

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

James Mulhall, :
 :
 Petitioner :
 :
 v. : No. 2116 C.D. 2007
 : Submitted: April 18, 2008
 Workers' Compensation Appeal :
 Board (Bemis Co., Inc.), :
 Respondent :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN

FILED: July 10, 2008

James Mulhall (Claimant) petitions for review of the October 17, 2007, order of the Workers' Compensation Appeal Board (WCAB), which reconfirmed and reinstated its December 8, 2006, order reversing the decision of a workers' compensation judge (WCJ) to grant Claimant's claim petition. We reverse.

Claimant retired on August 31, 2001, after working thirty-five years in a packaging plant where he was exposed to long-term hazardous industrial noise. (WCJ's Findings of Fact, Nos. 1, 14.) On April 4, 2002, Claimant filed a claim petition, alleging hearing loss due to exposure to noise at work. (WCJ's Findings of Fact, No. 1.)

Bemis Co., Inc. (Bemis) filed an answer, asserting that it did not acquire the plant until February 5, 1993, and that Claimant did not establish a 10% binaural hearing loss since that date. (WCJ's Findings of Fact, No. 1.) Bemis also asserted that it acquired the plant from Princeton Packaging (Princeton) but that it only purchased Princeton's assets; therefore, Bemis was not a successor-in-interest to Princeton with regard to Princeton's workers' compensation liability. (WCJ's Findings of Fact, No. 2.) The case was assigned to a WCJ, who held hearings on the matter.

As to the hearing loss issue, Claimant testified on his own behalf and presented the medical report of M. Masood Akbar, M.D. (WCJ's Findings of Fact, No. 4.) Dr. Akbar stated in his report that Claimant suffers from a binaural hearing impairment of 30.3% attributable to Claimant's exposure to occupational noise at the plant. (WCJ's Findings of Fact, No. 7; R.R. at 319a.)

Bemis presented two medical reports by Alan Miller, M.D. In the initial report, Dr. Miller agreed with Dr. Akbar that Claimant had a binaural hearing impairment of 30.3% due to his exposure to industrial noise. (WCJ's Findings of Fact, No. 8; R.R. at 326a.) However, in the later report, Dr. Miller stated that, after reviewing additional audiograms, he believed that Claimant had a binaural hearing loss of only 7.5% while employed by Bemis. (WCJ's Findings of Fact, No. 8; R.R. at 329a.)

As to its workers' compensation liability as a successor-in-interest to Princeton, Bemis presented the "Excluded Liabilities" provision of its asset

purchase agreement with Princeton. (WCJ's Findings of Fact, No. 18.) That provision stated that Bemis shall not assume any liabilities, incurred on or before the closing date of the acquisition, for workers' compensation claims brought by employees or former employees of Princeton. (R.R. at 343a-44a.)

After considering the evidence, the WCJ credited Dr. Akbar's report and the initial report of Dr. Miller, finding that Claimant suffered a permanent binaural hearing loss of 30.3% due to long-term exposure to hazardous noise at work. (WCJ's Findings of Fact, Nos. 7-8; WCJ's Conclusions of Law, No. 1.) The WCJ rejected Dr. Miller's second report, which had attributed only a 7.5% hearing loss to Bemis, because Dr. Miller based that opinion on audiograms that did not comply with Occupational Safety and Health Administration (OSHA) standards. (WCJ's Findings of Fact, No. 8; WCJ's "Discussion" at 6-7.) Finally, the WCJ concluded that Bemis is a successor-in-interest to Princeton, reasoning that Bemis could not escape workers' compensation liability through a purchase agreement. (WCJ's Findings of Fact, No. 18.) Therefore, the WCJ granted Claimant's claim petition.

Bemis appealed to the WCAB, which reversed in a December 8, 2006, decision. The WCAB stated that the WCJ improperly relied on Dr. Akbar's report because Claimant failed to establish that Dr. Akbar's audiograms complied with OSHA standards. The WCAB also concluded that Bemis is not a successor-in-interest to Princeton as to workers' compensation liability because Bemis acquired only certain specified assets of Princeton and did not expressly assume Princeton's workers' compensation liabilities.

Claimant filed a petition for reconsideration, asserting that the WCAB failed to consider this court's decision in *Hayduk v. Workers' Compensation Appeal Board (Bemis Co., Inc.)*, 906 A.2d 622 (Pa. Cmwlth. 2006), another hearing loss case involving Bemis. Claimant asserted that, in *Hayduk*, this court reversed the WCAB after addressing the OSHA and successor-in-interest issues. Claimant suggested that the WCAB's failure to address *Hayduk* was an oversight, pointing out that Bemis had discussed *Hayduk* in a supplemental brief that it filed with the WCAB. At argument on the petition for reconsideration, Claimant pointed out that this court similarly reversed the WCAB in *Bemis Company, Inc. v. Workers' Compensation Appeal Board (Bonafair)*, (Pa. Cmwlth. No. 333 C.D. 2007, filed July 31, 2007), another hearing loss case involving Bemis.

The WCAB granted reconsideration. However, on October 17, 2007, after reconsideration, the WCAB reconfirmed and reinstated its prior order. The WCAB stated that the claimant prevailed in *Hayduk* because Bemis failed to present audiograms that complied with OSHA standards,¹ and the claimant prevailed in *Bonafair* because Bemis failed to object to the admissibility of Dr. Akbar's report. According to the WCAB, in this case, Bemis objected to the admissibility of Dr. Akbar's report at page seventy of the September 10, 2003,

¹ This is not entirely correct. The claimant also prevailed because Bemis failed to object to Dr. Miller's report showing that Bonafair suffered greater than a 10% hearing loss. *Hayduk*.

hearing transcript. (WCAB's 10/17/03 op. at 2-3.) Claimant now petitions this court for review.²

I. Jurisdiction

As a preliminary matter, Bemis argues that, because Claimant did not file a timely petition for review of the WCAB's December 8, 2006, order, this court lacks jurisdiction over Claimant's petition for review. However, Claimant seeks appellate review of the WCAB's October 17, 2007, order, not the WCAB's December 8, 2006, order. Thus, we reject this argument.

