IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Philadelphia,	:	
Petitioner	:	
	:	
v.	:	No. 818 C.D. 2008
	:	Submitted: November 7, 2008
Workers' Compensation Appeal Board (Barber),	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY FILED: December 24, 2008

City of Philadelphia (Employer) petitions for review of an order of the Workers' Compensation Appeal Board (Board), dated April 7, 2008, affirming the decision and order of the Workers' Compensation Judge (WCJ), on remand, which granted the fatal claim petition filed by June Barber (Claimant) with regard to the death of her husband, Thomas Barber (Decedent). We now affirm.

Claimant and Decedent were married on March 15, 1973, and remained so until his death. Decedent, a firefighter, was employed by Employer from 1971 through June 21, 1992. He started experiencing shortness of breath on exertion in 1986, and learned he suffered from emphysema in 1992.

On February 15, 1993, Decedent and Employer entered into a supplemental agreement wherein it was agreed that he became disabled due to lung disease caused by twenty-one years of exposure to heat, smoke, gases and fumes from his employment as a firefighter. This agreement was made pursuant to the occupational disease provision

of Section 108(o) of the Pennsylvania Workers' Compensation Act (the Act), Act of June 2, 1915, P.L. 736, added by, Act of October 17, 1972, P.L. 930, as amended, 77 P.S. § 27.1(o).[1] Pursuant to this agreement, Claimant was to receive compensation, which the parties characterized as partial disability, as of June 21, 1992, at the rate of $455.00 per week for five hundred weeks.[2]

In October of 1994, Decedent was evaluated by Paul Epstein, M.D., who is Board-certified in pulmonary medicine. Dr. Epstein diagnosed Decedent as suffering from chronic obstructive pulmonary disease (COPD). Dr. Epstein noted that a chest x-ray taken on November 11, 1994, showed a small shadow on the back of the right lung and a prominence of the right hilium where the blood vessels and bronchiole tubes flow outwards from the main windpipe into the lung tissue itself. No pleural abnormalities were noted on the x-rays. Dr. Epstein recommended that Decedent undergo a CT scan of the chest and requested that he be able to review his prior chest x-rays as well as any other diagnostic tests.

A later CT scan completed in March of 1995 showed the presence of a mass in the right upper lobe of Decedent's lung. Decedent underwent additional testing,

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[1] Section 108(o) of the Act provides that the term "occupational diseases" includes "[d]iseases of the heart and lungs, resulting in either temporary or permanent total or partial disability or death, after four years or more of service in fire fighting for the benefit or safety of the public, caused by extreme over-exertion in times of stress or danger or by exposure to heat, smoke, fumes or gasses, arising directly out of the employment of any such firemen."

[2] For unknown reasons, Decedent's disability was characterized as partial. The rate, however, equated to a total disability rate. Following his surgery on May 9, 1995, during which doctors removed the upper portion of his right lung, Decedent filed a petition to modify his benefits from partial to total. A WCJ ultimately granted Decedent's petition. Nevertheless, Decedent's compensation rate remained at $455.00 per week. Employer appealed to the Board, but the Board affirmed. Employer then appealed to this Court, but we likewise affirmed in an unreported opinion and order. See City of Philadelphia v. Workers' Compensation Appeal Board (Barber), Pa. Cmwlth., No. 1398 C.D. 2001, filed December 19, 2001. It appears that Employer did not appeal our decision and order.

including a bronchoscopy and biopsy of the mass. The biopsy showed that he had a malignant growth in the middle portion of the right upper lobe of the bronchia tube. Decedent was admitted to the hospital on May 8, 1995, and underwent surgery where the upper portion of his right lung was removed. As pathology showed that the malignant cancer, squamous cell carcinoma, had spread to the lymph nodes near the hilium, Decedent thereafter underwent radiation therapy.

In November of 1996, Stanley L. Altschuler, M.D., who is Board-certified in pulmonary medicine, examined Decedent. At the time, Decedent complained of shortness of breath and early fatigue. Dr. Altschuler diagnosed Decedent with chronic airway obstruction, pulmonary disability and bronchogenic carcinoma.

In April of 1997, Michael Kline, M.D., examined Decedent and concluded that he had chronic obstructive pulmonary disease with a history of lung cancer but found no evidence of recurrence. Dr. Kline did not find any evidence to support a diagnosis of asbestosis or asbestos-related pleural disease.

