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

LEON E. WINTERMYER, INC. AND AMERICAN GENERAL GROUP,	:	No. 41 MAP 2001
Appellants	:	Appeal from the Order of the Commonwealth Court entered on 6/27/00 at 2330 CD 1999, which affirmed the
v.	:	Order entered 10/29/97 and reversed the Order entered 8/11/99, at A98-4227 and remanded to WCAB
WORKERS' COMPENSATION APPEAL BOARD (MARLOWE),	:	
Appellees	:	
PENN NATIONAL INSURANCE CO.	:	
Intervenors	:	Argued: November 13, 2001

CONCURRING OPINION

MADAME JUSTICE NEWMAN **Decided: December 10, 2002**

While I agree with the Majority that a determination of capricious disregard was unwarranted in this case, I write separately to further make it clear that I believe there is no capricious disregard standard of review of agency decisions. The appropriate standard of review in appeals from agency decisions, which has been previously articulated by this Court, is set forth in Section 5 of the Administrative Agency Law, 2 Pa.C.S. § 704. See, e.g., Fraternal Order of Police v. Pennsylvania Labor Relations Board, 735 A.2d 96 (Pa. 1999) (hereinafter FOP); Estate of McGovern v. State Employees' Retirement Board, 517 A.2d 523 (Pa. 1986). Section 5 of the Administrative Agency Law, 2 Pa.C.S. § 704 (Disposition of Appeal), as indicated by the Majority, states:

> The court shall hear the appeal without a jury on the record certified by the Commonwealth agency. 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**. If the adjudication is not affirmed, the court may enter any order authorized by 42 Pa.C.S. § 706 (relating to disposition of appeals).

2 Pa.C.S. § 704 (emphasis added). As expressed in FOP, "[The] essential import [of this standard] is to 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." FOP, 735 A.2d at 99 (emphasis added). As recognized by the majority, inherent as an element of that review process, is an examination of the evidence produced relative to the findings of the WCJ to see whether the WCJ capriciously disregarded competent evidence. It is only in performing a substantial evidence analysis that the appellate court, inter alia, looks to see that conclusions are adequately supported, constitutional rights were protected, legal precepts were properly invoked and applied, and factual findings are free from arbitrary or capricious decision making. FOP. But the touchstone of any agency adjudication remains that **substantial evidence must support the findings made by the WCJ**.

The Commonwealth Court has developed a line of cases holding that, where the burdened party is the only one to produce evidence and loses before the WCJ, the substantial evidence standard of review is inapplicable because there is no substantial evidence on which to base the findings of the lower tribunal. See, e.g., Cerasaro v. Workers' Compensation Appeal Board (Pocono Mountain Medical, Ltd.), 717 A.2d 1111

(Pa. Cmwlth. 1998); CRL of Maryland v. Workmen's Compensation Appeal Board (Hopkins), 627 A.2d 1238 (Pa. Cmwlth. 1993); Butler v. Workmen's Compensation Appeal Board (Commercial Laundry, Inc.), 447 A.2d 683 (Pa. Cmwlth. 1982). That court articulated its reasoning as follows:

> [W]here the burdened party is the only party to present evidence and does not prevail before the agency, the "substantial evidence" test falters. If no evidence was presented to support the prevailing party, there is no evidence upon which to apply the "substantial evidence" test; i.e., it is impossible to find substantial evidence to support a position for which no evidence was introduced. In such cases, therefore, the appropriate [standard] of review . . . is whether the agency erred as a matter of law or capriciously disregarded competent evidence.

Russell v. Workmen's Compensation Appeal Board (Volkswagen of America), 550 A.2d 1364, 1365 (Pa. Cmwlth. 1988).

The Commonwealth Court's capricious disregard standard represented a departure from previous Commonwealth Court cases that applied the decision of this Court in Estate of McGovern v. State Employees' Retirement Board, 517 A.2d 523 (Pa. 1986). In Kirkwood v. Unemployment Compensation Board of Review, 525 A.2d 841 (Pa. Cmwlth. 1987), the Commonwealth Court examined the standard of review articulated in McGovern, within the context of whether one or both parties presented evidence, and reasoned:

> Two possible scenarios present themselves when the burdened party fails to prevail: (a) where the evidence of the burdened party, even if believed, and substantially supporting the facts asserted, nonetheless is not sufficient, as a matter of law, to meet the imposed burden, and, (b) where the burdened party does present substantial and sufficient evidence as a matter of law, but the factfinder nonetheless finds against that party. . . . [T]o prevail, the burdened party must meet both [her] burden of production (*i.e.,* present sufficient evidence) and [her] burden of persuasion (*i.e.,* present credible evidence). . . . [W]here the burdened party did not prevail before the agency, we must assess whether [her] failure to prevail below is due to: (1) the legal insufficiency of the evidence or, (2) the lack of credibility of the evidence. . . .
>
> Kirkwood, 525 A.2d at 844 (footnotes omitted).

