IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Andrew Kurt, Petitioner | : | |
| v. | : | No. 2172 C.D. 2007 |
| | : | Submitted: February 22, 2008 |
| Workers' Compensation Appeal Board (Meadville Forging Company), Respondent | : | |

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

*OPINION NOT REPORTED*

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER FILED: July 3, 2008

Andrew Kurt (Claimant) seeks review of an order of the Workers' Compensation Appeal Board (Board) affirming a Workers' Compensation Judge's (WCJ) decision to deny Claimant's claim petition for hearing loss. Claimant argues whether the WCJ applied an incorrect burden of proof and misinterpreted the evidence by failing to find that Claimant had in fact met the burden imposed by the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§1 - 1041.4, 2501 - 2708, and whether the WCJ's decision is not supported by substantial competent evidence when the totality of the evidence, including the testimony of the defendant's expert, supports a determination that Claimant's continued hearing loss after 1996 remains occupationally induced.

WCJ Wehan held hearings in the case, but he retired. WCJ Bloom held a hearing and then issued the decision on March 22, 2007. The WCJ found that Claimant filed a claim petition alleging initially a hearing impairment of 11.875%, later amended to 22.5%, due to exposure to hazardous noise in the

course of his employment. Claimant testified on January 13, 2006 that he had been employed by Meadville Forging Company (Employer) since 1977. His hearing was good when he started; he first noticed a problem with hearing more than five years earlier, and it has worsened since then. At first he worked in the sander's department, which involved exposure to constant noise. For twenty-seven years through the present he worked as a press operator, which position also exposes him to constant noise. There are twelve forging presses in his area of the plant, and he stands within three feet of the center of his press. He testified that since 1997 the noise has increased due to the dumping of steel into the hopper nearby and dumping from the sandblaster and that three new 1,000 ton presses have been added on the other side of his press, whose graphite sucker motors produce a howling sound. He reiterated on June 23, 2006 that the forging presses' tripping 6000 to 8000 times a day produced loud banging sounds.

Claimant testified that he saw Dr. Stephen M. Froman on October 31, 2005, who was the first person to tell him that his hearing loss resulted from noise exposure at work. Dr. Froman, a board-certified otolaryngologist, testified on Claimant's behalf. The history he received was consistent with Claimant's testimony, except that Claimant did not say anything about heightened noise at work over the last seven years or so; the doctor's understanding was that there were continuous loud levels of noise throughout Claimant's employment. Dr. Froman conducted a complete otolaryngological examination of Claimant, which was within normal limits, not showing any obvious sign of conductive hearing loss (caused by physical impairment of the transmission of sound from the outer ear to the nerve of hearing) or of neurosensory loss (referring to the nerve of hearing and to nerve damage).

Dr. Froman opined that Claimant's hearing impairment is caused by cumulative exposure to loud noise during his years of employment with Employer. He acknowledged the correctness of the opinion of Dr. Douglas A. Chen that occupational noise generally produces a slow loss of hearing occurring during the first fifteen years of exposure and then slows down. He could not explain why Claimant's loss occurred at a more rapid rate and has progressed contrary to the typical pattern. He declined to comment on Dr. Chen's opinion that acceleration was not consistent with occupational loss but was consistent with biological factors. He stated that there are a number of potential causes for hearing loss, including heredity, exposure to certain illnesses, use of certain medication and exposure to occupational and non-occupational noise. Also, Dr. Froman explained that his second report changing the impairment to 22.5% was in response to a letter from counsel, which brought his attention to an error, *i.e.*, that bone conduction instead of air conduction test scores were used. His audiologist made a mistake in the manner of calculation. The WCJ noted that Dr. Froman admitted that it would not have been caught but for counsel's letter. Last, Dr. Froman stated that there is no way of knowing within a reasonable degree of medical certainty whether Claimant's hearing loss was entirely attributable to his employment and that he could not rule out that other causes might exist.