Later in the year, in December of 1997, Decedent underwent another CT scan which showed an enlargement of the lymph node in the middle portion of the chest. Subsequently, Decedent was admitted to the hospital and the cancer was found to be spreading.

In September of 1998, a CT scan showed that the cancer had spread to Decedent's lungs. Unfortunately, through the beginning of 1999, his condition deteriorated as the cancer continued to spread. He was hospitalized in early March. On March 16, 1999, Decedent passed away. No autopsy was performed, but the death certificate indicated that the cause of Decedent's death was metastatic carcinoma due to lung carcinoma.

On June 9, 1999, Claimant filed a fatal claim petition against Employer. Claimant alleged that her husband died on March 16, 1999, as a result of metastatic

carcinoma due to lung carcinoma, a work-related injury. In support of the petition, Claimant submitted into evidence: the supplemental agreement, a funeral bill, a marriage certificate, a divorce decree (from her previous marriage) and a death certificate. Claimant also submitted the deposition testimony of Dr. Altschuler, taken on February 22, 2000.

Employer filed its answer and admitted that although Decedent was an eligible recipient of benefits, he had not died as a result of his occupational disease. Hearings before WCJ Marc Weinberg were scheduled and held in the matter.

On March 29, 2001, WCJ Weinberg circulated his decision and order denying Claimant's fatal claim petition as he found that Decedent's work-related occupational disease did not cause his death. WCJ Weinberg concluded that although both medical experts were credible, Dr. Epstein's testimony was more credible and persuasive than Dr. Altschuler's testimony. Further, WCJ Weinberg found that "whenever the testimony of Drs. Altschuler and Epstein differ[ed], Dr. Altschuler's testimony [was] rejected." (WCJ Weinberg's Decision, March 29, 2001, p. 5).

Claimant subsequently appealed to the Board. Claimant alleged that WCJ Weinberg's findings were not supported by substantial evidence. Claimant also alleged that WCJ Weinberg failed to issue a reasoned decision. The Board agreed and by decision and order dated April 19, 2002, it vacated WCJ Weinberg's decision and order and remanded the matter for a reasoned decision with appropriate findings. The Board noted that there was an error in the numbering of the findings of fact and directed WCJ Weinberg to address this issue.[3]

[3] More specifically, the Board noted that WCJ Weinberg's decision was missing No. 6 and No. 7 in his finding of facts.

On August 14, 2002, after remand, and without taking additional testimony or evidence, WCJ Weinberg circulated his second decision which again denied Claimant's fatal claim petition. WCJ Weinberg remained convinced that Dr. Epstein was more credible than Dr. Altschuler and that Decedent's death was not a result of his work-related occupational disease. The decision incorporated the identical findings of fact, as numbered 1 through 5, from the first decision. WCJ Weinberg eliminated the finding of fact previously numbered as No. 8 and renumbered his previous finding of fact No. 9 to No. 6.

Claimant appealed the remanded decision to the Board. Claimant contended that WCJ Weinberg failed to issue a reasoned decision. Specifically, Claimant argued that WCJ Weinberg mischaracterized the medical testimony submitted on her behalf, erred in relying on diagnostic test results and erred in finding Dr. Epstein's testimony to be more credible than her medical expert's testimony.

In its decision dated August 5, 2003, the Board vacated WCJ Weinberg's findings of fact No. 2(b) and No. 5 and again remanded the matter to the WCJ. The Board concluded that WCJ Weinberg failed to issue a reasoned decision. In this regard, the Board noted that WCJ Weinberg had failed to accurately summarize the testimony of Dr. Altschuler. The Board also noted that WCJ Weinberg erred in accepting Dr. Epstein's testimony as more credible than Dr. Altschuler's testimony, because his testimony was corroborated by diagnostic test results. The Board noted that those test results were from 1994, five years prior to Decedent's death, and that later test results corroborated the testimony of Dr. Altschuler.

Employer subsequently filed a request for reconsideration with the Board. Employer argued that Claimant had waived the reasoned decision issue and that the Board impermissibly substituted its own findings for those of WCJ Weinberg. By

decision and order dated October 3, 2003, the Board denied Employer's request for reconsideration.

