IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Duquesne Light Company, Petitioner	:	
v.	:	No. 2560 C.D. 2009
	:	SUBMITTED: May 14, 2010
Workers' Compensation Appeal Board (Ferrante), Respondent	:	

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

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** July 29, 2010

Employer, Duquesne Light Company, petitions for review of the order of the Workers' Compensation Appeal Board (Board) that affirmed the order of the Workers' Compensation Judge (WCJ) granting the claim petition of Raymond Ferrante. For the reasons that follow, we affirm.

Ferrante began to work for Employer in 1975, and since that time he has filled a number of positions for the company, most recently that of journey hot stick lineworker. This position includes a number of roles in the installation, repair and maintenance of electrical lines and other equipment, and often requires the use of noisy machinery including jackhammers, backhoes and hydraulic chainsaws. In 2006, Ferrante filed a claim petition alleging that he suffered from work-related

bilateral hearing loss. At the hearing, Employer attempted to establish the affirmative defense that Ferrante was not exposed to long-term hazardous occupational noise. The WCJ held that Ferrante had sustained his burden of proving that he suffered work related bilateral hearing loss of 33.7%, and that Employer had not established the affirmative defense. On appeal, the Board affirmed, and an appeal to this court followed.

Employer makes three arguments for reversal. First, it argues that the WCJ erred by applying an improper burden of proof to its affirmative defense. Second, it argues that the WCJ's rejection of its affirmative defense was based on a flawed interpretation of the evidence. Finally, Employer argues that the WCJ erred in finding that Ferrante met his burden of proving the hearing loss was job related.

Employer's first two arguments stem from the WCJ's rejection of its affirmative defense. The Workers' Compensation Act (Act)[1] provides that in occupational hearing loss cases, the employer can assert as an affirmative defense that the employee has not been exposed to hazardous occupational noise or has not had long-term exposure to such noise. Section 306(c)(8)(x) of the Act, 77 P.S. § 513(8)(x). The Act defines "hazardous occupational noise" as noise levels exceeding the standards set by OSHA. Section 105.4 of the Act,[2] 77 P.S. § 25.4. The OSHA standard applicable to this case is a weighted average over eight hours of 90 dBA.[3] 29 CFR 1910.95. The Act defines "long term exposure" as exposure to noise exceeding the permissible daily average for at least three days each week

[1] Act of June 2, 1915, P.L. 736, *as amended*.

[2] Added by the Act of February 23, 1995, P.L. 1.

[3] A weighted average of decibels over time is abbreviated dBA, whereas noise at a particular time is measured in decibels, abbreviated dB.

for forty weeks of one year. Section 105.6 of the Act,[4] 77 P.S. § 25.6. Thus, we have held that

> [f]or an employer then to prove the affirmative defense that a claimant was not exposed to long-term hazardous occupation noise, it must establish:
> • that claimant was not exposed to sound levels equal to or in excess of 90 dBA during the period the claimant is contending that he or she was exposed to long-term hazardous noise;
> • if exposed to a noise level equal to or in excess of 90 dBA, the exposure during that period did not exceed the permitted daily exposure for three days a week for 40 weeks in any one year for which exposure to long-term hazardous noise is claimed.

Gen. Elec. Co. v. Workers' Comp. Appeal Bd. (Bower), 734 A.2d 492 (Pa. Cmwlth. 1999).

Employer attempted to establish this alternative defense through a noise study conducted by industrial hygienists Thomas Baculik and David Williams. Baculik testified that he studied the noise exposure of Employer's crews over four days by placing dosimeters on employees. Over the course of the study, the noise exposure of 16 individual employees was examined, including, for one day, Ferrante. Baculik testified that none of the workers studied, including Ferrante, was exposed to the legal limit of 90 dBA. Baculik did acknowledge, however, that some of the equipment used did produce noise in excess of 90 dB. Williams testified that it was unlikely, given the data collected, that Ferrante was subject to long term exposure to hazardous occupational noise.

Employer also presented the deposition testimony of construction supervisors Donald Plasecki and Michael Lehmeier, who supervised the work days

[4] Added by the Act of February 23, 1995, P.L. 1.

studied by Baculik and Williams. Although both testified that the work studied was not out of the ordinary, they did acknowledge that the study included only overhead wire work, and that Ferrante did a significant amount of other work, including Underground Residential Distribution (URD), which requires different machinery.

The WCJ found the conclusions of Baculik and Williams not credible. In doing so, the WCJ noted that Ferrante credibly testified that he was exposed to noise not only from his own equipment, but from the equipment of those around him, and that the types of equipment used and the length of time they are used vary greatly from day to day. In addition, the WCJ noted that "Mr. Williams and Mr. Baculik agreed that their opinions were limited to the days that they studied [but] Claimant worked different jobs than the ones that were studied, particularly URD work." WCJ Opinion at 8. Thus, Employer had not established that the days studied were representative of the work Ferrante did for Employer.

Employer argues that the WCJ's rationale for rejecting the affirmative defense was factually inaccurate. Employer argues that Ferrante admitted in his testimony that the day on which the noise study took place was representative of a normal day's activities. However, a review of the transcript pages cited by Employer reveals that, while Ferrante stated that the job done on the day studied was a normal duty of his, he also made clear that his work included both overhead and that URD work and the exact nature of his work, and his noise exposure, varied greatly from day to day. *See* Reproduced Record (R.R.) at 78a-79a, 82a. Thus, it is inappropriate to conclude, as Employer does, that Ferrante admitted that his noise exposure on the day studied was typical of his exposure on other days.

