IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Philadelphia,	:	
	:	
Petitioner	:	
v.	:	No. 369 C.D. 2010
	:	Submitted: June 18, 2010
Workers' Compensation	:	
Appeal Board (Podorski),	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: July 29, 2010

The City of Philadelphia (Employer) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of a Workers' Compensation Judge (WCJ) granting a Claim Petition and awarding hearing loss benefits to Joseph Podorski (Claimant). We affirm.

On May 30, 2007, Claimant filed a Claim Petition alleging that he sustained binaural hearing loss due to long term exposure to hazardous noise while in the course and scope of his employment. In support of his Petition, Claimant testified that he joined the fire department in 1973. He retired in June of 2004. For twenty years up until his retirement, Claimant worked at Ladder 20, a "double house" that included a ladder truck, engine truck, and a medical squad. Reproduced Record (R.R.) at 13a. According to Claimant, he was exposed to loud noise nearly every shift he worked caused by, *inter alia*, truck engines, power

saws, jaws-of-life, generators, sirens, air horns, and alarm systems. These noises would be heard during routine equipment check, travel to the site of an emergency, and on the scene. Although Claimant may have noticed some problems with his hearing, he did not think much of it until his wife pursued the issue. He has not been exposed to any loud noises since he retired. He was not subjected to any loud noise in the forty-eight hours before he saw either Jeffrey Cooper, M.D. or Rhonda Schuman in June of 2007.

Claimant presented the testimony and report of Dr. Cooper, board certified in otolaryngology, who examined him on June 18, 2007. Dr. Cooper reiterated a history that since his initial date of hire, Claimant has been exposed to significantly loud noises generated by sirens, engine motors, and machines. Testing by an audiologist revealed a bilateral sensorineural hearing loss of mild to moderate degree from 250 Hz through 8000 Hz. An impairment of 17.25 was calculated based on American Medical Association guidelines. Dr. Cooper explained, "I am able to state within a reasonable degree of medical certainty, that the binaural sensorineural impairment evidenced is consistent with a longstanding history of noise exposure while employed by the Philadelphia Fire Department for over thirty-one years." R.R. at 136a.

Dr. Cooper had the opportunity to review a study entitled Occupational Noise Exposure and the Philadelphia Fire Department. Dr. Cooper deemed the report significant inasmuch as it recommended firefighters wear hearing protection. Dr. Cooper acknowledged the conclusion of the report that the firefighters subject to the study did not spend enough time around hazardous noise for it to become detrimental. He disagreed with that assessment, however, and set forth that the author spent a maximum of only forty-eight hours at each fire station

in the study and that the firefighters involved each had over twenty years of service.[1]

Employer presented the testimony of Alan Miller, M.D., board certified in otolaryngology, who examined Claimant on March 18, 2008. An audiogram that was performed on that date, per Dr. Miller, showed further deterioration in Claimant's auditory acuity. A binaural hearing loss was calculated as 46.8%. According to Dr. Miller, Claimant's binaural hearing loss was not the result of exposure to hazardous noise.

Employer also presented the testimony of John P. Barry, industrial hygienist, who conducted the aforementioned study on occupational noise exposure of Employer's workers. He conceded that in the fire service in general, there is the potential for hazardous noise exposure. Per Mr. Barry, exposure to noise will vary day to day based on several factors, including a specific firefighter's assignment. Employer further presented the testimony of Colin Brigham, an industrial hygienist, who conducted an occupational noise survey over five days in March of 2003. He agreed that it is not possible to extrapolate the results of either his study or Mr. Barry's study and render an opinion about the noise levels Claimant experienced.

On February 25, 2009, the WCJ issued a decision wherein she credited Claimant's testimony concerning the details of the noises Claimant was exposed to during his tenure with Employer. The WCJ further credited the opinions of Dr. Cooper and found that Claimant met his burden of poof to establish he sustained 17.25% binaural hearing loss as a result of long term exposure to hazardous noise

[1] Claimant also submitted the report of Ms. Schuman who examined him on June 13, 2007 and calculated a binaural hearing loss of 14.1%.

while in the course and scope of his employment. Claimant was awarded 44.72 weeks of compensation for his work-related hearing loss.