The matter was then remanded to a different WCJ, John Liebau. By decision and order dated April 9, 2004, WCJ Liebau reaffirmed WCJ Weinberg's findings of fact Nos. 1 through 4 and denied Claimant's fatal claim petition, as he found that Decedent's death was not connected to his work-related occupational disease. WCJ Liebau also reaffirmed finding of fact No. 5, which found Dr. Epstein's testimony more credible than Dr. Altschuler's testimony, but added his own observations. WCJ Liebau noted that Dr. Altschuler testified that there were "primarily two factors which brought on the cancer . . . pulmonary disease and cigarette smoking" and specifically testified that "[y]ou cannot say which one caused it." (WCJ Liebau's Decision, April 9, 2004, p. 1). WCJ Liebau found that Dr. Altschuler "could not say for sure" if the exposure to smoke and fumes as a firefighter or the cigarette smoking was the substantial contributing factor to the development of cancer that led to Decedent's untimely death. Id.

Subsequently, Claimant filed an appeal to the Board. Claimant argued that WCJ Liebau failed to adequately explain why he found the testimony of Employer's expert, Dr. Epstein, to be more credible than Dr. Altschuler's testimony. Claimant also argued that it was not clear from the decision whether WCJ Liebau applied the correct burden of proof.

In its decision dated March 21, 2006, the Board agreed with Claimant, vacated WCJ Liebau's decision and order and remanded the matter. The Board found that WCJ Liebau did not render a reasoned decision when discussing the appropriate burden of proof and whether the work-related occupational disease was a contributing factor to Decedent's death. The Board directed WCJ Liebau to render credibility determinations with respect to the testimony of the medical experts and "articulate

objective reasons for those determinations." (Board's Decision, March 21, 2006, p. 7). The Board also directed WCJ Liebau to address whether or not Claimant met her burden of proof.

Following this remand, by decision and order dated January 19, 2007, WCJ Liebau granted Claimant's fatal claim petition finding that Decedent's work-related occupational disease was a substantial contributing factor in his death. WCJ Liebau indicated that after "carefully" considering the testimony of the two medical experts, he noted that Dr. Epstein had not reviewed any "actual x-ray films or CAT Scan films in preparation for his testimony." (WCJ Liebau's Decision, January 19, 2007, p. 2). He noted that Dr. Epstein only reviewed the films taken in 1994, even though he had testified a number of years after those films were completed. WCJ Liebau found Dr. Altschuler's testimony to be credible and found Dr. Epstein's testimony not credible or persuasive where it conflicted with the testimony of Dr. Altschuler.

Employer appealed to the Board. Employer argued that WCJ Liebau's findings were not supported by substantial competent evidence. It also argued that Claimant had not met her burden of proof, the testimony of Dr. Altschuler was equivocal and that the WCJ's decision was not a reasoned decision. The Board, however, affirmed this decision and order by WCJ Liebau. Employer then filed a petition for review with this Court.

On appeal,[4] Employer argues that the Board erred: 1) when it affirmed WCJ Liebau's finding that Claimant met her burden on the fatal claim petition because

[4] Our scope of review in a workers' compensation appeal is limited to determining whether an error of law was committed, constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704. Further, in Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002), our Supreme Court held that "review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in
(Footnote continued on next page…)

that finding is not supported by substantial competent evidence and the entire decision is not a reasoned decision; 2) when it affirmed WCJ Liebau's credibility determinations regarding the medical experts' testimony; 3) when it vacated three decisions of WCJ Weinberg and WCJ Liebau, dated April 9, 2004, August 14, 2002, and March 29, 2001, which had properly denied the fatal claim petition because Claimant failed to prove, through unequivocal medical evidence, that Decedent's occupational disease was a substantial contributing factor in his death; 4) when it vacated and remanded WCJ Liebau's decision dated August 14, 2002, on the basis of a reasoned decision because Claimant did not reserve such issue on appeal and the Board impermissibly substituted its own findings; and 5) when it reversed WCJ Liebau's decision dated April 4, 2004, because he committed a harmless error.

First, we will consider Employer's argument that the Board erred in affirming WCJ Liebau's finding that Claimant had met her burden on a fatal claim petition because that finding is not supported by substantial competent evidence of record. We disagree.

Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Corcoran v. Workers' Compensation Appeal Board (Stuart Painting Company), 601 A.2d 887 (Pa. Cmwlth.), petition for allowance of appeal denied, 530 Pa. 657, 608 A.2d 31 (1992). When deciding a substantial evidence problem, the Court must determine whether the entire record contains evidence which a reasonable person might find sufficient to support the

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(continued…)

which such question is properly brought before the court." Wintermyer, 571 Pa. at 203, 812 A.2d at 487.