This analysis says nothing about a capricious disregard of competent evidence. The review properly focuses on the burdened party and the success or failure of that party to meet her requisite burden of proof. The Commonwealth Court went on to say:

> When, however, the burdened party did present sufficient evidence as a matter of law and yet failed to prevail below, we then must determine whether the reason for the adverse determination stems from the factfinder's opinion that the evidence presented was not credible, or, whether instead the factfinder committed an error of law in applying the proper principle of law to the facts presented. . . . If specific credibility determinations appear that support the result of the adjudication, then we may affirm the decision below on the basis that the burdened party failed in [her] burden to persuade the factfinder.

Id. (Emphasis omitted.) This appears to articulate a clear understanding of the appropriate standard of review, regardless of whether one party or both parties produce evidence. Thus, where a party, with the burden of proof, is the only party to present evidence and does not prevail, that party has either failed to meet her burden of production or her burden of persuasion. Because a defendant has no burden of production or persuasion, at least until the plaintiff has sufficiently met both of her burdens, the burden of persuasion may **not** shift to the defendant to produce sufficient credible evidence or lose, before plaintiff has satisfied both those burdens.

The majority cites to Odgers v. Unemployment Compensation Board of Review, 525 A.2d 359 (Pa. 1987), as a case in which this court "emphasized capricious disregard as applicable to review of agency adjudications unfavorable to the burdened party." (Majority opinion, page 12.) However, a review of Odgers indicates that this Court was concentrating on an error of law analysis, rather than one of "capricious disregard." A few months later, this Court issued its opinion in Farquhar v. Workmen's Compensation Appeal Board (Corning Glass Works), 528 A.2d 580 (Pa. 1987), one in which the employer presented no witnesses, testimony or other evidence. While indicating that the standard of review had been expressed in varying language, we stated that, "At the very least the

findings and conclusions of the fact finder must have a rational basis in the evidence of record and demonstrate an appreciation and correct application of underlying principles of substantive law to that evidence." Id. at 584-85. Barely three years later, this Court, in Pieper v. Ametek-Thermox Instruments Div., 584 A.2d 301 (Pa. 1990), relied upon Odgers for the proposition that a Section 5, substantial evidence, standard of review was the appropriate standard. Moreover, Pieper involved a workers' compensation claim in which the employer presented no medical expert testimony.

A review of the origins of a capricious disregard analysis sheds light, I believe, on the context and manner of its application. In the late 1800s, at least as far as published opinions of that era reveal, cases that were improperly submitted to a jury or in which the jury rendered a judgment that resulted in a judgment non obstante veredicto (JNOV), were often reversed by a finding that the jury capriciously disregarded the evidence or lack of evidence in their determinations. This gave rise to the adage that widows and orphans make bad law. See, i.e., Pennsylvania Railroad Co. v. Beale, 73 Pa. 504 (1873) (reversing jury award in favor of widow and children of deceased where jury capriciously disregarded the fact that decedent's failure to stop immediately before crossing a railroad track was negligence per se); Pennsylvania Railroad Co. v. Mooney, 17 A. 590 (Pa. 1889) (reversing a judgment of $8,000 for the widow of a man struck and killed by a train where the lower court should have granted a JNOV); McNeal v. Pittsburgh & W.R. Co., 18 A. 1026 (Pa. 1890) (reversing jury award of damages for widow and children of man killed in railway crossing accident). In cases such as these, this Court repeatedly said that:

> [W]here the testimony in support of an action is a mere scintilla and that opposed to it so overwhelming that no real controversy is raised, and where the jury **could not find for the plaintiff without a capricious disregard** of apparently truthful testimony, probable in itself and not at variance with any admitted or proved facts, a verdict may be directed for the defendant."

