

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Donald Braun, :
 Petitioner :
 : :
 v. : No. 1663 C.D. 2007
 : Submitted: December 7, 2007
Workers' Compensation Appeal Board :
(BBT Logistics), :
 Respondent :

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
 HONORABLE RENÉE COHN JUBELIRER, Judge
 HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER

FILED: February 26, 2008

Donald Braun petitions for review of a decision of the Workers' Compensation Appeal Board (Board) that affirmed the decision of a Workers' Compensation Judge (WCJ) and denied Braun's claim petition. Braun states the questions involved as whether the WCJ issued a "reasoned" decision when he determined that substantial competent evidence failed to support the conclusion that Braun suffered a compensable work-related injury; whether the WCJ erred when he determined that Braun failed to establish by sufficient, competent, credible evidence that he sustained a work-related injury; and whether the WCJ erred by failing to provide an objective basis for accepting the testimony of the defendant's medical expert over that of Braun's medical expert.

Braun filed a claim petition on October 25, 2005. He testified that he worked for BBT Logistics (Employer) as an owner-operator truck driver and that on March 24, 2005 he dropped off a loaded container at a Sears in Ashley,

Pennsylvania. He began to shovel snow from under another container to allow him to back his truck under it and hook up to it; while shoveling he slipped and struck his left arm on a ledge running along the container. Braun stated that he felt like a spring had broken in his left arm and he had numbness and pain down his arm; nevertheless, he continued working and completed the delivery. On March 28 he returned to work and performed his regular duties but had tightness and a funny feeling in his arm. When he returned home he fell asleep on his recliner; he awoke with a severe pain down his shoulder and across the back of his neck; and around 2:00 a.m. he was taken to an emergency room. He returned to work on or about April 4, 2005 and worked through May 31, 2005 but was able to work much less because of the condition of his arm. On June 1 he stopped working for Employer because the registration on his truck expired and he could not afford the renewal fee. In December 2005 he returned to work for another company on a part-time basis, with some driving in a restricted radius. He stopped that work at the end of March 2006 because his medical card was about to expire.

Braun presented the deposition testimony of Dr. Terence F. Duffy, who is board-certified in internal medicine and physical medicine and who first saw Braun on March 30, 2005 on referral; at that time Braun did not provide any history of a work-related injury. Dr. Duffy's note of that date stated:

According to Mr. Braun, he awoke in the morning of 03/29/05, with a left wrist drop. The day before, he had essentially no complaints, other than doing some tax work with his head bent over. He had some periscapular pain. His wife reports that he slept that night in a recliner chair. He reports that frequently when he is sleeping in bed, his children will enter the bed and lay against his arm, possibly causing some compression. His wife states that that, however did not happen Monday evening.

Employer's Ex. Culp-4; Reproduced Record (R.R.) 261a. Dr. Duffy examined Braun and diagnosed an injury to the radial nerve of the left upper arm at the level of the spiral groove; he recommended further diagnostic testing. On April 5, 2005, he performed an electromyogram and nerve conduction velocity study that confirmed that diagnosis. The doctor rendered an unequivocal opinion that Braun sustained a neuropathy as a result of the March 24, 2005 slip and fall.

Employer presented the deposition testimony of Dr. Randall W. Culp, who is board certified in orthopedic and hand surgery. He reviewed some medical records and evaluated Braun at Employer's request on February 28, 2006. Braun provided the history of his alleged work injury; he stated that he had numbness and tingling in his left wrist, inability to extend his left wrist and weakness of his left hand. Dr. Culp's initial report deemed the condition to be work related.¹ Dr. Culp reviewed additional medical records, including the March 30, 2005 report from Dr. Duffy, and he issued a supplemental report of May 30, 2006 changing his opinion and stating as follows:

Of particular concern to me is a record dated 3/30/05 from Dr. Duffy. On that date it states that the patient awoke in the morning of 3/29/05 with a left wrist drop and that the day before he had no complaints. His wife reported that he slept in a recliner chair, possibly

¹ Dr. Culp's report of that date included the following:

This patient states that he sustained injuries while at work in March of 2005. He did demonstrate on examination a left radial neuropathy. Although the mechanism of injury to produce a radial neuropathy is somewhat unusual given the length of time from injury to present, I believe it is possible; therefore I do believe that it is likely that this is work related, given no evidence of any other injuries.

