

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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|------------------------------|---|------------------------------|
| City of Philadelphia, | : | |
| | : | |
| v. | : | No. 2173 C.D. 2010 |
| | : | Submitted: February 11, 2011 |
| Workers' Compensation Appeal | : | |
| Board (Hamilton), | : | |
| Respondent | : | |

**BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE BROBSON**

FILED: July 28, 2011

The City of Philadelphia-Fire Department (Employer) petitions for review of an order of the Workers' Compensation Appeal Board (Board), dated September 9, 2010, which affirmed the decision of a Workers' Compensation Judge (WCJ). The WCJ granted the review petition of John Hamilton (Claimant), determining that Claimant sustained a compensable hearing loss pursuant to Section 306(c)(8) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 513(8).¹ For the reasons that follow, we reverse.

¹ Section 306(c)(8) of the Act provides, in pertinent part:

(i) For permanent loss of hearing which is medically established as an occupational hearing loss caused by long-term exposure to hazardous occupational noise, the percentage of impairment shall be calculated by using the binaural formula provided in the Impairment Guides. The number of weeks for which compensation shall be payable shall be determined by multiplying the percentage of binaural hearing impairment as calculated under the Impairment Guides by two hundred sixty weeks.

Compensation payable shall be sixty-six and two-thirds per centum of wages during this number of weeks, subject to the provisions of clause (1) of subsection (a) of this section.

....

(iii) Notwithstanding the provisions of subclauses (i) and (ii) of this clause, if there is a level of binaural hearing impairment as calculated under the Impairment Guides which is equal to or less than ten per centum, no benefits shall be payable. Notwithstanding the provisions of subclauses (i) and (ii) of this clause, if there is a level of binaural hearing impairment as calculated under the Impairment Guides which is equal to or more than seventy-five per centum, there shall be a presumption that the hearing impairment is total and complete, and benefits shall be payable for two hundred sixty weeks.

....

(v) If an employe has previously received compensation under subclause (i) or (ii) of this clause, he may receive additional compensation under subclause (i) or (ii) of this clause for any work-related increase in hearing impairment which occurred after the date of any previous award of or agreement for compensation and only if the increase in hearing impairment is ten percentage points greater than the previous compensated impairment. Any employe who has claimed a complete loss of hearing prior to the effective date of this clause and has received an award or payment for hearing loss shall be barred from claiming compensation for hearing loss or receiving payment therefor pursuant to subclause (i) or (ii) of this clause.

(vi) An employer shall be liable only for the hearing impairment caused by such employer. If previous occupational hearing impairment or hearing impairment from nonoccupational causes is established at or prior to the time of employment, the employer shall not be liable for the hearing impairment so established whether or not compensation has previously been paid or awarded.

....

(x) Whether the employe has been exposed to hazardous occupational noise or has long-term exposure to such noise shall be affirmative defenses to a claim for occupational hearing loss and not a part of the claimant's burden of proof in a claim.

Claimant worked as a firefighter for Employer from June 1970 until his retirement on October 3, 2003. By decision issued May 25, 2004, the WCJ awarded Claimant workers' compensation benefits under Section 306(c)(8) of the Act for an occupational hearing loss occurring October 21, 2002. In granting Claimant's claim petition, the WCJ found credible the opinion of Claimant's medical expert, Jeffrey Cooper, M.D., a board certified otolaryngologist, who conducted an audiological examination of Claimant on July 16, 2002. Dr. Cooper submitted a narrative report on October 30, 2002, and provided deposition testimony on September 11, 2003. Dr. Cooper opined that Claimant sustained a binaural hearing loss of 40.6 percent due to long-term exposure to hazardous occupational noise while employed by Employer. Employer appealed the WCJ's May 25, 2004 decision to the Board. The Board vacated the WCJ's order and remanded the matter on the grounds that the WCJ failed to issue a reasoned decision. The WCJ issued a remand decision on February 28, 2007, which incorporated by reference a majority of the factual findings from the May 25, 2004 decision. The WCJ again relied on Dr. Cooper's opinion in awarding Claimant benefits.

