

[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 entered on June 27,
	:	2000 at 2330 CD 1999, which affirmed the
	:	Order of the WCAB entered October 29,
v.	:	1997 and reversed the Order of the
	:	WCAB entered August 11, 1999 at A98-
	:	4227 and remanded.
WORKERS' COMPENSATION APPEAL	:	
BOARD (MARLOWE),	:	
	:	
Appellees	:	ARGUED: November 13, 2001
	:	
PENN NATIONAL INSURANCE CO.	:	
Intervenor	:	

CONCURRING OPINION

MR. JUSTICE CAPPY

Decided: December 10, 2002

I join the majority opinion. I write separately for two reasons: first, to clarify my understanding of the proper place for the capricious disregard standard in the overarching statutory framework that governs appellate review of an agency's adjudication, and second, to emphasize the narrow circumstances in which review for a capricious disregard of the evidence will lead to the reversal of an agency's decision.

To set forth my understanding of where review for a capricious disregard of the evidence fits within the spectrum of appellate review, a brief discussion of the statutory framework governing appellate review of an agency adjudication is required. The

legislature has narrowed the sphere of an appellate court's review of an agency's decision to four distinct and separate bases for reversal:

After hearing, the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter A of Chapter 5 [relating to practice and procedure of Commonwealth agencies] have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence.

2 Pa.C.S. §704 (explanation supplied). Thus, the statute, viewed as setting forth an overarching framework in which to conduct appellate review, limits appellate review of an agency's adjudication to: (1) constitutional determinations; (2) legal conclusions; (3) procedural regularity; and (4) findings of fact.¹

In this appeal there is neither an assertion that the agency violated the constitutional rights of the Appellant nor a claim of irregular procedure in the agency proceedings. Therefore, only two of these four areas of review have been raised. Assertions have been raised regarding the legal conclusions reached by the workers' compensation judge and it has been suggested that issues regarding findings of fact are implicated as well.

As to legal conclusions, section 704 states that an appellate court may review the agency decision to determine whether the adjudication is "in accordance with law." Recently, our court has clarified the contours of an "in accordance with law" review. Fraternal Order of Police v. PLRB, 735 A.2d 96 (Pa. 1999). The "essential import is to

¹ See generally, Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. App. Prac. & Process 47, 47-49 (2000)(dividing appellate review into three parts: review of facts, review of law, and review of discretion, each with varying level of deference to the action or decision under review).

establish limited appellate review of agency *conclusions* to ensure that they are adequately supported by competent factual findings, are free from arbitrary or capricious decision making, and to the extent relevant, represent a proper exercise of the agency's discretion." Id. at 99 (emphasis supplied).

Thus, review for whether an agency's legal conclusions are "in accordance with law" consists of at least three distinct facets. Stated another way, FOP sets forth certain inquiries to be applied in the appropriate situation: (1) whether the legal conclusions are supported by competent factual findings; (2) whether the legal conclusions were made in an arbitrary and capricious fashion; and/or (3) whether the legal conclusions were an abuse of discretion.

As to findings of fact, section 704 offers that an appellate court must affirm the agency's adjudication, unless the appellate court determines that "any *findings of fact* made by the agency and necessary to support its adjudication is not supported by substantial evidence." 2 Pa.C.S. §704 (emphasis added). The statute itself provides the standard of review appropriate for findings of fact: the inquiry regarding an agency's affirmative factual findings is whether they are supported by substantial evidence.

With this background, I write to clarify my understanding of the placement of review for a capricious disregard of the evidence within this framework because I believe there to be some confusion or disagreement into which statutory area a capricious disregard review falls. I am persuaded that while a capricious disregard review has as a component consideration of the evidence offered at a hearing, it is not an inquiry regarding an agency's affirmative findings of fact. Rather, it is a review of the agency's legal conclusions to determine whether in making those legal conclusions, the agency capriciously disregarded evidence of record that would have clearly and beyond doubt commanded a different result. Being a review of legal conclusions, consideration of whether a tribunal capriciously disregarded evidence is a component of the in accordance with law review.

This conclusion is consistent with, and supported by, our decision in FOP. As stated in FOP, an appellate court will review to determine if the agency's *conclusions* are, *inter alia*, free from arbitrary and capricious decision making. FOP, 735 A.2d at 99. As the majority in this appeal explains, the concept of legal conclusions being free from arbitrary and capricious decision making, and the related concept of the legal conclusions being reasonable, "overlaps with and, indeed, *subsumes* the traditional description of the 'capricious disregard' facet of review." Majority Slip Op. at 15 (emphasis supplied); id. n.13 (capricious disregard sub-component of in accordance with law). Simply stated, if an agency capriciously disregards evidence in reaching its legal conclusions, its adjudication is capricious, and thus, not in accordance with law. It therefore cannot be affirmed. 2 Pa.C.S. §704.²

In sum, it is my understanding that review for a capricious disregard of the evidence, at its core, does not entail consideration of the agency's affirmative *finding* of facts, but instead goes to a review of the agency's legal *conclusions*.³ It "is not only legal but

² It is for this reason that I cannot agree with Madame Justice Newman's contention that review for a capricious disregard of evidence is not the application of a standard of review, but a legal conclusion. I believe that it can be conceptualized as both. Specifically, while not all standards of review describe a standard and a legal conclusion (see the *de novo* standard of review applicable to pure questions of law), other standards do have a dual meaning. The standard of review described as an "abuse of discretion" sharpens the point. An appellate court may review a trial court's admission of evidence to determine if the trial court committed an abuse of discretion. The standard of review is the "abuse of discretion" standard. If the appellate court determines the trial court erred, the legal conclusion is that the trial court "abused its discretion."