Crucial to her determination to credit Dr. Cooper's opinion was the fact that it was consistent with Claimant's uncontradicted testimony regarding noise exposure over the years of his employment. The WCJ further stated that Employer's lay witnesses offered corroborating testimony that in general, firefighters are exposed to high levels of hazardous noise. Additionally, the WCJ noted Dr. Cooper's calculation of Claimant's binaural hearing loss was similar to that calculated by Ms. Schuman and that even Dr. Miller, Employer's medical expert, calculated a hearing loss. In rendering her determination, the WCJ also credited Ms. Schuman's testimony to the extent it was consistent with that of Dr. Cooper. The WCJ rejected the testimony of Dr. Miller to the extent it was inconsistent with that of Dr. Cooper. She credited the testimony of Mr. Barry and Mr. Bringham where favorable to Claimant. The Board affirmed. This appeal followed.[2]

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[2] 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. DeGraw v. Workers' Compensation Appeal Board (Redner's Warehouse Mkts., Inc.), 926 A.2d 997 (Pa. Cmwlth. 2007). A WCJ is free to accept or reject, in whole or in part, the testimony of any witness. Greenwich Collieries v. Workmen's Compensation Appeal Board (Buck), 664 A.2d 703 (Pa. Cmwlth. 1995). Her credibility determinations are not reviewable by this Court. Campbell v. Workers' Compensation Appeal Board (Pittsburgh Post Gazette), 954 A.2d 726 (Pa. Cmwlth. 2008). It does not matter that there is other evidence of record that supports a factual finding other than that made by the WCJ. Moberg v. Workers' Compensation Appeal Board (Twining Village), 955 A.2d 385 (Pa. Cmwlth. 2010). Rather, the proper inquiry is whether there is any evidence that supports the WCJ's factual findings. Community Empowerment Ass'n v. Workers' Compensation Appeal Board (Porch), 962 A.2d 1 (Pa. Cmwlth. 2008). A WCJ is required to make crucial findings of fact on all essential issues necessary for review, but is not required to address specifically each bit of evidence offered. Pistella v. Workmen's Compensation Appeal Board (Samson Buick Body Shop), 633 A.2d 230 (Pa. Cmwlth 1993). A capricious disregard of evidence exists when there is a willful and deliberate disregard of competent testimony and relevant evidence that one of ordinary

Employer argues on appeal that Dr. Cooper's opinion was equivocal and therefore incompetent to support an award of benefits in this instance. According to Employer, Dr. Cooper failed to present any evidence concerning the extent of Claimant's hearing loss at the time of Claimant's retirement. Employer posits that there was no evidence to support "[Claimant's] theory that an occupational hearing loss can manifest itself after the exposure had terminated." Appellant's brief, p. 11.

Section 306(b)(8)(i) of the Pennsylvania Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §513(8)(i), establishes a schedule of benefits for permanent loss of hearing that is work-related. Section 306(b)(8)(vi) of the Act provides that "[a]n employer shall be liable only for the hearing impairment caused by such employer."

A claimant seeking compensation benefits for a loss of hearing bears the burden of proving the existence of a permanent hearing loss of 10% or greater that is medically established to be work-related and caused by exposure to hazardous occupational noise. Elliott Co. v. Workers' Compensation Appeal Board (Shipley), 795 A.2d 480 (Pa. Cmwlth. 2002). See also Bucci v. Workers' Compensation Appeal Board (Rockwell Int'l), 758 A.2d 279 (Pa. Cmwlth. 2000). It is not enough to simply say a claimant has a binaural hearing impairment greater than 10%, it must be medically established that the impairment was caused by occupational noise at the workplace. Rockwell Int'l v. Workers' Compensation Appeal Board (Sutton), 736 A.2d 742 (Pa. Cmwlth. 1999). Once the claimant meets his initial burden, the burden shifts to the employer to establish that the employee was not exposed to hazardous occupational noise. USX Corp. (Clairton)

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intelligence could not possibly have avoided in reaching a result. Casne v. Workers' Compensation Appeal Board (STAT Couriers, Inc.), 962 A.2d 14 (Pa. Cmwlth. 2008).

v. Workers' Compensation Appeal Board (Labash), 788 A.2d 1101 (Pa. Cmwlth. 2001). Alternatively, it may establish that the claimant did not have long-term exposure to hazardous noise. Id. at 1105.