On October 16, 2007, Claimant filed a review petition alleging that his compensable binaural hearing loss worsened by 16.6 percent, increasing from 40.6 percent to 57.2 percent. Employer filed a timely answer denying Claimant's allegations.

In support of his review petition, Claimant provided deposition testimony on March 24, 2008. Claimant testified that he continued to work as a firefighter for Employer from October 21, 2002—the date of injury of his previously acknowledged hearing loss—until his retirement on October 3, 2003.

(Reproduced Record (R.R.) at 13a.) During that time period, Claimant testified that he continued to be exposed to the same hazardous occupational noise that served as the basis for his original claim petition. (R.R. at 13a-14a.) Claimant further testified that, since his retirement, he has not been exposed to any loud noises similar to the loud noises that he was exposed to as a firefighter. (R.R. at 15a.)

Claimant also presented a narrative report, dated September 24, 2007, prepared by Dr. Cooper, who reevaluated Claimant on September 19, 2007. Dr. Cooper stated that he has treated Claimant since Claimant's initial visit on July 16, 2002, and that Claimant reported a decrease in hearing sensitivity in August 2005. (R.R. at 31a.) Dr. Cooper further stated that Claimant has not been exposed to high noise levels since his retirement from Employer. (*Id.*) Based on his audiological examination of Claimant, Dr. Cooper concluded that Claimant suffers from a binaural hearing impairment of 57.2 percent, which reflects a 16.6 percent deterioration from Claimant's initial binaural hearing impairment of 40.6 percent. (*Id.* at 32a.)

In response, Employer presented a narrative report, dated April 14, 2008, prepared by Lee E. Rowe, M.D., a board certified otolaryngologist, who conducted an independent medical evaluation (IME) of Claimant on March 24, 2008. Based on his audiological examination of Claimant, Dr. Rowe concluded that Claimant has a binaural hearing impairment of 52.1875 percent. (*Id.* at 38a.) Noting that "a principle characteristic of noise induced hearing loss is that once exposure to noise is discontinued there is no significant further progression of hearing loss as a result of the noise exposure," Dr. Rowe opined that there was no evidence to establish that the deterioration of Claimant's hearing occurring after

July 16, 2002—the date of Dr. Cooper’s initial audiological examination of Claimant—was induced by Claimant’s exposure to hazardous occupational noise while employed by Employer. (*Id.* at 38a-39a.) Instead, Dr. Rowe opined that Claimant’s hearing loss since July 16, 2002, is “characteristic of age-related hearing loss which accelerates over time.” (*Id.* at 39a.)

By decision dated October 30, 2009, the WCJ granted Claimant’s review petition, concluding that Claimant sustained his burden to prove a compensable hearing loss under Section 306(c)(8) of the Act.² The WCJ credited Dr. Cooper’s opinion and accepted as fact his September 24, 2007 narrative report, stating: “[Dr. Cooper’s] uncontested testimony establishes hearing loss worsened by continued exposure from 40.6 [percent] to 57.2 [percent].” (*Id.* at 68a.) The WCJ rejected Dr. Rowe’s narrative report, stating: “The report of Dr. Rowe must be rejected, since he [accepts] the previous conclusion of the court that hearing loss was the result of noise exposure. His explanation of aging as the cause is legally insufficient.” (*Id.*)

Employer appealed to the Board, arguing that Claimant did not sustain his burden of proving that his hearing loss was work-related. Employer also argued that the WCJ’s decision was not well-reasoned. By decision issued September 9, 2010, the Board rejected Employer’s arguments and affirmed the WCJ’s order. Employer now petitions this Court for review.

On appeal,³ Employer argues, *inter alia*, that the Board erred in affirming the WCJ because Claimant failed to sustain his burden of proof under

² The WCJ incorporated by reference, in full, the findings of fact and conclusions of law from his February 28, 2007 decision. (R.R. at 67a.)