Employee's Ex. C-8, p. 3; R.R. 268a.

causing compression. According to the records he awoke on the morning of 3/29/05 with a wrist drop. The day before he had no complaints. This would contradict what he stated in my examination that this injury occurred on 3/24/05. If the medical record of Dr. Duffy is true, this appears to is [sic] non-work related.

Employer's Ex. C-4; R.R. 260a. The WCJ found that in his testimony Dr. Culp rendered a clear and unequivocal opinion that Braun did not suffer a work-related injury on March 24, 2005 and that his condition of "Saturday Night palsy" was caused by sleeping in his recliner the prior evening.²

The WCJ rejected Braun's testimony that he developed complaints or symptoms in his left arm in the immediate aftermath of striking it on March 24, 2005 or any time before the morning of March 29, noting that when Braun first sought treatment he provided no history of injury on March 24 or any earlier complaints to the first three medical providers. The WCJ found that on March 29, 2005 Braun awoke with complaints and symptoms in his left upper extremity after sleeping in his recliner the previous evening. Based on a careful review of the evidence, the WCJ stated that he "accepts the testimony and medical opinions of Dr. Culp as competent, credible, and worthy of belief, for the reasons articulated by him at the time of his deposition." WCJ's Decision, Finding of Fact No. 25.

The WCJ accepted the testimony of Dr. Duffy to the extent that it was not inconsistent, but he expressly rejected the opinion of Dr. Duffy that Braun sustained or developed the neuropathy as a result of his activities at work on March 24, 2005, stating as reasons in Finding of Fact No. 25 (a) - (c) that there was no competent and credible evidence of complaints before March 29; that at the

²Saturday night neuropathy refers to a neuropathy of the radial nerve for which one typical scenario is that an inebriated person falls asleep with his arm over a chair, which causes direct compression to the radial nerve. Deposition of Dr. Duffy, p. 32; R.R. 109a.

time of their depositions both physicians acknowledged that Braun could have developed the neuropathy and left wrist drop as a result of activity such as sleeping in the recliner chair; and that the WCJ was particularly impressed with Dr. Culp's evaluation of Braun's left upper extremity condition and its causation and agreed with Dr. Culp that it was much more likely that Braun developed his conditions from sleeping in his recliner rather than from striking his arm against a trailer on March 24. The WCJ concluded that Braun did not sustain his burden of proof.

On Braun's appeal the Board stressed that the WCJ is the ultimate determiner of witness credibility, *Universal Cyclops Steel Corp. v. Workmen's Compensation Appeal Board*, 305 A.2d 757 (Pa. Cmwlth. 1973). It is the WCJ's function to weigh the evidence and to resolve conflicting testimony, and he or she may accept the testimony of any witness, including a medical witness, in whole or in part. *Alpo Petfoods, Inc. v. Workmen's Compensation Appeal Board (Neff)*, 663 A.2d 293 (Pa. Cmwlth. 1995). The Board determined that the WCJ's statement that he accepted Dr. Culp's testimony "for the reasons articulated by him at the time of his deposition" plus the enumerated reasons in Finding No. 25 (a) - (c) was sufficient explanation why Dr. Culp's testimony was accepted over Dr. Duffy's.³

Braun quotes Section 422(a) of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §834, relating in part to reasoned decision.⁴ A WCJ's decision is "reasoned" under Section 422(a) if it allows for

³The Court's review of the Board's order is limited to determining whether there was a constitutional violation or an error of law, whether any practice or procedure of the Board was not followed and whether substantial evidence of record supports the findings of fact. *Helvetia Coal Co. v. Workers' Compensation Appeal Board (Learn)*, 913 A.2d 326 (Pa. Cmwlth. 2006).

