

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Clark Fiske, :
 :
 Petitioner :
 :
 v. : No. 1131 C.D. 2008
 : Submitted: September 19, 2008
 Workers' Compensation Appeal Board :
 (Cotton's Concrete Construction), :
 Respondent :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
 HONORABLE ROBERT SIMPSON, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY JUDGE SMITH-RIBNER

FILED: November 21, 2008

Clark Fiske (Fiske) petitions for review of the May 28, 2008 opinion and order of the Workers' Compensation Appeal Board (Board) affirming the decision of the Workers' Compensation Judge (WCJ) that denied Fiske's claim petition alleging work-related injury in the nature of occupational exposure to chemicals/toxins in the workplace. Fiske argues that the WCJ erred in finding that he failed to prove by sufficient, competent and credible evidence that he suffered an injury in the course and scope of his employment and that such injury resulted in a disability. Fiske submits that the causal relationship between his injury and resulting disability and his employment is so obvious that it requires reversal of the Board's order. He argues that the WCJ failed to issue a "reasoned decision" as required by Section 422(a) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §834, and that the decision of the WCJ was not supported by competent, credible evidence.

Fiske was employed by Cotton's Concrete Construction (Employer) as a foreman for fifteen years. Employer builds concrete buildings, but it usually subcontracts construction of the floors; however, some floors built by subcontractors were sealed by Employer. Kure-N-Seal is a sealant used by Employer on floors in high-traffic areas that would have no further coverings. Between 1989 and 1998 Employer used Kure-N-Seal on two floors, both fire department garages. As foreman, Fiske trained workers and oversaw the work, which included pouring foundations and setting walls. William Cotton (Cotton), the owner, testified that Fiske was a good employee. Prior to 1998 Fiske complained to Cotton of headaches.

On February 18, 1998, Cotton and Fiske worked together sealing a firehouse floor with Kure-N-Seal. Cotton testified that respirators were available for use on this job, but Fiske did not use them because he could not stand pressure on his head. Cotton left the job site to get coffee and upon his return found that Fiske had vomited and was dizzy. Cotton called an ambulance and Fiske was taken to the Emergency Room. Fiske experienced nausea, vomiting, headache, blurred vision and dizziness at the hospital. He underwent lab tests, which were essentially normal, and he was released with a recommendation to follow up with Dr. Theodore Them in the Department of Occupational Medicine. Fiske returned to work the following day, but he did see Dr. Them on March 26, 1998. Fiske reported to Dr. Them that his symptoms had persisted for about one week after the exposure. Dr. Them found Fiske to be in no distress and recorded that his concentration, orientation, memory and attention were intact. Dr. Them opined that Fiske suffered transient inhaled toxicity, with no sign of lasting effects, and released him to full duty with no planned follow-up.

On March 26, 2003, Fiske suffered a seizure at home. He thereafter underwent brain surgery for removal of a cavernous hemangioma.¹ Fiske returned to work in early November 2003 and worked until he suffered a second seizure on November 26, 2003. Fiske has not returned to work since that date. In his claim petition filed October 31, 2005, Fiske stated that he was disabled due to repeated occupational exposure to chemicals/toxins in the workplace. Fiske testified on three different occasions in support of his claim petition: twice appearing before the WCJ and once by deposition. He testified that he used Kure-N-Seal in jobs before and after February 1998 but also stated that when he went to job sites after February 1998 he stayed in the truck and only supervised. The WCJ found Fiske's testimony credible as to the fact of his brain injury and diminished capacity but not persuasive as to their cause.

The WCJ rejected testimony of Fiske's medical witnesses Dr. Leroy Pelicci, board-certified in neurology and pain management, and Dr. Kalipatnapu Rao, a professor of pathology with specialty in toxicology. Dr. Pelicci diagnosed Fiske with organic brain syndrome and cognitive brain dysfunction related to his chemical exposure at work but he disagreed that Fiske's cavernous angioma was directly related to his exposure to chemicals. Dr. Rao opined that Fiske suffered permanent neurological dysfunction and long-term cognitive impairment due to his chemical exposure and that Fiske formed a cavernous hemangioma due to this exposure. The doctors were unaware of the frequency of Fiske's work exposure to chemicals generally or to Kure-N-Seal.

¹A cavernous hemangioma is defined as: a vascular malformation containing large blood-filled spaces, due apparently to dilation and thickening of the walls of the capillary loops. Stedman's Medical Dictionary 770 (26th ed. 1995).

Cotton testified before the WCJ, and his testimony was found to be credible and convincing. Cotton stated that Fiske never worked with Kure-N-Seal after February 1998, and he personally was involved in sealing a floor the next year but Fiske did not participate. The WCJ also credited testimony of Dr. Them, who is board certified in occupational and environmental medicine. He saw Fiske following his exposure in 1998 and again on August 2, 2005 after he had suffered the seizure and had undergone a craniotomy to remove the cavernous hemangioma. On the second visit to Dr. Them, Fiske reported only one other exposure to Kure-N-Seal. Dr. Them reviewed Fiske's medical history, as well as the Material Safety Data Sheet for Kure-N-Seal (listing chemical components) and relevant literature on chemical exposure and cavernous hemangioma, and he opined that Fiske's cavernous hemangioma and dementia were not related to his work or to exposure to chemicals at work. The WCJ credited, as well, testimony of Jack W. Snyder, M.D., J.D., Ph.D., board certified, *inter alia*, in toxicology, clinical chemistry and occupational medicine. Dr. Snyder reviewed Fiske's medical records and found a lack of evidence supporting the claim that his cavernous hemangioma, memory problems or cognitive dysfunction were due to exposure to chemicals at work.