Employer presented the testimony of Dr. Chen, who is board-certified in otolaryngology, otology and neurotology. He performed an independent medical examination of Claimant on February 2, 2006, including a physical examination and audiogram and review of work attendance records, multiple work audiograms and Dr. Froman's report. Dr. Chen testified that audiometric records showed a slow progression of hearing loss and impairment up through April 1996,

when the impairment was 4.06%. Between 1996 and February 2006 the impairment progressed to 22.94%, showing that the hearing loss accelerated over the last ten years. That acceleration is not consistent with occupationally induced hearing loss because such loss is slow and progressive, with the substantial portion occurring during the first ten to fifteen years. After that, the progression slows, and any acceleration is due to other causes; this pattern for occupationally induced hearing loss is well documented in medical literature. In his opinion, the hearing loss between 1996 and 2006 was not the result of occupational noise. On cross-examination, he attributed the loss after 1996 to biological factors, such as age.

The WCJ expressly found Claimant to be a competent and credible witness. He ascribed much credibility to the testimony of Dr. Chen, stating that his conclusions that Claimant's hearing loss was not caused by exposure to noise at work were in accord with accepted scientific principles well documented in medical literature. The WCJ did not ascribe much credibility to the testimony of Dr. Froman. The mistake in his first report cast severe doubt on Dr. Froman's office procedures and his conclusions. When he was informed of Claimant's testimony of an increase in noise levels in later years, Dr. Froman stated that it might explain why there was a more rapid progression of hearing loss over that time, although he had seen examples of rapid progression without an obvious cause; in this case, that certainly is a reasonable cause. Dr. Froman merely surmised that the increase in noise could be a cause of hearing loss, but he did not express that opinion within a reasonable degree of medical certainty. Based on all the credible evidence, the WCJ concluded that Claimant had not met his burden of proof to establish through credible medical testimony that his hearing loss was caused by exposure to occupational noise.

The Board stated that it is solely within the WCJ's discretion to find facts, which may not be disturbed if supported by competent evidence. *Universal Cyclops Steel Corp. v. Workmen's Compensation Appeal Board*, 305 A.2d 757 (Pa. Cmwlth. 1973). Claimant must prove that his hearing loss was caused by his employment. *Rockwell Int'l v. Workers' Compensation Appeal Board (Sutton)*, 736 A.2d 742 (Pa. Cmwlth. 1999). If a causal relationship is not obvious, unequivocal medical evidence must be offered, *Jeannette Dist. Mem'l Hosp. v. Workmen's Compensation Appeal Board (Mesich)*, 668 A.2d 249 (Pa. Cmwlth. 1995), and the WCJ here required Claimant to present unequivocal medical evidence as to cause.

One reason the WCJ gave for rejecting Dr. Froman's opinion was the fact that he was unaware that Claimant testified to an increase in noise levels in the last years of his employment. Dr. Froman admitted on cross-examination that he had no way of knowing within a reasonable degree of medical certainty whether Claimant's hearing loss was entirely due to his employment. The Board stated that the WCJ had substantial evidence to support his conclusion that Claimant's medical evidence was insufficient to meet his burden of proof. In addition, the Board rejected the argument that the WCJ overemphasized Dr. Froman's admission that he made a mistake in calculating the cumulative hearing loss, which was corrected in the later report. The Board stated that the error was an error and that there was no reason for the WCJ to ignore it. The Board concluded that the WCJ's Finding of Fact No. 13 assigning little credibility to Dr. Froman's testimony was adequately explained for purposes of Section 422(a) of the Act, 77 P.S. §834.[1]

[1]The Court's review 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 the necessary findings of fact are supported by substantial evidence in the record. *Helvetia Coal Co. v. Workers' Compensation Appeal Board (Learn)*, 913 A.2d 326 (Pa. Cmwlth. 2006).

Claimant first acknowledges that the Court may not reweigh evidence, *Supervalu, Inc. v. Workers' Compensation Appeal Board (Bowser),* 755 A.2d 715 (Pa. Cmwlth. 2000), but he adds that the Court is empowered to review the WCJ's findings to determine if they are supported by substantial evidence. *Id.* Section 306(c)(8)(i) of the Act, 77 P.S. §513(8)(i), requires that Claimant prove that he suffers a "permanent loss of hearing which is medically established as an occupational hearing loss caused by long-term exposure to hazardous occupational noise…."[2] Claimant argues that testimony from both experts showed a hearing loss "medically established" to be due to long-term noise exposure. Dr. Froman stated that the audiogram in his office was consistent with occupational, noise-induced hearing loss. Dr. Chen testified that the audiogram in his office also presented a number of hallmarks of occupational, noise-induced hearing loss. Dr. Chen's Deposition, p. 21; Reproduced Record (R.R.) 172a. Therefore, Claimant asserts that he met the burden under Section 306(c)(8)(i).