⁴Section 422(a) provides in part:
(Footnote continued on next page...)

adequate review by the Board without the need for further elucidation and if it allows for adequate review by the appellate courts under their review standards. *Daniels v. Workers' Compensation Appeal Board (Tristate Transport)*, 574 Pa. 61, 828 A.2d 1043 (2003). Facts upon which an expert bases an opinion must be supported in the record. *Kozak v. Struth*, 515 Pa. 554, 531 A.2d 420 (1987).

Braun contends first that the WCJ's decision does not meet these requirements. Braun stresses that in Dr. Culp's report of February 28, 2006, he stated that he believed the mechanism of injury through striking the arm was possible and therefore believed that the injury likely was work related. Dr. Culp then sent his "addendum report" of May 30, 2006, which referred to Dr. Duffy's report of March 30, 2005. At his deposition Dr. Culp testified: "What I think happens is that I think that on the 28th, the night of the 28th, I think he slept in the recliner, I think that produced compression of the radial nerve," Deposition of Dr. Culp, p. 16; R.R. 181a. Dr. Culp admitted, however: "No, it does say in the

(continued...)

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 [he or she] 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.

next sentence possibly causing compression. But it doesn't matter. That's my words because this is a more likely scenario than what I saw on his original description." *Id.*, p. 22; R.R. 187a. Braun argues that Dr. Culp's opinion is based on mischaracterization of Dr. Duffy's statement report about Braun's children.

When asked what position creates such a problem, Dr. Culp stated: "Compression of your arm against the other recliner armrest, if you're on a park bench, it's the edge of the park bench and – God knows I've seen enough of these on recliners from people sleeping that I see all the time." *Id.*, pp. 32 - 33; R.R. 197a - 198a. He admitted that he did not know what Braun's position in the recliner was, and he did not state how long Braun might have been in the chair or how much time would be required. Braun testified only that "I went to sleep on my recliner for a little while." Notes of Testimony (N.T.) November 22, 2005, pp. 11 - 12; R.R. 27a - 28a. Braun concludes that the WCJ's opinion is not based upon consideration of the evidence as a whole but rather on mischaracterization of a single sentence and that it relies on facts not of record.

Braun's second argument is that the substantial, competent evidence of record supports a determination that he did suffer a work-related injury. He notes that "the requirement that medical evidence be unequivocal cannot reasonably be viewed as a demand for perfect testimony from members of the medical profession." *Children's Hospital of Philadelphia v. Workmen's Compensation Appeal Board (Washington)*, 547 A.2d 870, 872 (Pa. Cmwlth. 1988). Dr. Duffy testified within a reasonable degree of medical certainty that Braun's report of falling against his truck on two occasions would be enough to cause this type of trauma. The EMG test that he performed was consistent. Further, Dr. Duffy would not release Braun to return to driving a tractor trailer.

Finally, Braun contends that the WCJ erred by failing to provide a competent articulation of the objective basis for his determination that Employer's medical expert was more credible than Braun's. The Supreme Court stated that absent the situation where a credibility determination may have been tied to the inherently subjective circumstance of witness demeanor, "some articulation of the actual objective basis for the credibility determination must be offered for the decision to be a 'reasoned' one which facilitates effective appellate review." *Daniels*, 574 Pa. at 78, 828 A.2d at 1053. Here the WCJ simply found Dr. Culp's testimony to be credible "for the reasons articulated by him at the time of his deposition," which Braun regards as insufficient to meet the *Daniels* standard. The Board accepted this statement and pointed also to Finding of Fact No. 25(a) - (c).

