[6] In our opinion the Vice Chancellor was right in dismissing the counterclaims. Defendants' argument assumes that the rationale for dismissals by the Federal Court of the complaint and the counterclaims was the same, and that is not so. We have already discussed at some length the basis for dismissal of the complaint as ordered by the United States Supreme Court. The counterclaims were dismissed, not on the absence of a statutory remedy or CAB approval, but specifically on their merits and "with prejudice" because of Toolco's "willful and deliberate disobedience of and failure and refusal to comply with" certain discovery orders of the District Court.[6] The Court of Appeals affirmed, 2 Cir., 332 F.2d 602 (1964), and its decision became final when the United States Supreme Court dismissed its writ of certiorari as improvidently granted. 380 U.S. 249, 85 S.Ct. 934, 13 L.Ed.2d 818 (1965).

* * *

Affirmed.

WILMINGTON FIBRE SPECIALTY COMPANY, Employer, Appellant,

v.

Helene RYNDERS, Employee, Appellee.

Supreme Court of Delaware.

Argued Jan. 13, 1975.

Decided April 9, 1975.

Employer appealed from decision of Industrial Accident Board awarding employee workmen's compensation for 80% permanent functional impairment to her back. The Superior Court, 316 A.2d 229, affirmed, and employer again appealed. The Supreme Court held that loss of use resulting from pain caused by industrial accident was compensable whether such pain was attributable to organic or psychogenic factors.

Affirmed.

Workmen's Compensation ⇐595

Loss of use resulting from pain caused by industrial accident was compensable whether such pain was attributable to organic or psychogenic factors. 19 Del.C. § 2326(g).

Upon appeal from Superior Court. Affirmed.

Stephen P. Casarino of Tybout, Redfearn & Schnee, Wilmington, for employer, appellant.

Oliver V. Suddard, Wilmington, for employee, appellee.

Before HERRMANN, C. J., and DUFFY and McNEILLY, JJ.

PER CURIAM:

The determinative questions presented in this workmen's compensation case are (1) whether loss of use of any member or part of the body resulting from pain is compensable under 19 Del.C. § 2326(g); and (2) whether there was substantial evidence sufficient to support the findings of the Industrial Accident Board.

The Superior Court held (316 A.2d 229) that pain may properly be considered in determining loss of use under 19 Del.C. § 2326(g), and that there was substantial evidence sufficient to support the findings of the Board.

We agree with those conclusions.

6. As to the first five Federal counterclaims; the sixth counterclaim was disposed of on the merits, TWA's motion for summary judgment being granted by the District Court. These six Federal counterclaims are identical in scope to the four counterclaims asserted in this Chancery action.

Loss of use resulting from pain caused by an industrial accident is compensable under 19 Del.C. § 2326(g), whether such pain is attributable to organic or psychogenic factors. See Sturgill v. M & M, Inc., Del.Supr., 329 A.2d 360 (1974).

Affirmed.

Robert H. RICHARDS, Jr., et al., Petitioners,

v.

William G. TURNER, Jr., et al., Respondents.

Superior Court of Delaware, New Castle.

March 31, 1975.

City board of adjustment granted a variance to permit building of parking facility as a nonconforming use, and residents petitioned for writ of certiorari. The Superior Court, New Castle County, O'Hara, J., held that granting of variance constituted an abuse of discretion and error of law where, if interests of applicants for a variance in certain property was by option, they could avoid the adverse topographic condition, as well as any other hardship related to the properties, by declining to exercise the option, and where residents were not permitted to cross-examine witness about contract of applicants with owner of such property.

Order reversed.

1. Zoning ⇐646

In certiorari proceeding to review order of board of adjustment granting a variace, court measures sufficiency of the record by standard established in the enabling act, and if record shows substantial evidence upon which board could have properly based its decision, correctly applying the law to the facts, court will sustain the decision.

2. Zoning ⇐493

One factor to be considered in determining existence of undue hardship justifying the granting of a variance is the timing of acquisition of properties for which variance is sought.

3. Zoning ⇐497

Where a person buys property after zoning restrictions are placed upon it, the hardship is self-imposed and is generally not sufficient to sustain a variance.

4. Zoning ⇐607

Although an economic disadvantage does not constitute such an unnecessary hardship peculiar to the property involved that will in itself justify issuance of a variance, it is another criterion for court to consider on appeal from granting of variance.

5. Zoning ⇐489, 537

Fact that applicants for a variance may obtain a better return on their investment by a nonconforming use will not suffice as grounds for a variance; economic necessity must be shown by evidence that is substantial, serious and compelling.