WCJ's findings. Laird v. Workers' Compensation Appeal Board (Michael Curran & Associates), 585 A.2d 602 (Pa. Cmwlth. 1991).

In a fatal claim petition, the claimant must establish first that he or she is a widow or widower of the claimant in order to qualify for benefits under the Act. Cyga v. Workmen's Compensation Appeal Board (Shade Mining Company), 524 A.2d 1078 (Pa. Cmwlth. 1987). Next, the claimant must show by unequivocal medical evidence, that the deceased suffered from an occupational disease and that such disease was a substantial, contributing factor in bringing about death. Martin v. Workers' Compensation Appeal Board (Red Rose Transit Authority), 783 A.2d 384, 389 (Pa. Cmwlth. 2001), petition for allowance of appeal denied, 568 Pa. 710, 796 A.2d 988 (2002).

An expression of medical opinion will meet the standard of unequivocal medical testimony if the expert testifies that in his expert opinion there is a relationship or that the expert thinks or believes that there is a relationship. Cerro Metal Products Company v. Workers' Compensation Appeal Board (Plewa), 855 A.2d 932 (Pa. Cmwlth. 2004), petition for allowance of appeal denied, 582 Pa. 678, 868 A.2d 1202 (2005). Complete medical certainty is not required and the testimony of the expert must be taken as a whole. Id. Also, it is not a requirement that a medical expert use the magical words of "substantial contributing factor" when expressing his opinion. Bethlehem Mines Corporation v. Workmen's Compensation Appeal Board (James), 528 A.2d 1078, 1079 (Pa. Cmwlth. 1987). Rather, it is sufficient that a medical expert express his opinion with reasonable certainty. Id. The question of whether unequivocal medical evidence exists to establish causation is a question of law fully reviewable by this Court. Id.

Here, it is undisputed that Claimant was the widow of Decedent. It is also undisputed that Decedent suffered from an occupational disease, i.e., lung disease

caused by twenty-one years of exposure to heat, smoke, gases and fumes. Employer accepted liability for the same and began making payments of what it characterized as partial disability benefits as of June 21, 1992. The question raised by Employer is whether Claimant met her burden and established through Dr. Altschuler's testimony that Decedent's occupational disease was a substantial contributing factor in his death. Employer argues that Dr. Altschuler testified that Decedent's lung disease, which he recognized as compensable under the Act, did not cause his cancer.

A review of Dr. Altschuler's entire testimony indicates that while he did note that "cigarette smoking and asbestos exposure and other inhalants" were contributing factors to Decedent's death, he testified that it was his opinion, to a reasonable degree of medical certainty, that Decedent "died of cancer of the lung with metastases and that his exposure to smoke, asbestos and other toxic inhalants were substantial contributing factors in the development of his carcinoma". (N.T., Dr. Altschuler, February 22, 2000, pp. 19, 21). Dr. Altschuler stated that Decedent's death resulted from the same disease that caused his disability when he testified as follows:

> Q: Doctor, do you have an opinion as to whether Mr. Barber's disabling lung disease resulted in his death?
>
> A: Yes.
>
> Q: Could you explain to us the basis of your opinion; can you clarify what you mean by that, Doctor?
>
> A: His lung disease was a combination of lung cancer and reactive airway disease and interstitial fibrosis; those were the combining factors of his lung disease. They all contributed to his death. The lung disease was the actual cause of death.
>
> Q: In your opinion, Doctor, is the cause that resulted in his death the same as the cause that resulted in his disability?
>
> A: Yes.

(N.T., Dr. Altschuler, February 22, 2000, pp. 22, 23).

Further, Dr. Altschuler testified, in response to additional questions concerning his expert medical opinion, as follows:

> Q: Could you weigh in those factors for us, please as to what factors you're referring to?
>
> A: With regard to the lung disease, the effect of the inhalants and toxic materials, they were the cause of his lung disease, the diffusion abnormality that we're seeing on pulmonary function studies, the deterioration of his breathing.
>
> As far as the cancer of the lung, the same factors that caused his underlying lung disease caused the cancer of the lung but with the addition of cigarette smoking; so, I can't say that they were the 100 percent cause of his underlying lung disease. They were a substantial cause of his lung cancer.

(N.T., Dr. Altschuler, February 22, 2000, p. 54.)

Taken as a whole, we conclude that Dr. Altschuler's testimony provides sufficient support for WCJ Liebau's determination that Decedent's occupational disease was a substantial contributing factor in his death.