An employer may defend against a claim of work-related binaural hearing impairment by presenting evidence concerning a level of hearing loss present prior to the time of employment. Anchor Hocking Packaging Co. v. Workers' Compensation Appeal Board (Martin), 735 A.2d 157 (Pa. Cmwlth. 1999). When audiograms exist that briefly predate a claimant's retirement that reveal a binaural hearing loss of less than 10%, it is incumbent on the employee to present evidence that his hearing loss continued to develop even after he left his employment. Maguire v. Workers' Compensation Appeal Board (Chamberlain Manuf. Co.), 821 A.2d 178 (Pa. Cmwlth. 2003).

Upon review of the aforementioned, we reject Employer's argument. Claimant had the burden in this instance to establish he sustained permanent hearing loss greater than 10% as a result of continued exposure to hazardous occupational noise attributable to his employment. Elliott Co.; Bucci. Claimant was further required to submit medical evidence establishing that his hearing impairment was caused by occupational noise at the workplace. Sutton. Claimant presented testimony concerning the fact that in his thirty years of working as a firefighter he was consistently subject to loud occupational noise while furthering the interests of Employer. Dr. Cooper testified as to causation and calculated an impairment of 17.25%. Claimant's testimony and the opinions of Dr. Cooper were credited by the WCJ. Once Claimant satisfied his *prima facie* case, the burden shifted to Employer to show Claimant was not exposed to hazardous occupational noise or long-term exposure to such noise. Labash. Employer's medical and lay witness testimony was rejected where inconsistent with that of Claimant and Dr.

Cooper. Consequently, Employer was unable to establish an affirmative defense to an award of hearing loss benefits.

Employer's contention that Dr. Cooper was equivocal because he failed to definitively establish Claimant's hearing loss at the date of his employment and that there is no evidence to support Claimant's "theory" that any increase in hearing loss following retirement is work-related is flawed on multiple levels. We initially point out that 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 evidence is equivocal if, after a review of a medical expert's entire opinion, 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). Dr. Cooper offered an opinion that he was "able to state within a reasonable degree of medical certainty" that Claimant's "binaural sensorineural impairment... is consistent with a longstanding history of noise exposure while employed by the Philadelphia Fire Department...." R.R. at 136a. This opinion is not based on possibilities, it contains no equivocation, and is stated to a reasonable degree of medical certainty. Dr. Cooper's opinion, consistent with Signorini, is not equivocal.

Employer's position that Dr. Cooper's opinion is equivocal is based on the Maguire case. Employer's argument is based on a misreading of Maguire. The claimant in Maguire retired on October 30, 1998. Several audiograms were conducted prior to the claimant's retirement, the most recent being dated July of 1998. None of the audiograms that preceded the claimant's retirement revealed a hearing impairment greater than 10%. An audiogram conducted on April 22, 2009 showed a 15.625% hearing loss. The claimant's medical witness did not review

the preexisting audiograms, nor could he opine that the claimant's hearing loss exceeded 10% as of October 30, 1998.

We explained that the claimant's theory of recovery was that his hearing loss caused by exposure to occupational noise can manifest itself after the exposure to the same terminates. We further explained that the current consensus among medical experts is that typically occupational hearing loss is a repetitive trauma injury that manifests itself in a fixed state at the last point of exposure to harmful noise. Maguire, 821 A.2d at 181. This Court added that occupationally induced hearing loss does not usually continue to progress after exposure to hazardous noise ceases. Id. We placed the burden on the claimant to produce evidence that his work-related hearing loss continued to develop even after he left his employment and found he failed to satisfy that burden.