6. Zoning ⇐495, 536

Reduction in value shared by other owners of land along a zoning boundary, arising from impact of zoning ordinance on the entire district, is not enough to qualify properties for a variance; party claiming injury must prove that the ordinance peculiarly injured his property.

7. Zoning ⇐496

Variance may be granted where property is subject to conditions unique or peculiar to itself, as distinguished from conditions arising from impact of zoning regulations on the entire district.

ty. Its interpretation of the rule should therefore be reversed only if clearly wrong. The interpretation urged by the appointing authority does violence to the language and punctuation of the rule. As to the reason for the sixty-day time period, it seems to give the employee a right to transfer for sixty days whereas transfers are normally within the control of the appointing authorities involved and the personnel director. See Merit System Rule 13.0200. On the other hand, under the interpretation urged by the appointing authority, employees could be forced out of the classified service after a sixty-day grace period by simply reallocating their position downward. This would of course defeat the general purpose, as indicated in 29 Del.C. § 5902, of the classified service.

[5] The appointing authority has failed to meet its burden of proving that it acted in accordance with law, as required by 29 Del.C. § 5949(b), and the decision of the Commission is therefore affirmed.

WILMINGTON FIBRE SPECIALTY COMPANY, Employer-Appellant,

v.

Helene RYNDERS, Employee-Appellee.

Superior Court of Delaware,
New Castle.
Feb. 6, 1974.

Employer appealed from a decision of Industrial Accident Board awarding employee workmen's compensation for 80% permanent functional impairment to her back. The Superior Court, Taylor, J., held that evidence that employee's complaints of pain were real and sincere and related to accident in which she sustained injury to her coccyx and to operations which followed injury and that employee had sustained 80% or more permanent loss of use of low back and 10 to 15% permanent loss of use of leg was sufficient to support the award, even if, in absence of pain, employee would have had no significant degree of disability.

Affirmed.

1. Workmen's Compensation ⇐891, 894

Loss of use of member or part of body should be determined on basis of ability of employee to use the member or part. 19 Del.C. § 2326(g).

2. Workmen's Compensation ⇐891, 894

"Loss of use" of member or part of body within Workmen's Compensation Law represents that degree of normal use which is beyond the ability or capability of employee. 19 Del.C. § 2326(g).

See publication Words and Phrases for other judicial constructions and definitions.

3. Workmen's Compensation ⇐546

General condition of psychosis or neurosis which is not localized as to member or organ of the body is not compensable. 19 Del.C. § 2326(g).

4. Workmen's Compensation ⇐836, 891, 894

Fact that employee can perform a function only by undergoing considerable pain is one element which properly may be considered in determining whether employee has sustained a compensable disability, regardless of whether issue is inability to work or loss of use. 19 Del.C. § 2326(g).

5. Workmen's Compensation ⇐595, 891, 894

Pain which is not associated with loss of use of member or part of body is not compensable; however, pain of movement may constitute an inhibitory force which prevents movement or use of the member or part of the body. 19 Del.C. § 2326(g).

6. Workmen's Compensation ⇐1654

Evidence that pain experienced by employee following injury to her coccyx sustained in course of her employment was real and related to accident in which the injury was sustained and to operations which followed, that pain rendered employee unable to use her back and leg and that employee had sustained 80% or more permanent loss of use of low back and 10 to 15% permanent loss of use of leg sustained award of compensation for 80% permanent functional impairment to employee's back notwithstanding that, in absence of pain, employee would have had no significant degree of disability. 19 Del.C. §§ 2301 et seq., 2326(g).

7. Workmen's Compensation ⇐1939.4(4)

In reviewing decision of Industrial Accident Board, it is function of court to determine whether there is substantial competent evidence in the record to support Board's findings and conclusions.

Stephen P. Casarino, of Tybout, Redfearn & Schnee, Wilmington, for employer-appellant.

Oliver V. Suddard, Wilmington, for employee-appellee.

TAYLOR, Judge.

This is an appeal by Wilmington Fibre Specialty Company [employer] from a decision of the Industrial Accident Board [Board] which held that Helene Rynders [employee] sustained a permanent functional impairment to her back caused in part by an accident on September 15, 1967 and in part by the anxiety neurosis and awarded permanent injury benefits to employee for a period of two hundred forty weeks, representing an eighty percent permanent functional impairment to employee's back.