The WCJ denied Fiske's claim petition, and he appealed to the Board, which determined that the arguments Fiske raised as to the WCJ's findings went more to the weight of the evidence than to the legal competence of the testimony and the evidence.² The Board also determined that the WCJ's decision was

²The Court's review of the Board's order is limited to determining whether a constitutional violation or an error of law has occurred, whether any practice or procedure of the Board was not followed and whether the necessary findings of fact are supported by substantial evidence of record. *Crompton Corp. v. W.C.A.B. (King)*, 954 A.2d 751, 753 (Pa.Cmwlth., 2008). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Bethenergy Mines v. Workmen's Compensation Appeal Board (Skirpan)*, **(Footnote continued on next page...)**

"reasoned" for purposes of Section 422(a) of the Act as it allowed for adequate review. Finally, the Board concluded that the WCJ's findings were supported by substantial, competent evidence.

Fiske first acknowledges that he had the burden of proving that he sustained a work-related injury that causes continued disability. *See Innovative Spaces v. Workmen's Compensation Appeal Board (DeAngelis)*, 646 A.2d 51 (Pa. Cmwlth. 1994). He claims, however, that the causal relationship between his injury and resulting disability and his work-related activities is so obvious that his own testimony established the relationship. He cites three decisions of this Court; however none of them ultimately concluded that the symptom or disability was so causally connected to the work injury as to eliminate the need for medical testimony to meet the burden of proof. In *Green v. Workmen's Compensation Appeal Board (Ass'n for Retarded Citizens)*, 670 A.2d 1216 (Pa. Cmwlth. 1996), this Court rejected the existence of an obvious causal connection between the "head injury" for which the employer had accepted a claim and the claimant's treatment for temporomandibular joint disorder (TMJ). In *Tobias v. Workmen's Compensation Appeal Board (Nature's Way Nursery, Inc.)*, 595 A.2d 781 (Pa. Cmwlth. 1991), the Court held that the claimant met his burden but only because the medical evidence was sufficient to establish the causal connection between his prior injury and the dysfunction for which he sought treatment.

(continued...)

531 Pa. 287, 612 A.2d 434 (1992). The WCJ, as the ultimate fact-finder, may accept or reject any testimony, including the medical opinion of one expert witness over that of another. *USX Corp. (Clairton) v. Workers' Compensation Appeal Board (Labash)*, 788 A.2d 1101 (Pa. Cmwlth. 2001).

The claimant in *Weaver v. Workmen's Compensation Appeal Board (Pennsylvania Power Co.)*, 487 A.2d 116 (Pa. Cmwlth. 1985), argued that his own testimony was sufficient to establish the causal connection between an intense light flash in front of his eye that he experienced while welding and his subsequent loss of vision. He relied on *Montgomery Mills Co. v. Workmen's Compensation Appeal Board*, 364 A.2d 508 (Pa. Cmwlth. 1976), where the causal connection between a fall at work and back injury diagnosed a few days later was found to be so obvious as to eliminate the need for medical testimony to establish the connection. The Court reasoned in *Weaver* that lay testimony could be probative on the issue of causation only where the cause and effect were "so immediate, direct and natural to common experience as to obviate the need for an expert medical opinion." *Id.*, 487 A.2d at 118. The disability in *Weaver*, unlike that in *Montgomery Mills*, was one with an indirect cause thereby requiring medical testimony.

The memory and cognitive dysfunction being claimed by Fiske is more akin to the partial blindness at issue in *Weaver* as it does not have a direct and immediate cause. Thus Fiske was required to prove causation by competent, credible medical evidence. Employer argues that Fiske's contentions relate more to the weight of the evidence than to the legal competence of the testimony and evidence. The Court agrees and concludes that the WCJ did not err in rejecting Fiske's medical witnesses and concluding that he did not meet his burden.

Fiske next argues that the WCJ did not issue a "reasoned decision" as is required by Section 422 (a) of the Act. This section provides in relevant part:

All parties to an adjudicatory proceeding are entitled to a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole which clearly and concisely states and explains the rationale for the decisions so that all can determine why

and how a particular result was reached. The workers' compensation judge shall specify the evidence upon which the workers' compensation judge relies and state the reasons for accepting it in conformity with this section. When faced with conflicting evidence, the workers' compensation judge must adequately explain the reasons for rejecting or discrediting competent evidence. Uncontroverted evidence may not be rejected for no reason or for an irrational reason; the workers' compensation judge must identify that evidence and explain adequately the reasons for its rejection. The adjudication shall provide the basis for meaningful appellate review.

