offset" and that "Claimant's counsel received payment of counsel fees, also due and owing." (Claimant's Br. at 6.)

[5] "This Court's scope of review is limited to determining whether the necessary findings of fact are supported by substantial evidence, whether errors of law were made, or whether constitutional rights were violated." Peters Township School District v. Workers' Compensation Appeal Board (Anthony), 945 A.2d 805, 810 n.8 (Pa. Cmwlth. 2008).

Act.[6] Claimant contends that, having established a violation of the Act, WCJ Bowers should have granted the Penalty Petition and imposed penalties against Employer. According to Claimant, the 2012 Board Opinion affirming the denial of the Penalty Petition was based on the erroneous basis that Employer was entitled to take the pension offset and sick pay credit in the first instance.

Employer makes two main arguments in response. Employer points out that the 2011 Board Opinion, finding that Employer had not proven its entitlement to a pension offset, did not exist when WCJ Bowers made her Decision and also argues that it should not be attached to Claimant's brief or part of his argument. Employer contends that Claimant's present argument, that Employer was not entitled to any offset/credit, differs from that asserted in his Penalty Petition before WCJ Bowers and the Board, which was whether Employer erred in calculating the attorney's fees based on the amount of Claimant's WC benefits reduced by the offset/credit awarded by WCJ Devlin. Employer points out that Claimant, in his Petition for Review and his appellate brief, is no longer making the argument that he had made in front of WCJ Bowers and the Board. For these reasons Employer asserts that Claimant's appeal should be either quashed or denied. According to Employer, Claimant has not preserved the issue he originally raised in his Penalty Petition by not asserting it in his Petition for Review or appellate brief filed with this Court, has waived his present argument by not asserting it in the Penalty

[6] "Once the employer's liability for the work injury has been established, the employer may not unilaterally stop making benefit payment[s] in the absence of a final receipt, an agreement, a supersedeas or any other order . . . authorizing such action." McLaughlin v. Workers' Compensation Appeal Board (St. Francis Country House), 808 A.2d 285, 288 (Pa. Cmwlth. 2002). Until such authority is granted, "employer must continue to make payment while challenging the claimant's entitlement to benefits." Id. at 288-89.

Petition before WCJ Bowers and the Board, and by not challenging WCJ Bowers' finding that WCJ Devlin granted the pension offset and sick pay credit. (WCJ Bowers Decision, FOF ¶ 1). Second, were we to reach the merits of Claimant's appeal of the Board's 2012 Opinion, Employer maintains that the Board properly held that Employer's calculation of the attorney's fee in this matter was correct pursuant to LTV Steel Co. and Acme Markets, Inc.

An employer or insurer may be penalized pursuant to Section 435(d)(i) of the Act, 77 P.S. § 991(d)(i). In order for a penalty to be assessed, the claimant must prove a violation of the Act. Futura Agency, Inc. v. Workers' Compensation Appeal Board (Marquez), 878 A.2d 167, 172 (Pa. Cmwlth. 2005). The assessment and amount of penalties is a matter for the WCJ's discretion, which this Court will not reverse absent an abuse of discretion. Westinghouse Electric Corp. v. Workers' Compensation Appeal Board (Weaver), 823 A.2d 209, 213 (Pa. Cmwlth. 2003). "An abuse of discretion is not merely an error of judgment but occurs, *inter alia*, when the law is misapplied in reaching a conclusion." Id. at 213-14. Therefore, at issue in this Penalty Petition is, first, whether Claimant has proven that Employer violated the Act.

In examining the appeal, we are mindful that the doctrine of waiver applies in WC proceedings, Wheeler v. Workers' Compensation Appeal Board (Reading Hospital and Medical Center), 829 A.2d 730, 734 (Pa. Cmwlth. 2003), and that the failure to raise an issue in an appeal to the WCJ and the Board will result in the waiver of that issue under Rule 1551 of the Pennsylvania Rules of Appellate Procedure, Pa. R.A.P. 1551. McGaffin v. Workers' Compensation Appeal Board

