

[J-154-2001]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

LEON E. WINTERMYER, INC. AND	:	No. 41 MAP 2001
AMERICAN GENERAL GROUP,	:	
	:	Appeal from the Order of the
Appellants	:	Commonwealth Court dated June 27,
	:	2000, at 2330 CD 1999, affirming the
	:	Order of the Workers' Compensation
v.	:	Appeal Board dated October 29, 1997 and
	:	reversing the Order dated August 11,
	:	1999, at A98-4227
WORKERS' COMPENSATION APPEAL	:	
BOARD (MARLOWE),	:	
	:	
Appellee	:	
	:	
PENN NATIONAL INSURANCE CO.	:	
	:	
Intervenors	:	ARGUED: November 13, 2001

CONCURRING OPINION

MR. CHIEF JUSTICE ZAPPALA

Decided: December 10, 2002

I concur in the result reached by the majority. Simply put, the Workers' Compensation Judge (WCJ) credited the testimony offered by Employer regarding the nature of Claimant's duties and found the testimony of Claimant and her medical expert incredible. Having found that Employer's evidence rebutted the factual predicate upon which Claimant's medical expert based his opinion, the WCJ concluded that Claimant failed to sustain her burden of proving that she suffered carpal tunnel syndrome *during the course and scope of her employment*. Thus, the Workers' Compensation Appeal Board and the Commonwealth Court erred in awarding workers' compensation benefits based on the ground that the WCJ capriciously disregarded Claimant's medical evidence. The fact that

Employer presented factual evidence as opposed to medical evidence does not alter the analysis.

As to the application of the capricious disregard standard in the appropriate case, I would adhere to the case law holding that such standard applies only where the party with the burden of proof is the sole party to present evidence, yet does not prevail before the fact finder. See Russel v. Workers' Compensation Appeal Board, 550 A.2d 1364 (Pa. Cmwlth. 1988) (holding that if no evidence was presented to support the prevailing party, there is no evidence upon which to apply the "substantial evidence" test and therefore the "capricious disregard" standard applies). The majority finds difficulty with this approach and states that "it is troubling to suggest that the General Assembly intended for judicial review to be simply unavailable in an instance in which substantial evidence supported the agency's factual findings, but where it was clear beyond doubt that its conclusions were based upon capricious disregard of other evidence." Majority opinion at 13. I do not share this concern because if substantial evidence exists to support the factual findings of the WCJ, the appellate tribunal should not delve into whether the WCJ capriciously disregarded "other evidence."

I also do not view this Court's decision in Fraternal Order of Police v. PLRB, 735 A.2d 96 (Pa. 1999), as altering the capricious disregard standard. The majority concedes that Fraternal Order of Police did not involve such standard, but rather addressed the "in accordance with law" standard of review of administrative decisions. Majority opinion at 14. Finally, I would refrain from expanding the application of the capricious disregard standard, even on a limited basis, in a case where the factual predicate does not warrant it.¹

¹ The majority specifically holds that "review for capricious disregard of material, competent evidence is an appropriate component of appellate consideration in every case in which such question is properly brought before the court." Majority opinion at 15. I believe that such questions are only "properly before the court" when the party with the burden of proof is the sole party to present evidence, yet loses before the fact finder.