Employer goes on to argue that the WCJ applied an unreasonable burden of proof in rejecting the affirmative defense. It essentially argues that if its study, which covered 16 employees and found that none had been exposed to hazardous noise over a one-day period, was not enough to establish the defense, than no evidence would be. This argument ignores the crucial point that the conclusions of the study were discredited because the study did not accurately replicate the totality of Ferrante's work environment. In workers' compensation cases, the WCJ is the ultimate finder of fact, and as such, the WCJ can accept or reject, in whole or in part, the testimony of any witness. *Prot. Tech., Inc. v. Workers' Comp. Appeal Bd. (Dengler)*, 665 A.2d 557 (Pa. Cmwlth. 1995). Employer also argues that the WCJ capriciously disregarded the noise study evidence, but a judge's express consideration and rejection of evidence is not capricious disregard. *Williams v. Workers' Comp. Appeal Bd. (USX Corp. – Fairless Works)*, 862 A.2d 137 (Pa. Cmwlth. 2004). In this case, the WCJ expressly considered the noise evidence, and gave several cogent reasons why it was not credible. Therefore, the WCJ did not capriciously disregard evidence.

Employer next argues that the WCJ erred in regards to the affirmative defense by misconstruing the distinction between decibels (dB) and the weighted average of decibels over time (dBA), and that if the concepts had been applied correctly, the WCJ would have found that Ferrante had not been exposed to hazardous occupational noise. This argument fails for a number of reasons. First, we can find no instance in the WCJ's decision where these terms were used incorrectly, or where the two concepts were confused. Second, the evidence relied upon by Employer in this argument was, as explained above, found not credible by the WCJ, and that determination will not be disturbed on appeal. Finally,

Employer appears to misstate the law when it argues that the WCJ's finding that Ferrante had long-term exposure to hazardous occupational noise lacks evidentiary support. *See* Employer's brief at 25-26. Under the Act, Ferrante was not required to prove that he was exposed to hazardous occupational noise, rather, the burden was on Employer to prove that he was not exposed to such noise. *Joy Mining Mach. v. Workers' Comp. Appeal Bd. (Noggle)*, 805 A.2d 1279 (Pa. Cmwlth. 2002). When an employer attempts to prove this affirmative defense through evidence the WCJ finds not credible, the employer has failed to prove the defense, and no further evidence on the issue is required. *Id.*

Finally, Employer argues that the WCJ erred in finding that Ferrante met his burden of proving the hearing loss was job-related. On the issue of causation, Ferrante and Dr. Michael C. Bell testified. Ferrante testified about the nature of his work, and the various pieces of noise-producing equipment he operated and worked nearby. He also testified to his symptoms, including hearing loss and a ringing in his ears at the end of the workday. Ferrante testified that he has no major heath problems, besides hypertension, and does not engage in noisy activities outside of work, besides occasionally riding his motorcycle. He testified he has ridden the motorcycle only about 10,000 miles over the course of the 25 years he has owned it.

Ferrante presented to the WCJ the deposition testimony of Dr. Bell, a board certified otolaryngologist. Dr. Bell had examined and conducted hearing tests on Ferrante, and determined that he suffered bilateral hearing loss of 33.7%. Dr. Bell testified that neither Ferrante's hypertension nor anything else in his family or medical history was a contributing cause of the hearing loss. In addition, although he had not been told of Ferrante's motorcycle use at the time of his exam,

when he was informed of it, Dr. Bell testified within a reasonable degree of medical certainty that Ferrante's occasional motorcycle use was not a contributing cause of Ferrante's hearing loss. Dr. Bell testified that Ferrante's 30 years of exposure to occupational noise was "the single most important contributing factor to his present sensorineural loss." R.R. at 529a.

Employer presented the WCJ with the deposition testimony of Dr. Douglas A. Chen, certified specialist in otology and neurotology. Dr. Chen confirmed that Ferrante suffered from hearing loss, finding impairment of 35.625%, but found that "[h]is hearing loss is not entirely consistent with occupational noise as a sole cause." R.R. at 165-66a. Dr. Chen was not, however, able to identify any alternate cause of Ferrante's hearing loss. The WCJ found Dr. Bell's conclusions to be more credible than Dr. Chen's, noting Dr. Chen's failure to identify an alternate cause.

Employer argues that Dr. Bell's conclusions are flawed because he relied on an inaccurate medical history. However, the supposed flaws Employer points to in the medical history are insubstantial. First, Employer points to the fact that Dr. Bell was not aware of Ferrante's motorcycle riding at the time of his exam. However, Dr. Bell was informed of this information prior to his testimony, and he stated that it did not change his opinion. Second, Employer argues that Dr. Bell received an inflated account of the amount of noise Ferrante was exposed to on the job. This, however, is merely a reargument of the issues discussed above, which the WCJ resolved by finding the conclusions of the noise study not credible.

Finally, in his brief, Ferrante argues that this appeal is frivolous and requests that we assess counsel fees against employer. Such fees are authorized if we "determine[] that an appeal is frivolous or taken solely for delay or that the

conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious." Pa. R.A.P. 2744. We have defined a frivolous appeal as "one presenting no justiciable questions and so readily recognizable as devoid of merit on face of record that there is little prospect that it can ever succeed." *In re Appeal of Langmaid Lane Homeowners Ass'n*, 465 A.2d 72, 75 (Pa. Cmwlth. 1983). While this is not a close case, we cannot say that it presented no justiciable question, or that it was entirely devoid of merit, and therefore we decline to assess fees.

For all the foregoing reasons, we affirm the order of the Board, and deny Ferrante's request for counsel fees.

BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Duquesne Light Company, Petitioner	:	
v.	:	No. 2560 C.D. 2009
Workers' Compensation Appeal Board (Ferrante), Respondent	:	

O R D E R

AND NOW, this 29th day of July, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is hereby AFFIRMED, and the Respondent's request for the assessment of counsel fees is DENIED.

_____

BONNIE BRIGANCE LEADBETTER,
President Judge