³ This Court’s standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. § 704.

Section 306(c)(8) of the Act. Employer disputes neither that Claimant previously established by medical evidence that he sustained a binaural hearing loss of 40.6 percent due to his exposure to hazardous occupational noise in the workplace, nor that Claimant's binaural hearing loss has worsened by 16.6 percent since July 16, 2002; instead, Employer contends that Claimant failed to establish that the deterioration of his hearing occurring after July 16, 2002 was causally related to his exposure to hazardous occupational noise while employed by Employer. We agree.

In a workers' compensation case, it is axiomatic that a claimant is not entitled to benefits absent proof that the injury is causally related to the employment. *Rockwell Int'l v. Workers' Comp. Appeal Bd. (Sutton)*, 736 A.2d 742, 744 (Pa. Cmwlth. 1999). Where the causal relationship between the injury and the employment is not obvious, a claimant must present medical evidence to establish causation. *Id.* To be competent, a claimant's medical evidence must be unequivocal. *City of Philadelphia v. Workers' Comp. Appeal Bd. (Seaman)*, 8 A.3d 1004, 1007 (Pa. Cmwlth. 2010). As our Supreme Court stated in *Lewis v. Workmen's Compensation Appeal Board (Pittsburgh Board of Education)*, 508 Pa. 360, 365-66, 498 A.2d 800, 802 (1985):

Where medical testimony is necessary to establish a causal connection, the medical witness must testify, not that the injury or condition might have or possibly come from the cause, but that in his professional opinion the result in question did come from the assigned cause. Medical evidence which is less than positive or which is based upon possibilities may not constitute legally competent evidence for the purpose of establishing the causal relationship.

(Citations omitted.)

Here, Section 306(c)(8) of the Act required Claimant to present unequivocal medical evidence to sustain his burden of establishing that his binaural hearing loss of 16.6 percent was caused by exposure to hazardous occupational noise while employed by Employer. *Seaman*, 8 A.3d at 1007. A review of Dr. Cooper’s September 24, 2007 narrative report reveals that, not only did Dr. Cooper fail to opine unequivocally that Claimant’s hearing loss occurring after July 16, 2002, was causally related to his employment, Dr. Cooper failed to provide any opinion at all regarding the causal relationship between Claimant’s hearing loss and his employment. Dr. Cooper’s September 24, 2007 narrative report only goes so far as providing that Claimant sustained a binaural hearing loss of 16.6% since July 16, 2002, and that Claimant has not been exposed to high noise levels since his retirement; there is no semblance of a statement providing that Claimant’s workplace exposure to hazardous noise caused Claimant’s additional hearing loss. Claimant, therefore, failed to sustain his burden under Section 306(c)(8) of the Act because Claimant did not present sufficient evidence to establish a causal nexus between his hearing loss and his employment with Employer.⁴

Accordingly, we reverse.⁵

P. KEVIN BROBSON, Judge

⁴ By way of comparison, the language of Dr. Cooper’s September 24, 2007 narrative report is a far cry from that used in Dr. Cooper’s October 30, 2002 narrative report—submitted in support of Claimant’s initial claim petition—which provides: “Based upon my overall evaluation of [Claimant], I am able to state within a reasonable degree of medical certainty, that the binaural hearing loss evidenced is consistent with a longstanding history of noise exposure while employed by [Employer] for over thirty years.” (R.R. at 28a.)

⁵ Employer also argues on appeal that the Board erred in affirming the WCJ because the WCJ failed to issue a reasoned decision. Having held that Claimant failed to sustain his burden of proof under Section 306(c)(8) of the Act, this Court need not address this argument.

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ORDER

AND NOW, this 28th day of July, 2011, the order of the Workers' Compensation Appeal Board, dated September 9, 2010, is hereby REVERSED.

P. KEVIN BROBSON, Judge