³ The concept of appellate review for whether an agency's *conclusions* are supported by "substantial evidence" has become part of the appellate court lexicon. See Wilson Area School District v. Easton Hospital, 747 A.2d 877, 879 (Pa. 2000)(*decision* is supported by substantial evidence); Mallios v. Pa. State Police, Bureau of Liquor Control Enforcement, 633 A.2d 1163, 1165 (Pa. 1993)(whether *order* of Board is supported by substantial evidence). Use of the "substantial evidence" verbiage to describe both review of an agency's affirmative findings of fact *and* review of an agency's legal conclusions (continued...)

structural and, pursuant to legislative design and long-standing principles, requires correction." Majority Slip Op. at 15.

Second, while I believe that review for whether the agency's legal conclusions were made by a capricious disregard of the evidence is an appropriate appellate function, I, like the majority, recognize that such review has the potential for abuse. Thus, I emphasize that reversal by an appellate court of an agency's determination by application of the capricious disregard standard will be the exceptional case. As stated by the majority, "where there is substantial evidence to support an agency's factual findings [in accord with section 704], and those findings in turn support the [legal] conclusions [in accord with FOP], it should remain a rare instance in which an appellate court would disturb an adjudication based upon capricious disregard." Majority Slip Op. at 16 n.15 (comments added). More precisely, reversal based on this type of review should occur only where it is "clear beyond doubt" that an agency's legal conclusions were based upon capricious disregard of evidence - a very high bar. Id. at 14. As suggested by the majority, this might occur if "the agency expressly refused to resolve conflicts in the evidence and make essential credibility determinations." Id. It might also be the case where the agency completely ignores

(...continued)

unnecessarily confuses matters. I believe it far more desirable to keep the inquiry regarding findings of fact distinct from the inquiry regarding conclusions of law and to use distinct terms with respect to each area. To keep the inquiries separate, and to create a common lexicon, I would suggest using the terminology "substantial evidence" only with respect to the deferential review of an agency's findings of fact. This position is of course, grounded in section 704. 2 Pa.C.S. §704 (whether findings of fact are supported by substantial evidence). For review of an agency's legal conclusions, i.e., whether the conclusions are in accordance with law, I would advocate use of the terms articulated in FOP. That is review, where appropriate, to determine if the agency's legal conclusions are adequately supported by competent factual findings, are arbitrary and capricious, or constitute an abuse of discretion. FOP, 735 A.2d at 99.

overwhelming evidence without comment. Thus, reversal based upon review for a capricious disregard of the evidence would be an exceedingly rare event.⁴

Finally, I envision reversal for a capricious disregard of evidence to be the exception for an additional reason. The agency's finder of fact is bound by section 422(a) of the Workers' Compensation Act (the "Act"). 77 P.S. §1 *et seq.* This provision requires, *inter alia*, a reasoned decision containing findings of fact and conclusions of law based upon the evidence as a whole. Specifically:

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 workers' compensation judge shall specify the evidence upon which he relies and state the reasons for accepting it in conformity with this section. **When faced with conflicting evidence, the workers' compensation judge must adequately explain the reasons for rejecting or discrediting competent evidence. Uncontroverted evidence may not be rejected for no reason or for an irrational reason; the workers' compensation judge must identify that evidence and explain adequately the reasons for its rejection.**

77 P.S. §834 (emphasis supplied). Thus, if a workers' compensation judge considers all the evidence offered by the parties, sets forth reasons for making factual determinations, including rational reasons for the rejection of uncontroverted evidence, then it is likely there

⁴ It is for this reason that I believe that Chief Justice Zappala's position unnecessarily circumscribes appellate review. I, like the majority, envision a situation in which a tribunal disregards overwhelming evidence of record without comment which, if considered, would command a different result. Without the tool of review for a capricious disregard of the evidence, an appellate court would be limited to a review of whether the affirmative findings of fact made by the judge were supported by the substantial evidence. Consideration of the overwhelming contra-evidence, not found by the agency as facts, would be precluded.

will be no grounds for an appellate court to overturn his or her legal conclusions on the basis of a capricious disregard of the evidence.

In sum, there is a place for appellate review of whether an agency capriciously disregarded the evidence in reaching its legal conclusions and this review is part of the "in accordance with law" sphere of review. Furthermore, I believe that reversal of an agency's adjudication on this basis must be the rare exception, and will be so, in part, because of the dictates of section 422(a) of the Act.

Mr. Justice Nigro joins this concurring opinion.