Bemis also argues that this court lacks jurisdiction over Claimant's petition for review because the WCAB erred in granting Claimant's petition for reconsideration. In other words, Bemis argues that, because the WCAB erred in granting reconsideration, the WCAB's October 17, 2007, reconsideration decision is a nullity. We disagree that the WCAB erred in granting reconsideration.

Section 426 of the Workers' Compensation Act (Act)³ authorizes the WCAB to grant a rehearing upon cause shown. The WCAB's decision to grant or deny reconsideration is within the WCAB's discretion and will only be reversed

² Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether the necessary findings are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

³ Act of June 2, 1915, P.L. 736, *as amended*, added by section 6 of the Act of June 26, 1919, P.L. 642, *as amended*, 77 P.S. §871.

for an abuse of that discretion. *Babcock & Wilcox Construction Co. v. St. John*, 408 A.2d 915 (Pa. Cmwlth. 1979). The WCAB may permit re-argument under section 426 of the Act when the WCAB is convinced that it has clearly misapprehended or failed to consider an issue. *General Woodcraft & Foundry v. Workmen's Compensation Appeal Board*, 318 A.2d 385 (Pa. Cmwlth. 1974).

Here, Claimant sought reconsideration because the WCAB failed to address *Hayduk* in its December 8, 2006, decision. Claimant believed this was an oversight, pointing out that Bemis had discussed *Hayduk* in a supplemental brief. In granting reconsideration, then, the WCAB simply acknowledged that: (1) it had clearly misapprehended that the interpretation of this court's decision in *Hayduk* was at issue; and (2) it failed to address that issue. Under *General Woodcraft*, this is a proper basis for granting reconsideration.

II. Audiograms

Turning to the merits, Claimant argues that the WCAB erred in concluding that the WCJ improperly relied on Dr. Akbar's report because Claimant did not establish that Dr. Akbar's audiograms complied with OSHA standards. We agree.

Section 306(c)(8)(iv) of the Act provides that the percentage of hearing impairment in hearing loss cases shall be established solely by audiogram and that the audiometric testing must conform to OSHA standards. 77 P.S. §513(8)(iv). In *USX Corporation (Clairton) v. Workers' Compensation Appeal Board (Labash)*, 788 A.2d 1101, 1105 (Pa. Cmwlth. 2001), *appeal denied*, 569 Pa.

696, 803 A.2d 737 (2002), however, this court stated that a WCJ is “at liberty to rely upon an audiogram where the record reveals no evidence that it was not performed in accordance with OSHA standards.” Here, the record contains no evidence that Dr. Akbar’s audiogram was not performed in accordance with OSHA standards; thus, the WCJ could rely on Dr. Akbar’s audiogram in finding that Claimant had a 30.3% hearing loss.

Moreover, contrary to the statement in the WCAB’s decision, Bemis did **not** object to the admissibility of Dr. Akbar’s report at page seventy of the September 10, 2003, hearing transcript. Although the WCAB stated otherwise, the WCAB’s statement is incorrect. In making its erroneous statement, the WCAB apparently relied upon a hand-written note on Dr. Akbar’s report, indicating an objection was made at “Hearing 9-10-03 pp 70.” (R.R. at 319a.) However, if the WCAB had examined the September 10, 2003, hearing transcript carefully, the WCAB would have learned that the note is incorrect.

The September 10, 2003, hearing involved **two** claimants: Claimant and Bonafair. (R.R. at 31a.) The WCJ dealt with Claimant’s exhibits at page sixty of the transcript, and Dr. Akbar’s report was admitted without objection on page sixty as Claimant’s exhibit nine (C-9). (R.R. at 90a, 319a.) The WCJ dealt with Bonafair’s exhibits on page seventy of the transcript, and Bemis objected to Bonafair’s exhibit nine (B-9), which was identified as a “notice of Credible Transfer from the Bemis Company.” (R.R. at 100a.) Thus, although Bemis objected to B-9, Bemis did **not** object to C-9, Dr. Akbar’s report. As a result, Bemis waived any challenge to Dr. Akbar’s report. *See Wheeler v. Workers’*

Compensation Appeal Board (Reading Hospital and Medical Center), 829 A.2d 730 (Pa. Cmwlth. 2003) (stating that an issue is waived unless it is raised at every stage of the proceeding).

Even if we were to conclude that Bemis properly objected to the admission of Dr. Akbar's report and that Bemis presented evidence to show that Dr. Akbar's report did not comply with OSHA standards, the WCJ accepted the initial report of Dr. Miller, which also showed that Claimant sustained a permanent binaural hearing loss of 30.3%. Bemis did not object Dr. Miller's initial report, and that report, by itself, supports the WCJ's finding of a 30.3% binaural hearing loss. *Hayduk*.

Accordingly, we reverse.⁴

ROCHELLE S. FRIEDMAN, Judge

⁴ Claimant also argues that the WCAB erred in concluding that Bemis is not a successor-in-interest to Princeton. However, we need not reach this issue because the WCJ rejected the evidence presented by Bemis showing that Claimant already had sustained some hearing loss at the time Bemis purchased the plant from Princeton.

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Board (Bemis Co., Inc.),	:	
Respondent	:	

ORDER

AND NOW, this 10th day of July, 2008, the order of the Workers' Compensation Appeal Board, dated October 17, 2007, is hereby reversed.

ROCHELLE S. FRIEDMAN, Judge