According to Fiske, the WCJ's decision does not comply with Section 422(a) because he accepted as credible Fiske's testimony and that of Cotton, which give conflicting accounts of the number of times Fiske was exposed to Kure-N-Seal. Fiske further argues that the reasons given by the WCJ for rejecting the testimony of his fact witnesses are not supported by the record. Employer asserts that the decision complies with Section 422(a) as it summarizes the witnesses' testimony and explains in detail why the testimony of each was accepted or rejected.

The Supreme Court addressed the reasoned decision requirement with regard to a case with conflicting evidence in *Daniels v. Workers' Compensation Appeal Board (Tristate Transport)*, 574 Pa. 61, 828 A.2d 1043 (2003), and it held that a decision is reasoned within the meaning of Section 422(a) if it allows for adequate appellate review. Although the WCJ must provide adequate reasons for rejecting or discrediting competent evidence, the WCJ is the ultimate fact finder with exclusive authority to assign witness credibility and evidentiary weight. *Id.* Section 422(a) does not permit a party to challenge or second-guess the WCJ's reasons for credibility determinations. *Kasper v. Workers' Compensation Appeal Board (Perloff Bros., Inc.)*, 769 A.2d 1243 (Pa. Cmwlth. 2001). Unless arbitrary or capricious, credibility determinations will be upheld on appeal. *Empire Steel*

Castings, Inc. v. Workers' Compensation Appeal Board (Cruceta), 749 A.2d 1021 (Pa. Cmwlth. 2000). When a WCJ evaluates live testimony, it is appropriate to base credibility determinations on witness demeanor, and further explanation often is not necessary. *Daniels*. When witnesses testify by deposition, Section 422(a) requires more than a "mere announcement" that the WCJ finds one witness more credible and persuasive than another witness. *Id.* The WCJ must articulate a reason for rejecting or discrediting testimony. In the present case, the WCJ did so.

The WCJ issued an eleven-page decision summarizing the testimony of six fact witnesses (including Fiske and Cotton, who each testified three times) and six medical witnesses. Following the summaries, the WCJ made ten specific findings of credibility determinations with explanations. Some are quite lengthy, and some consist of only one sentence. The WCJ observed Fiske's demeanor and found it apparent that his memory and cognition were diminished. The WCJ accepted that Fiske had been exposed to Kure-N-Seal on two occasions and found him credible as to the fact of his impairment but not persuasive as to the cause. The WCJ rejected the testimony of fact witnesses Jeffrey Fiske and Daniel Fiske (Fiske's brothers), Laura Fiske (his Wife) and Lyle Delp (former employee) for reasons including, among others, the contradictions in testimony over the extent of Fiske's exposure to Kure-N-Seal, the lack of qualifications to testify about events of February 18, 1998 or the confusion regarding identity of the chemicals used on the job. As the ultimate fact finder, the WCJ could accept part of Fiske's testimony and reject any conflicting testimony. *O'Donnell v. Workers' Compensation Appeal Board (United Parcel Service)*, 831 A.2d 784 (Pa. Cmwlth. 2003). On review, it is clear that the WCJ satisfied the Section 422(a) "reasoned" decision standards.

Fiske's final argument is that the decision of the WCJ is not supported by competent, credible evidence. He notes that Cotton's testimony, which the WCJ found credible, conflicts with Fiske's testimony as to frequency of exposure to Kure-N-Seal. He also challenges the credibility of witnesses whose testimony was accepted by the WCJ inasmuch as it conflicts with Fiske's version of the events. Employer argues that the record shows only one exposure to Kure-N-Seal that did not result in a disability because Fiske immediately returned to work and did not seek treatment between 1998 and March of 2003 when he suffered his seizure.

Findings made by the WCJ are deemed conclusive on appeal when they are supported by substantial evidence. *Columbo v. Workmen's Compensation Appeal Board (Hofmann Indus., Inc.)*, 638 A.2d 477 (Pa. Cmwlth. 1994). In performing a substantial evidence analysis, the Court must view the evidence in the light most favorable to the party who prevailed before the fact-finder and draw all reasonable inferences deducible from the evidence in favor of the prevailing party. *Hoffmaster v. Workers' Compensation Appeal Board (Senco Prods., Inc.)*, 721 A.2d 1152 (Pa. Cmwlth. 1998). The WCJ credited Fiske's testimony that he was exposed to Kure-N-Seal on two occasions, Cotton's testimony that Fiske did not use Kure-N-Seal after February 1998, Dr. Them's opinion that neither Fiske's cavernous hemangioma nor memory and cognitive dysfunction were caused by his exposure to chemicals at work and Dr. Snyder's finding that no evidence existed of a causal relationship between Fiske's medical problems and his employment. The record clearly shows that the WCJ's findings are supported by substantial evidence, and as such they will not be disturbed on appeal. Accordingly, the Court affirms.

DORIS A. SMITH-RIBNER, Judge

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Respondent	:	

ORDER

AND NOW, this 21st day of November, 2008, the order of the Workers' Compensation Appeal Board, dated May 28, 2008, is hereby affirmed.

DORIS A. SMITH-RIBNER, Judge