

**[J-110-2001]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

WAYNE DANIELS,	:	No. 51 EAP 2000
	:	
Appellant	:	Appeal from the Published Opinion and
	:	Order of the Commonwealth Court (en
	:	banc), dated May 23, 2000, affirming the
v.	:	Order of the Workers' Compensation
	:	Appeal Board, dated August 12, 1998.
	:	
WORKERS' COMPENSATION APPEAL	:	753 A.2d 293 (Pa. Cmwlth. 2000)
BOARD (TRISTATE TRANSPORT),	:	
	:	ARGUED: October 15, 2001
Appellee	:	
	:	
	:	
	:	
	:	

**CONCURRING AND DISSENTING OPINION**

**MADAME JUSTICE NEWMAN**

**DECIDED: July 22, 2003**

I concur in the result reached by the Majority. I write separately to express my concern that, permitting the Workers' Compensation Judge (WCJ) to declare that a particular witness is simply credible or not credible, without setting forth in some detail the basis for the findings of fact, fails to effectuate the purpose of the statute and neither results in a reasoned decision nor does it facilitate appellate review.

The credibility of a witness is a "subjective amorphous quality, often defined as much by the preconceptions of the persons who perceive the witness as by the witness' personal characteristics." 81 Am.Jur.2d Witnesses § 1027. Furthermore, the credibility of a witness

may be affected by factors such as the credibility of other witnesses in this case, the plausibility of the theory that the witness is meant to support, the order in which witnesses are called, and the character and preconceptions of the fact finder. Id. Thus, to justify the use of any witness, the witness must be competent; the witness must be credible; and, finally, the witness must be believed.

The issue of witness credibility is, in actuality, a bifurcated one. There are two components to a finding of credibility -- observational credibility and substantive credibility. Observational credibility goes to the demeanor of the witness when testifying and requires that the fact finder actually be present to observe it. "The manner in which a witness tells his [or her] story; the advantages he [or she] appears to have had for gaining accurate information on the subject, the accuracy and retentiveness of his [or her] memory; his [or her] capacity for consecutive narration of acts and events; his [or her] apparent frankness and intelligence, and numerous other considerations" animate the formulation of witness credibility determinations. Darner v. S.E. Idaho In-Home Svc., 841 P.2d 427 (Idaho 1992). This is the "demeanor credibility," concerning which the Majority deems no explanation or analysis is required and asserts that a mere visceral determination is sufficient to satisfy the "reasoned decision" requirement of Section 422(a) of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 834. Substantive credibility, however, may be affirmatively judged on the grounds of inaccuracies and conflicting facts contained in the testimony of the witness **and** is not addressed by the Majority.

The findings of the WCJ must assure the reviewing court that all of the evidence has been examined by the WCJ and that there is ample support for the resultant findings. A reviewing court requires no more than assurance from the WCJ that he or she has made his or her findings from the entire record, that these findings are supported by substantial

evidence, and that he or she has sufficiently articulated the reasons for arriving at these conclusions, including some basis for its credibility determinations. Justice Cappy, now Chief Justice Cappy, in his responsive Opinion in Bowman v. Dept. of Env'tl. Res., 700 A.2d 427, 431 (Pa. 1997) (Cappy, J. concurring and dissenting), made the following observation, applicable to the instant matter:

An agency opinion needs to contain sufficiently detailed findings of fact, together with a coherent legal discussion, so that the Commonwealth Court can perform a meaningful review. Any less would frustrate the legislative intent, in addition to providing agency panels with a means of nullifying the effect of legislation, because it would enable an agency to shield its decisions from review by drafting opinions in generalized and conclusory terms.

The suggestion that a WCJ may insulate his findings from review by denominating them credibility determinations is a very real concern. While factors other than demeanor and inflection go into the decision of whether or not to believe a witness, failure to articulate the basis for a finding of credibility leaves the reviewing court adrift and the parties at the mercy of the WCJ. This is so because it has become a bedrock principle of law that credibility determinations delivered by fact finders are sacrosanct and may not be disturbed on appeal. See, e.g., McCauley v. Imperial Woolen Co., 104 A. 617 (Pa. 1918). The task of the reviewing court is facilitated where documents or objective evidence contradict the story of the witness; or the story itself is so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it. Where such factors are present, an appellate court is permitted to find clear error, even in a finding purportedly based on a credibility determination. But where such factors are not present, there is little to review if no rationale is provided for the credibility determinations of the fact finder. Further, a reviewing court is unable to subsequently ascertain whether the Board properly performed its review function if it is unable to understand the rationale underpinning the decision of the WCJ.