Employer also argues that WCJ Liebau failed to issue a reasoned decision. Again, we disagree.

Section 422(a) of the Act addresses the reasoned decision requirement, and provides as follows:

> 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 [WCJ] shall specify the evidence upon which the [WCJ] relies and state the reasons for accepting it in conformity with this section. When faced with conflicting evidence, the [WCJ] must adequately explain the reasons for rejecting or discrediting competent evidence…The adjudication shall provide the basis for meaningful appellate review.

77 P.S. §834.

Our Supreme Court discussed this Section of the Act in Daniels v. Workers' Compensation Appeal Board (Tristate Transport), 574 Pa. 61, 828 A.2d 1043 (2003), wherein the Court stated that "a [WCJ's] decision is 'reasoned' for purposes of Section 422(a) if it allows for adequate review by the [Board] without further elucidation, and if it allows for adequate review by the appellate courts under applicable standards of review." Daniels, 574 Pa. at 76, 828 A.2d at 1052. Further, the Court in Daniels held that when the testimony presented is by way of deposition, a WCJ must articulate reasons why the testimony of one witness was credited over the testimony of another; the "resolution of conflicting evidence cannot be supported by a mere announcement that [the WCJ] deemed one expert more 'credible and persuasive' than another." Daniels, 574 Pa. at 78, 828 A.2d at 1053.

In his decision, WCJ Liebau noted the medical testimony provided by Drs. Altschuler and Epstein, both of whom agreed that Decedent died of lung cancer. Nevertheless, WCJ Liebau indicated that Dr. Altschuler and Dr. Epstein differed on the cause of said cancer and Decedent's ultimate demise, with Dr. Altschuler attributing the cause to both Decedent's smoking history and his occupational exposures and Dr. Epstein attributing the same solely to the former. After carefully considering this conflicting testimony, WCJ Liebau accepted the testimony of Dr. Altschuler as credible and rejected the testimony of Dr. Epstein where it conflicted. WCJ Liebau explained his credibility determination noting that Dr. Altschuler considered the supplemental agreement acknowledging that Decedent had an occupational lung disease for which he was receiving workers' compensation benefits. WCJ Liebau further explained that Dr. Epstein did not review any actual x-ray films or CAT scan films, but merely relied upon an x-ray taken in 1994.

As WCJ Liebau specifically noted the evidence upon which he relied, stated his reasons for accepting the evidence and adequately explained why he rejected the conflicting medical testimony, thereby providing for meaningful appellate review, we cannot say that his decision was not reasoned.

Next, Employer argues that the Board erred in affirming WCJ Liebau's decision because he changed the credibility determinations regarding the testimony of the medical experts. We disagree.

The Board has broad discretionary power to order a remand. Joseph v. Workers' Compensation Appeal Board (Delphi Company), 522 Pa. 154, 560 A.2d 755 (1989). When the Board remands a matter to a WCJ, the WCJ can change the original credibility determination made as to a medical expert as long as such action is within the parameters of the remand order. Teter v. Workers' Compensation Appeal Board (Pinnacle Health Systems), 886 A.2d 721 (Pa. Cmwlth. 2003). Also, on remand from the Board with directions to explain the rationale for credibility determinations, a WCJ is not required to reach the same result as in the original decision. Id.

The Board, in its decision, remanded the matter and specifically directed the WCJ to "render credibility determinations with respect to the testimony of the medical experts and articulate objective reasons for those determinations." (Board's Decision, March 21, 2006, p. 7). Thus, WCJ Liebau acted within his authority and in accordance with the Board's instructions on remand and we see no error by WCJ Liebau in this regard.

Next, with regard to Employer's third argument, Employer argues that the Board erred in reversing three previous WCJ decisions which denied Claimant's fatal claim petition. Employer argues that the Board went beyond its scope of review and erroneously remanded the decisions. We disagree.

The Board has broad discretionary power to order a remand. Joseph. The Board can order a remand when it finds that there are questions of fact, when it finds that the WCJ failed to consider a memorandum of law, when it finds that the WCJ failed to consider an issue entirely, and when it finds that the WCJ failed to utilize a correct legal principle. Id. (citations omitted).