There is no basis in the record to apply Maguire in this instance. There are no audiograms conducted prior to Claimant's retirement showing hearing loss below the threshold level of 10% to obtain benefits. There is no reason for Employer's assumption that Claimant's "theory of recovery" is that his hearing loss continued to progress after Claimant left his employment. No pre-retirement 'baseline" is present in the record. Claimant's established a 17.25% impairment based on his credible expert testimony. Dr. Cooper credibly testified that Claimant had binaural hearing loss as a result of his employment. Any delay in seeking medical treatment until such time that Claimant's wife convinced Claimant to get his hearing checked does not necessarily mean that Claimant's hearing loss did not manifest itself until that time. See generally Crompton Corp. v. Workers' Compensation Appeal Board (King), 954 A.2d 751 (Pa. Cmwlth. 2008)(holding a

claimant may not be charged with the knowledge of a compensable hearing loss unless and until the claimant is so informed by a health care provider).[3]

We reiterate that an employer may defend against a claim of work-related binaural hearing impairment by presenting evidence that hearing loss existed prior to the time of employment. Martin. Similarly, when an employee is determined to have a binaural hearing impairment below 10% within a short time before his last date of exposure to hazardous occupational noise, he must establish any post-employment worsening of his hearing is attributable to the work environment. Maguire. In either instance, the impediment to an award of benefits is the existence of an earlier audiogram. No such preexisting audiogram is present in the instant matter.

Employer further contends that the WCJ failed to consider Dr. Cooper's acknowledgment that some studies indicate that noise-induced hearing loss typically occurs within the first ten years of exposure and that Dr. Cooper did not examine Claimant until three years after his retirement. Employer further posits that Dr. Cooper recognizes "temporary threshold shifts" where hearing loss will appear greater within 24 to 48 hours after exposure to loud noise. Yet, it contends he failed to explain the discrepancies between Claimant's testimony that he was not exposed to loud noise following his retirement and the differences between Claimant's hearing impairment calculated by his office and the impairment calculated by Ms. Schuman.

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[3] A claimant is allotted three years following his last date of exposure to hazardous occupational noise to file a claim petition for work-related hearing loss. Keystone Coal Mining Corp. v. Workers' Compensation Appeal Board (Wasnak), 756 A.2d 1200 (Pa. Cmwlth. 2000). Simply because Claimant filed his Claim Petition nearly three years after his retirement does not give rise to an inference that any calculated binaural hearing impairment is greater than it was on the date of retirement or that the claimant's "theory of recovery" is that he did have an increase in hearing impairment following his retirement and that that increase is still attributable to his employment.

Finally, Employer suggests that if Dr. Cooper's opinion is deemed equivocal and incompetent, this Court should be left with no choice but to find that the WCJ and the Board capriciously disregarded the evidence of Dr. Miller. This Court acknowledges that inasmuch as Employer presented a reasonable contest in this matter, it is wholly able to point to evidence that may have factored against an award of benefits. The WCJ, however, is the sole arbiter of witness credibility. Buck. The business of this Court is not to review those credibility determinations. Campbell. It is immaterial that there is other evidence of record that supports factual findings other than that made by the WCJ. Moberg. The fact remains that the WCJ credited Claimant and Dr. Cooper above all other witnesses and experts, including Ms. Schuman. Consistent with Porch, there is sufficient evidence to support the WCJ's factual findings. While the WCJ may not have addressed the "temporary threshold shift" potentially at play between the audiogram conducted by Ms. Schuman and the one done in Dr. Cooper's office to Employer's satisfaction, we reiterate the WCJ is not required to address each piece of evidence offered in rendering his decision. Pistella. In regard to Employer's argument that in the event we find Dr. Cooper's opinion equivocal and incompetent, we should find that workers' compensation authorities capriciously disregarded the opinions of Dr. Miller, we note we do not find Dr. Cooper either incompetent or equivocal. The rule set forth in Casne is not implicated.

Based on our review, there is sufficient basis for the WCJ's findings. Consequently, the order of the Board is affirmed.

JIM FLAHERTY, Senior Judge

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	:	
Respondent	:	

ORDER

AND NOW, this 29th day of July, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is affirmed.

JIM FLAHERTY, Senior Judge