(Manatron, Inc.), 903 A.2d 94, 101-02 (Pa. Cmwlth. 2006). Additionally, an issue must be preserved at each stage of the proceedings or it is waived. See Riley v. Workers' Compensation Appeal Board (DPW/Norristown State Hospital), 997 A.2d 382, 388 (Pa. Cmwlth. 2010) (holding that an issue was waived where it was not raised specifically before the Board on appeal from a WCJ's decision). "The mere filing of an appeal does not preserve issues that are not specifically raised." Clark v. Workmen's Compensation Appeal Board (Wonder Bread Co.), 703 A.2d 740, 743 n.6 (Pa. Cmwlth. 1997). The purpose of the waiver doctrine is to guarantee that all of the cognizable issues are presented to the WCJ, and the Board, in order to preserve the "'integrity, efficiency, and orderly administration of the work[ers'] compensation scheme of redress for work-related injury.'" Smith v. Workmen's Compensation Appeal Board, 543 Pa. 295, 300 n.6, 670 A.2d 1146, 1149 n.6 (1996) (quoting DeMarco v. Jones & Laughlin Steel Corp., 513 Pa. 526, 532, 522 A.2d 26, 29 (1987)).

As is clear from the discussion of the facts and the previous orders and opinions involving Claimant's injury, Claimant originally filed the Penalty Petition that is before this Court prior to the Board's 2011 Opinion, which stated that Employer had not proven its right to a pension offset. WCJ Bowers had before her WCJ Devlin's Decision, which authorized a pension offset, and Claimant's argument in the Penalty Petition focused on Employer's method of calculating the attorney's fees given the offset, as follows:

> The employer has failed to abide by the Judge's Decision and has not paid the benefits or the attorney[']s fees properly. An inappropriate credit has been taken before the payment of attorney[']s fees. The employer failed to calculate/pay the benefits owed and

> attorney[']s fees before taking the credit for any pension benefits received by the Claimant. Unreasonable contest fees are requested.

(Penalty Petition at 2, R.R. at 6a.) WCJ Bowers determined that it was not contrary to WCJ Devlin's Decision for Employer to calculate the attorney's fees based on the amount actually paid to Claimant, after taking the credit for pension benefits and sick pay. Claimant then argued, in his appeal to the Board from WCJ Bowers' Decision, that "[t]he [WCJ] failed to acknowledge case law that supports the claimant's position concerning how the offset sickness and accident benefits is to be calculated." (Appeal from Bowers Decision at 1, R.R. at 10a.) In neither forum did Claimant argue that Employer violated the Act by taking an offset and, given WCJ Devlin's Decision, that is understandable. Therefore, WCJ Bowers and the Board focused on whether, given the offset permitted by WCJ Devlin's Decision, the Employer had properly calculated the attorney's fees.

However, now, in his Petition for Review, Claimant maintains that:

> The Board erred in affirming WCJ Bowers' determination that Claimant's attorney was not entitled to fees on the full amount awarded through WCJ Devlin's Decision and Order. The Employer was never entitled to a pension offset or to a credit for sick pay. Accordingly, the amount awarded to Claimant through WCJ Devlin's Decision should not have been reduced by a pension offset or sick pay credit. The analysis of whether the Employer was self-insured for workers' compensation purposes was irrelevant, given these circumstances. Claimant's counsel was entitled to a fee on the full amount awarded, and not a unilaterally reduced amount, as arbitrarily determined by the Employer.

(Petition for Review ¶ 16.) Claimant is now challenging Employer's calculation of the attorney's fees on the basis that Employer was "never entitled to a pension

offset or to a credit for sick pay," an argument which is based on the subsequent decision of the Board, affirmed by this Court. Claimant's change in the issues he now presents for appeal before this Court creates multiple procedural problems. First, his argument appears to be based on the Board's subsequent decision on the merits of the offset, which was not before WCJ Bowers or the Board. They reviewed whether Employer was in compliance with WCJ Devlin's Decision. Second, because the alleged violations of the Act and Claimant's arguments are not the same as they were before the WCJ and the Board, the allegations of error asserted in the Penalty Petition and appeal to the Board would not have placed WCJ Bowers or the Board on notice that Claimant was asserting that Employer's taking of the offset and credit was a violation of the Act. Third, as Employer points out, Claimant did not challenge WCJ Bowers' finding that:

> [WCJ] Devlin provided a credit for pension benefits Claimant received to the extent funded by Employer. Evidence of record indicated the pension was 95.53 percent funded by Employer. Employer also submitted records documenting sick payments to Claimant, and [WCJ] Devlin found Claimant did receive sick pay after he stopped working.