With respect to WCJ Weinberg's decision dated March 29, 2001, the Board found that certain numbered findings of fact, specifically, findings of fact Nos. 6 and 7, were missing from the WCJ Weinberg's decision. The Board noted that it would not "speculate" as to whether the WCJ made an "administrative error in numbering, or whether these are pertinent Findings erroneously excluded from the Decision." (Board's Decision, April 19, 2002, p. 3). Additionally, the Board noted that finding of fact No. 8 was ambiguous and required clarification. We cannot say that the Board erred in remanding the matter to the WCJ.

Considering WCJ Weinberg's decision dated August 14, 2002, the Board vacated findings of fact No. 2(b) and No. 5 and again remanded the matter as it found that WCJ Weinberg had failed to issue a reasoned decision. Specifically, the Board found that the WCJ failed to accurately summarize the testimony of Dr. Altschuler and erred in characterizing Dr. Altschuler's testimony as indicating that a "number of factors" could have caused the cancer, when such characterization was "absolutely critical to the applicable legal test." (Board's Decision, August 5, 2003, at p. 4). The Board also concluded that the WCJ failed to "accurately outline critical evidence, and his reliance on diagnostic test results in determining credibility was incomplete, at best." (Board's Decision, August 5, 2003, at p. 5). We cannot say that the Board erred in remanding the matter for these reasons.

With respect to WCJ Liebau's decision dated April 9, 2004, the Board remanded the matter as it found that WCJ Liebau had applied an improper burden of

proof. The Board noted that Claimant only had to prove that the work-related exposure to smoke and fumes "was a, and not the only substantial contributing factor to Decedent's death . . ." (Board's Decision, March 21, 2006, p. 7) (emphasis in original). The Board also noted that WCJ Liebau had indicated that Dr. Altschuler could not say which of the two circumstances was the substantial contributing factor. Id. The Board concluded that WCJ Liebau could not rely on that fact as an objective basis for rejecting Dr. Altschuler's testimony. The Board directed WCJ Liebau to render credibility determinations with respect to the testimony of the medical experts and "articulate objective reasons for those determinations" as well as to address whether Claimant met her burden of proof. Id. Again, we cannot say that the Board erred in remanding this decision.

Fourth, Employer argues that the Board erred in vacating and remanding WCJ Weinberg's decision dated August 14, 2002, as Claimant did not preserve the "reasoned decision" issue. Additionally, Employer argues that the Board substituted its own findings for those of WCJ Weinberg. We disagree.

Although Claimant may not have used the "magic words" of "reasoned decision" on her appeal form, Claimant did specifically challenge WCJ Weinberg's findings as well as his credibility determinations with respect to the medical testimony of Dr. Altschuler. In essence, Claimant was raising a reasoned decision argument, as characterized by the Board and we cannot say that Claimant waived this argument. Contrary to Employer's argument, the Board did not substitute its findings for those of WCJ Weinberg.

Instead, the Board concluded that WCJ Weinberg had erred by failing to discuss the diagnostic test results corroborating the testimony of Claimant's medical expert and that reliance on similar results in accepting the testimony of Employer's medical expert, Dr. Epstein, was incomplete at best. The Board also concluded that

WCJ Weinberg had failed to accurately outline critical evidence. We see no error by the Board in this regard.

Finally, Employer argues that the Board erred in vacating and remanding WCJ Liebau's decision dated April 9, 2004, because he committed a harmless error when he stated that Decedent's occupational disease was not "the" substantial contributing factor, as opposed to "a" substantial contributing factor, in his death. Employer argues that WCJ Liebau specifically found that Decedent's death was not connected to his work-related injury. Again, we disagree.

As we noted above, Claimant had the burden in her fatal claim petition to show that her husband's disease was a substantial contributing factor in his death. Martin. WCJ Liebau significantly altered this burden by stating that Claimant had the burden to establish that said disease was "the" substantial contributing factor. Additionally, WCJ Liebau appears to have mischaracterized Dr. Altschuler's testimony in this regard. Thus, we cannot say that the error was harmless or that the Board erred in vacating and remanding WCJ Liebau's decision and order.

Accordingly, we affirm the Board's order.

JOSEPH F. McCLOSKEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Philadelphia, Petitioner	:	
v.	:	No. 818 C.D. 2008
Workers' Compensation Appeal Board (Barber), Respondent	:	

O R D E R

AND NOW, this 24th day of December, 2008, the decision and order of the Workers' Compensation Appeal Board, dated April 7, 2008, is hereby affirmed.

JOSEPH F. McCLOSKEY, Senior Judge