In Finding of Fact No. 25(a), the WCJ stated that based on the finding in the previous paragraph, there was no competent, credible testimony or evidence that Braun developed any complaints or symptoms in his upper left arm before the morning hours of March 29, 2005. Braun states that this is not based on the evidence, although in fact this and Finding No. 24 are based upon the WCJ's rejection of any testimony by Braun (which was delivered in person before the WCJ) of any complaints or symptoms in the arm between March 24 and March 29. He quotes Dr. Culp's original opinion, *see* n1 above, and states that there is no evidence of "any other injuries" that would undermine the conclusion of work-relatedness. Braun dismisses Finding No. 25(b) as speculation and asserts that if Dr. Culp's opinion is to form the foundation for a determination that Braun did develop wrist drop as a result of sleeping in the recliner chair then the testimony must show how he came to that conclusion. Regarding Finding No. 25(c) Braun notes that the WCJ accepted that Braun did strike his arm.

The Board first argues that the WCJ correctly determined that Braun did not meet his burden of proof, noting that a claimant bears the burden of proving all elements necessary to support an award. *Inglis House v. Workmen's Compensation Appeal Board (Reedy)*, 535 Pa. 135, 634 A.2d 592 (1993). The WCJ in Finding No. 24 specifically rejected Braun's testimony of symptoms or complaints before March 29. Dr. Culp attributed the neuropathy to Saturday Night palsy caused by sleeping in the recliner, and the WCJ credited that opinion. Dr. Culp stated that if Braun did suffer a radial nerve injury March 24th, then he would have had wrist drop immediately and not a later presentation. It sees substantial, competent evidence to support the WCJ's findings. On the issue of whether the WCJ provided a sufficient basis for his credibility determination, this Court has stated that the purpose of a reasoned decision is "to spare the reviewing court from having to *imagine* why the WCJ believed one witness over another." *Lewis v. Workers' Compensation Appeal Board (Disposable Prods.)*, 853 A.2d 424, 429 (Pa. Cmwlth. 2004) (emphasis in original). The Board asserts that Finding No. 25 explains the WCJ's credibility determinations.

The Court turns first to the reasoned decision challenge to the WCJ's credibility determinations. First, the Board is correct that the WCJ's rejection of Braun's testimony as to symptoms between March 24 and March 29 is fully within the WCJ's authority as judge of demeanor and also is explained. Second, although a statement that a WCJ credits a doctor's testimony "for the reasons articulated by him at the time of his deposition" might in some cases violate the requirement of objective explanation, in this case the record is sufficient to permit appellate review. There is no question that Dr. Culp has very extensive experience in treating arm problems, as indicated by his curriculum vitae.

After Dr. Culp's statement quoted by Braun about seeing enough of these from people sleeping on recliners, Dr. Culp stated: "What I don't see all the time, which I have never seen, really, that's what I said it was an unusual mechanism, is a delay of four days on a neuropathy. I have never seen it." Deposition of Dr. Culp, p. 33; R.R. 198a. He stated also: "I've been doing this for quite a long time, and I don't think I've ever seen somebody present with a radial nerve palsy four days after a contusion.... If you have a contusion to a radial nerve, it's out. It doesn't show up four days later." *Id.*, pp. 25 - 26; R.R. 190a - 191a. The Court concludes that the WCJ relied upon Dr. Culp's experience and his statements based on that experience as the basis for his credibility determination and that the decision based on the record is adequate for appellate review. *Daniels*.

In view of the credibility determinations made, the Court deems the WCJ's findings to be fully supported. First, the rejection of Braun's testimony of symptoms or complaints between March 24 and March 29 seriously undermined Braun's attempt to meet his burden under *Inglis House* to prove a work-related injury. Second, the crediting of Dr. Culp's revised opinion provides further support for the WCJ's conclusion that Braun did not meet his burden of proving a work-related injury. Because the WCJ and the Board acted within their authority in concluding that Braun failed to meet his burden, the Board's decision is affirmed.

DORIS A. SMITH-RIBNER, Judge

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ORDER

AND NOW, this 26th day of February, 2008, the order of the Workers' Compensation Appeal Board is affirmed.

DORIS A. SMITH-RIBNER, Judge