Employee, while in the course of her employment for employer on September 15, 1967, while walking down a ramp, slipped and fell, injuring her coccyx. On October 2, 1967 employee commenced treatment with Dr. James Waddell, an orthopedic surgeon, for pain the coccygeal area. On March 1, 1968 he performed a coccygectomy. The pain persisted after the operation, and it was ascertained by X-ray examination that a segment of the coccyx had not been removed. On September 16, 1968 the upper segment of the coccyx was removed. This too failed to produce improvement. Dr. Prerre LeRoy commenced treating employee in December, 1968. In January, 1969 he performed a radio frequency lesion to interrupt the nerve function, but this again failed to relieve employee. On April 24, 1969 he removed a painful nodule of nerve tissue, but this also failed to correct the condition.

According to employee, she has disabilities involving her low back, her left leg and her neck. She cannot sit down or lie on her back. She can bend her body only to a limited extent and is unable to lift even a small amount of weight. Her left leg is numb and she has difficulty moving it. She also has difficulty in turning her neck. All of the physicians who testified, with the exception of Dr. Joseph Arminio, concluded that employee's complaints of pain were real and sincere and that they related to the 1967 accident, and the operations which followed. They were also in agreement that in the absence of the pain, employee would have no significant degree of disability. All of the doctors agreed that many who have had the coccyx removed still experience substantial pain. Although the physicians failed to find a physical justification for the disability, no one found employee capable of performing normal functions. They agreed that pain can be disabling.

[1, 2] The issue before the Board was whether there was a permanent loss of use of a member or part of the body and whether such loss of use was caused by an accident within the meaning of the Workmen's Compensation Law, 19 Del.C. §

2326(g). Ernest DiSabatino & Sons, Inc. v. Apostolico, Del.Supr., 269 A.2d 552 (1970). Loss of use should be determined based upon the ability of the employee to use the member or part, and conversely, the loss of use represents that degree of normal use which is beyond the ability or capability of the employee.

Employer contends that a condition "caused by mental factors" is not compensable. The cases relied on are discussed below.

In Burton Transportation Center, Inc. v. Willoughby, Del.Supr., 265 A.2d 22 (1970), the Delaware Supreme Court stated:

> "We think, on the other hand, that the term 'part of the body' is intended to refer to some specific identifiable member or organ of the body, and should not be stretched to include a general condition of psychosis or neurosis."

There, the Supreme Court refused to permit compensation for a "general condition of psychosis or neurosis" because it was not identifiable with a specific member or organ of the body. Further, the Court commented that traumatic neurosis "is not usually looked upon as a kind of injury which is necessarily a presumably *per se* disabling . . . ". It is clear that in *Willoughby* the Supreme Court did not have before it evidence showing loss of use of an organ or member of the body resulting from psychosis or neurosis and the Court was not precluding compensation for disability of a member of the body which stemmed from psychosis or neurosis.

[3] In Guy Johnston Construction Co. v. Kennedy, Del.Supr., 287 A.2d 658 (1972), the Delaware Supreme Court in discussing *Willoughby* distinguished a general condition of psychosis or neurosis which was not localized as to a member or organ of the body from a loss of use of a specific identifiable member or organ of the body. The latter is compensable under 19 Del.C. § 2326(g), ibid., while the former is not compensable. In view of the facts of that case, the Court found it unnecessary to discuss the validity of an award based solely on psychological factors.

Rice's Bakery v. Adkins, Del.Supr., 269 A.2d 215 (1970), involved a claim for workmen's compensation for permanent total disability based upon psychosomatic back disability. Although the matter was remanded to the Board for findings upon the causal connection between the industrial accident and the psychosomatic back disability from which employee suffered, the Supreme Court stated:

> "The law seems settled that, provided a sufficient causal connection is proved by competent evidence between an industrial accident and a resulting psychological or neurotic disorder resulting therefrom, such disability is compensable under Workmen's Compensation Law. See Fiorucci v. C. F. Braun & Co., 4 Storey 79, 173 A.2d 635 (Del.Super. 1961). We so hold."

The philosophy of *Adkins* was reasserted and extended in Sears, Roebuck and Company v. Farley, Del.Supr., 290 A.2d 639 (1972) in the following language:

> It is, of course, true that an award for a postraumatic hysteria may be made when the hysteria occurs when a worker sustains a primary disabling physical injury and thereafter develops a secondary mental condition which causes him to believe that he still suffers from the disabling effects of the physical injury, even though he has in fact fully recovered physically."

In Avon Products, Inc. v. Lamparski, Del. Supr., 293 A.2d 559 (1972) the Delaware Supreme Court reaffirmed the principle.

The Delaware holdings are consistent with holdings in many states. 1A Larson, Workmen's Compensation Law, 7–359, § 42.22, recognizing that in view of the Delaware statute, allowance based on permanency must relate to loss of use of a member or part of the body. Ibid, p. 7–369, § 42.22.