(WCJ Bowers Decision, FOF ¶ 1.) Thus, neither WCJ Bowers nor the Board were given the opportunity to address the argument Claimant now asserts in his appeal to this Court. Moreover, the allegations of violation of the Act on which Claimant argued a penalty should be issued had to be focused on Employer's actions *at that time* and whether they were in accord with WCJ Devlin's Decision, which was in effect at the time of WCJ Bowers' Decision. Accordingly, we find that Claimant

did not raise the issue he argues on appeal to this Court before WCJ Bowers and the Board.[7,8]

[7] We note that WCJ Devlin's Decision did permit Employer to take a pension offset and specifically referred to Claimant's receipt of sick pay from Employer. (WCJ Devlin Decision, FOF ¶¶ 1(g), 6, 7, COL ¶ 4.) Thus, although Employer's liability to pay Claimant WC benefits was set in WCJ Devlin's Decision, that liability was reduced by Employer's ability to take an offset pursuant to that same decision. It was not until after the Board's 2011 Opinion, filed after the Penalty Petition, WCJ Bowers' Decision, and Claimant's appeal to the Board from WCJ Bowers' Decision, that Employer's entitlement to that offset and credit came into question, a question based on the 2011 Board Opinion's holding that Employer had *not* established an entitlement to the pension offset and sick pay credit. However, this Court granted Employer supersedeas on September 7, 2011, thereby relieving Employer of its obligation to pay Claimant full WC benefits while the appeal proceeded before this Court. Thus, WCJ Bowers' Decision that Employer did not violate the Act appears to be supported by substantial evidence, based on the record before this Court.

[8] As for Claimant's original allegation in the Penalty Petition, Claimant has not reasserted this challenge in either his Petition for Review or his appellate brief. The decision not to raise or address an issue in an appellate brief filed with this Court results in the waiver of that issue. See G.M. v. Department of Public Welfare, 954 A.2d 91, 93 (Pa. Cmwlth. 2008) (citing Pa. R.A.P. 2116(a), which states "[n]o question will be considered unless it is stated in the statement of questions involved," and holding that failure to comply with Rule 2116(a) results in waiver); City of Philadelphia v. Berman, 863 A.2d 156, 161 n.11 (Pa. Cmwlth. 2004) (holding that, pursuant to Pa. R.A.P. 2119(a), which requires the argument section of a party's brief "be divided into as many parts as there are questions to be argued" and include "such discussion and citation of authorities as are deemed pertinent," a party's failure to develop an issue in the argument section of his or her brief constitutes waiver of the issue). Thus, since Claimant has not challenged whether Employer violated the Act by calculating Claimant's attorney's fees based on Claimant's compensation rate, reduced by the pension offset and sick pay credit, we need not address it. We, nonetheless, discern no error in the Board's 2012 Opinion affirming WCJ Bowers' denial of Claimant's Penalty Petition based on the fact that WCJ Bowers found that Employer was self-insured and did not receive a pecuniary benefit to which Employer would not have been entitled had Claimant not prevailed on his Claim Petition. (WCJ Bowers Decision, FOF ¶ 7.) Pursuant to LTV Steel Co. and Acme Markets, Inc., if the employer is self-insured and/or the insurer paying the non-WC benefits does not recognize a pecuniary benefit from the grant of a claim petition, the claimant's attorney's fee is not calculated on the full amount of WC benefits. LTV Steel Co., 690 A.2d at 1320; Acme Markets, Inc., 644 A.2d at 261-62.

Having concluded that Claimant has not raised his issues for appellate review, which would not have been successful anyway, we affirm the Board's November 2, 2012 Order.

**RENÉE COHN JUBELIRER, Judge**

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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**O R D E R**

**NOW**, August 19, 2013, the November 2, 2012 Order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby **AFFIRMED**.

**RENÉE COHN JUBELIRER, Judge**