The WCJ denied benefits in part because of Dr. Froman's testimony with regard to other potential causes, finding that he could not give an opinion within a reasonable degree of medical certainty as to cause, and the Board noted that Dr. Froman also admitted on cross-examination that he had no way of knowing whether Claimant's hearing loss was "entirely attributable" to his work. Claimant maintains, first, that the law does not require him to establish that his

[2]Claimant points out that under Section 306(c)(8)(x), 77 P.S. §513(8)(x), whether an employee was exposed to hazardous occupational noise or has long-term exposure to such noise shall be an affirmative defense to a claim for occupational hearing loss and not part of the claimant's burden of proof. S. Todd Woods, the Safety Director for Employer, testified that the areas where Claimant works are hearing-protection posted, which means that noise exposure there is more than 90 decibels. There is no dispute in this case however, that Claimant was exposed to hazardous levels of noise throughout his employment.

hearing loss is solely and exclusively caused by occupational noise, only that it is a substantial contributing factor. Second, the full context of the remark shows that Dr. Froman was responding to a question concerning "every last tenth of a percentage of loss" and was credibly explaining that within a reasonable degree of medical certainty the occupational noise was the significant cause. A claimant need not prove that every last tenth of a percentage point of hearing loss is caused by exposure at work; rather, the expert must testify that on the whole, and within a reasonable degree of medical certainty, the cause or a substantial contributing factor in the hearing loss is occupational noise. *See generally USX Corp. v. Workers' Compensation Appeal Board (Rich)*, 727 A.2d 165 (Pa. Cmwlth. 1999), *aff'd sub nom. LTV Steel Co., Inc. v. Workers' Compensation Appeal Board (Mozena)*, 562 Pa. 205, 754 A.2d 666 (2000).[3]

Next Claimant argues that the totality of the evidence, including the testimony of Employer's expert, supports a finding that his hearing loss after 1996 remains occupationally induced. He contends that the factual circumstances do not allow for application of the "general scientific principle" that occupational hearing loss reaches its peak in the first ten to fifteen years of employment and that the WCJ erred in applying it. He testified that his workplace was noisier in recent

[3]In *USX Corp.* the defendant's expert (also Dr. Chen) found a binaural hearing loss of 20.5%, but he suggested disregarding 6.8% that he calculated by a formula based on aging to be due to aging. The Court quoted the provision known as the "Causation Section," Section 306(c)(8)(vi), 77 P.S. §513(8)(vi), stating that "[a]n employer shall be liable only for the hearing impairment caused by such employer" and that the employer shall not be liable for previous occupational hearing loss or non-occupational hearing loss established at or prior to the time of employment. The Court refused to apply this in a manner that was other than that specified in the Act and would vitiate the normal principle that an employer is responsible for disability caused by a combination of work-related and non-work-related factors, if the work-related factors were a substantial contributing cause to the injury. An employer would not be liable for a portion of hearing loss shown to be due to non-work-related injury or disease.

years due to the addition of various machines. Significantly, he told both doctors that his hearing was different after working. Dr. Froman noted that even with the use of hearing protection Claimant still experiences threshold shifts after leaving work; the doctors agreed that this indicated exposure to hazardous levels of noise.

Both doctors testified that occupational hearing loss can progress after the ten-to-fifteen-year period if the noise to which the individual is exposed increases. Although the WCJ stated that Dr. Froman could not explain why Claimant's hearing loss increased contrary to the general pattern, he in fact testified that this is a common pattern but not the only one and that he had seen many patients whose hearing loss increased as exposure to loud noise increased. The WCJ said that Dr. Froman "refused to comment" on what Dr. Chen meant by "other biological factors" causing acceleration in hearing loss over the last ten years, but that was because Dr. Chen did not say what he meant by that. Dr. Froman's Deposition, p. 25; R.R. 117a. He maintained his opinion as to cause.