Cromley v. Pennsylvania R. Co., 60 A. 1077 (Pa. 1905) (citing Lonzer v. Lehigh Valley Railroad Co., 46 A. 937 (Pa. 1900)) (emphasis added). See also Holland v. Kindregan, 25 A. 1077 (Pa. 1893). The operative word in this analysis is "capricious." The clear meaning of capricious disregard that is gleaned from these early cases is that the fact finder intentionally and willfully overlooked overwhelming controlling law or evidence to the contrary to arrive at its intended result. This is not an application of a standard of review, but a legal conclusion. Moreover, there is no evidence in the matter sub judice that the WCJ intentionally overlooked controlling law, or evidence to the contrary, to achieve a desired outcome.

This Court has also said that, "[t]he rule stated in [Lonzer], that a verdict may be directed where a different conclusion could not be reached by the jury without a capricious disregard of [facts] . . . **does not apply** where there is a **conflict of testimony** . . . ." Heh v. Consolidated Gas Co., 50 A. 994, 995 (Pa. 1902) (emphasis added). In the instant matter, the WCJ determined that the testimony of Claimant was less than credible. Claimant went to work for Wintermyer in 1991 after she was aware that she had CTS. In fact, she informed Wintermyer that she had CTS when she was hired. The determination of the WCJ to deny benefits was a direct result of the testimony of Employer's witnesses as to the repetitive task requirements of Claimant's job and went directly to the work-relatedness of the injury. The WCJ is not bound to believe every story that a witness or witnesses willingly swears to, simply because no other witness contradicts it. Having discredited Claimant's testimony concerning the causation of her underlying CTS and its direct relationship to her job, as well as other important aspects of her testimony, the WCJ discredited the testimony of Dr. Yates because Dr. Yates' opinion that Claimant's CTS was a work-related injury was based entirely upon the discredited testimony of Claimant. The WCJ did **not** discredit the testimony of Dr. Yates because it was equivocal. The sole issue here was credibility, not unequivocality

I would reiterate that this Court has rejected the "capricious disregard" standard as applied by the Commonwealth Court beginning with McGovern and continuing to the present, even where only one party produced evidence. Moreover, it must be remembered that the defendant is not required to produce any evidence, including medical evidence, because it bears no burden of proof. Our workers' compensation jurisprudence has not held that, irrespective of the credibility determinations of the lay witnesses and of the claimant, if a physician testifies that the claimant was injured at work, then, despite a lack of factual foundation for that testimony, the testimony of the physician must be accepted and the claim granted. In the instant matter, the decision of the Commonwealth Court and the Board would set an untenable precedent of requiring the production of medical testimony by the defense or face the imposition of liability. Regardless of how many parties present evidence, the WCJ must issue findings of fact. It is these findings of fact that must be supported by substantial evidence, whether or not the evidence is controverted. If the findings of fact that are necessary to support an adjudication are supported by substantial evidence in the record, then the adjudication will be supported by substantial evidence, even if that evidence demonstrates that the party with the burden of proof has failed to carry its burden.

Substantial evidence can support a negative finding by a tribunal charged with deciding the outcome of a particular cause of action. **Insufficient** evidence presented by the burdened party is ascertainable and provides substantial evidence to support a finding that the plaintiff failed to carry his or her burden of production and the plaintiff's case has failed. **Sufficient** evidence presented by the burdened party that is not credited by the fact finder is also ascertainable and provides substantial evidence that the burdened party has failed to sustain his or her burden of persuasion. When the Commonwealth Court opined that, where "no evidence was presented to support the prevailing party, there is no evidence upon which to apply the 'substantial evidence' test," Russell, 550 A.2d at 1365,

the focus of the court's review was misdirected. That is because a capricious disregard analysis shifts the focus to the actions of the fact finder, rather than remain attentive to the sufficiency or credibility of the evidence presented. As the majority discerns, a capricious disregard analysis is an "appropriate component" of appellate consideration when undertaking a review pursuant to the substantial evidence standard of review. But it is only a mechanism to facilitate review. Because the capricious disregard analysis is applied to the findings of fact, credibility determinations and evidentiary weight of the proceedings at issue, it is not a standard of review but a tool to be utilized in determining that substantial evidence supports the ultimate determination. The substantial evidence standard is set forth in Section 5 of the Administrative Agency Law, 2 Pa.C.S. § 704 and that is the standard we must apply.