The WCJ cannot reject evidence for no reason or for the wrong reason. In my view, a WCJ may not make credibility determinations solely on "instinct." An explanation from the WCJ, at a minimum, to explain those portions of the testimony found to be credible and/or those aspects of demeanor that formed the basis for a credibility finding is required so that a reviewing court can determine whether the reasons for acceptance or rejection were improper. It is beyond cavil that a simple credibility determination does not satisfy the substantive purposes of the fact-finding requirement. A statement that the WCJ finds a witness credible is no more enlightening than a statement that a claimant is not permanently disabled. Specific findings of fact are essential to an effective system of administrative law. "The practical reasons for requiring administrative findings are so powerful that the requirement has been imposed with remarkable uniformity by virtually all federal and state courts. The reasons have to do with facilitating judicial review, avoiding judicial usurpation of administrative functions, assuring more careful administrative consideration, helping parties plan their cases for rehearings and judicial review, and keeping agencies within their jurisdiction." Perez v. United States Steel Corp., 426 N.E.2d 29 (Ind. 1981).

Both a claimant and the employer have a legal right to know the evidentiary bases upon which the ultimate finding rests. That responsibility initially lies with the administrative agency, which must enter specific findings of basic fact to support its findings of ultimate fact and the resulting conclusions of law. The statutory requirement of a reasoned decision serves to protect against careless or arbitrary administrative action. The requirement that findings of basic fact be entered ensures that a careful examination of the evidence, rather than visceral inclinations, will control an agency's decision.

There are cogent and strong reasons for having a [reasoned decision] requirement in Pennsylvania. They include these: (i) the Administrative

Agency Law requires it; (ii) failure to provide an adequate explanation for a [WCJ's] decision leaves the loser with an impression of arbitrariness and unfairness and a legacy of bitterness and alienation; (iii) if such failure becomes routine, it will alienate the Bureau Of Workers' Compensation from the community of interest which it was created to serve; (iv) a statement of reasons by the [WCJ], who is the fact finder, will aid the appellate reviewer to do his/her job; (v) clear reasons for decisions which deliver required but unjust results can focus disapproval on the law's folly and promote its reform; (vi) fully reasoned decisions will enable parties to understand the issues they must confront, to appreciate the kind of evidence that the tribunal will want to hear and, by permitting litigants to make informed judgments as to chances of success, discourage inappropriate applications or appeals; (vii) adequate reasons provide future litigants with the means for invoking the principle of relative fairness[,] which holds that like cases should lead to like results; (viii) decision writing with reasons has an important role in the decision-making process by causing the adjudicator to think more clearly and to analyze more carefully; (ix) full written reasons provide a means of reviewing the decision-making process at a later date and give substantive content to the right of appeal.

Stephen I. Richman, Reasoned Decisions in Workers' Compensation Cases, Pa. Bar Assoc. Quarterly, 63 Pa.B.A.Q. 32, 33 (January 1992).

When the fact finder does not reveal the factual basis for his or her ultimate determination, which is the quintessential purpose of the requirement that administrative agencies enter specific findings of fact as part of their orders, the statutory Workers' Compensation scheme is frustrated and the parties are dealt a disservice. I would hold that, if the factual basis for the decision includes a determination based substantially on the credibility of a witness, the WCJ must identify whether reliance was placed on observational credibility and/or substantive credibility and provide any specific evidence of the observed demeanor, manner, or attitude of the witness, or any perceived inconsistencies or lack thereof. I would also find that a reviewing court should only accord great weight to a determination of credibility that identifies the factors that support it. Accordingly, I dissent

from that portion of the Majority Opinion that permits a WCJ to simply set forth credibility determinations without accompanying rationale.