Dr. Chen referred to the Consensus Statement by the American College of Occupational Medicine for the principle relied upon. Claimant purports to quote that document as stating that "at stable exposure levels, losses at 3000, 4000 and 6000 Hz will usually reach a maximal level in about 10 to 15 years." Dr. Chen agreed that the slowing in hearing loss after that period is premised upon the noise level's remaining relatively the same and that if the noise level changes the loss could continue to progress. Dr. Chen stated that because Claimant's job did not change he did not expect a change in noise level; but that opinion was not based on substantial evidence. Finally, regarding the mistaken initial calculation of hearing loss, Dr. Froman explained that the same audiogram results were used, and the revised calculation was very similar to Dr. Chen's results.

Employer counter-states the question as whether substantial evidence supports the WCJ's decision that Claimant did not prove by unequivocal medical evidence that his hearing loss was caused by occupational noise.[4] Employer asserts that Claimant's arguments are nothing more than an improper assault on the WCJ's findings. To receive benefits an injured worker must prove all elements necessary to support an award, *Rockwell Int'l*, and in a hearing loss case the claimant must prove causation under Section 306(c)(8)(i) of the Act. The affirmative defense available to prove lack of harmful exposure comes into play only if the claimant makes out a prima facie case. The WCJ did not apply a heightened burden of proof requiring Claimant to prove that "every last tenth of a percentage loss" was caused by exposure at work. Based on thorough consideration of the credible evidence, the WCJ determined that Claimant failed to meet his burden.

Second, Employer stresses that questions of credibility and weight of evidence are the exclusive province of the WCJ who is free to accept or reject the testimony of any witness, in whole or in part and whose determinations will not be disturbed unless they are not supported by substantial evidence. *See Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe)*, 539 Pa. 322, 652 A.2d 797 (1995). The experts agreed that progression of Claimant's hearing loss did not conform to the usual pattern for occupationally induced hearing loss. Contrary to Claimant's argument, the WCJ did not ignore evidence of increase in noise levels in recent years. The WCJ permitted argument on the issue, although Claimant admitted that he did not tell either doctor about an increase.

[4]The Court notes that this formulation, which was also used by the Board, is not a correct statement of law because substantial evidence refers to necessary support for findings of fact, whereas a determination that a party failed to meet his or her burden is a conclusion of law, which is based upon the evidence presented but is not a finding to be supported.

The Court concludes that the decision of the Board must be upheld. Employer is correct that Claimant's arguments primarily ask the Court to reject the WCJ's credibility determinations and to reweigh evidence, which the Court may not do. *Supervalu, Inc.*; *Lehigh Valley Vo-Tech School*. In regard to the testimony of an increase in noise levels in recent years and its effect, the Court observes that Section 306(c)(8)(iii) of the Act, 77 P.S. §513(8)(iii), provides: "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." Even Doctor Chen's concession that there probably was some noise-induced hearing loss after 1996, when the level was 4.06%, did not establish that it ever met the 10% threshold, and he never recanted his opinion that the substantial portion of the increase between 1996 and 2006 was not work-related.

As to the WCJ's credibility determination regarding Dr. Froman, the law is settled that where a WCJ makes a credibility determination for a witness who testifies by deposition, the WCJ must offer some articulation of the basis for credibility determinations to satisfy the "reasoned decision" requirement of Section 422(a) of the Act. *Daniels v. Workers' Compensation Appeal Board (Tristate Transp.)*, 574 Pa. 61, 828 A.2d 1043 (2003). The WCJ articulated the error in the initial report as a partial basis for his credibility determination. Claimant has cited no case as to a WCJ's overemphasizing a particular factor in making such a determination. Concluding that the Board did not err, the Court affirms its order.

DORIS A. SMITH-RIBNER, Judge

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***O R D E R***

AND NOW, this 3rd day of July, 2008, the order of the Workers' Compensation Appeal Board is affirmed.

DORIS A. SMITH-RIBNER, Judge