[4] One element which properly may be considered in determining disability is whether a function can be performed only by undergoing considerable pain. 2 Larson, Workmen's Compensation, 88.6, § 57.-51; 11 Schneider, Workmen's Compensation Law, 496, § 2313. This standard is applicable regardless of whether the issue is inability to work or loss of use.

[5] Pain which is not associated with loss of use is not compensable under Workmen's Compensation Law. 58 Am. Jur. 785, Workmen's Compensation § 292. However, pain of movement may constitute an inhibitory force which prevents movement or use.

[6] Employer argues that since pain is a subjective matter, an impairment of use which derives wholly or in part from pain is not a lost use within the Workmen's Compensation Law. This is based on the premise that pain is subjective and cannot be established objectively. Admittedly, in evaluating such loss, one must be on guard against deception. Deception may exist in some cases. However, in this case, no physician has questioned the reality of employee's experience of pain or her inability because of the pain to use her back and leg. Cf. Avon Products, Inc. v. Lamparski, Del.Supr., 293 A.2d 559 (1972). It is undisputed that it is not within the capability of this employee to use her back, leg or neck to some degree.

Dr. LeRoy found eighty percent or more permanent loss of use of the low back and ten to fifteen percent permanent loss of use of the leg. Dr. John Hogan and Dr. Arminio evaluated employee's disability from the removal of the coccyx as a ten percent loss. In each case this evaluation was not based on observed loss of use but on a statistical chart published by the American Medical Association.

Employer argues that Dr. LeRoy's evaluation is speculative because he is unable to establish the physical origin of the pain and because he cannot measure the amount of pain. It appears that the evaluation of loss indicated the extent to which employee was unable to use her back and leg based upon his observation of employee during examinations. This is a proper basis of evaluation.

[7] In reviewing a decision of the Board, it is the function of this Court to determine whether there was substantial competent evidence in the record upon which to support the Board's findings and conclusions. Johnson v. Chrysler Corporation, Del.Supr., 213 A.2d 64 (1965). There is ample competent evidence of loss of use of the back. While employer takes issue with Dr. Leroy's findings, it is clear that Dr. LeRoy found an eighty percent or greater impairment of function of the low back area. This alone is sufficient to support the finding of the Board. Moreover, it does not appear from the record that the other doctors who evaluated the loss of function considered that loss in terms of employee's actual capability. The permanency of employee's condition, based on the present record, has not been in dispute. It appears that in basing its award upon a finding of "permanent functional impairment", the Board was making its determination of loss of use as provided by 19 Del.C. § 2326(g).

The Court finds that the Board's findings and conclusions are supported by substantial competent evidence and are supported by law.

Accordingly, the decision of the Board is affirmed.

It is so ordered.

Nanticoke Homes v. Miller, Not Reported in A.2d (2003)

2003 WL 22232809
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

NANTICOKE HOMES
v.
Curtis MILLER

No. Civ.A. 02A-09-003RFS.
|
Submitted July 25, 2003.
|
Decided Sept. 29, 2003.

Dear Counsel:

Opinion

STOKES, J.

***1** This is my decision on Nanticoke Home's ("Employer") appeal of the Industrial Accident Board's ("Board") decision awarding additional benefits to Curtis Miller ("Claimant"). The Board's decision is affirmed for the reasons set forth herein.

STATEMENT OF FACTS

On December 17, 2001, Claimant filed a Petition to Determine Additional **Compensation** Due for injuries incurred in a March 17, 1988 compensable work accident. Following the accident, Claimant received an award of 22.5% **permanent impairment** to his back. Claimant initially injured his back while working for another Employer in 1983. Claimant received an award of 17% **permanent** partial disability to his back for that injury. Thereafter, Claimant was involved in an automobile accident but his injuries were confined to his neck and upper extremities. He was involved in another automobile accident in 1991. Over the years, Claimant has been treated by a number of physicians, undergone multiple back surgeries, received chemical injections and taken a number of medications to treat his back injury. More recently, Claimant suffered a flair-up of his back injury in 2001 resulting in a period of total disability.

In the present Petition, Claimant sought an additional 18% **permanent** partial disability for his back, unpaid prescriptions and

a 10% **permanent** partial disability for his leg. The Board held a hearing on the Petition on August 13, 2002 at which it considered the testimony of two physicians, Dr. Rodgers and Dr. Townsend, who evaluated Claimant for **permanent impairment**.

Dr. Rodgers examined Claimant, reviewed his medical records and considered past **permanency** findings by a variety of doctors. Dr. Rodgers found that Claimant suffered from a 35% **impairment** to his back and placed Claimant into a Diagnosis Related Estimates ("DRE") Category V, based on the DRE contained in the American Medical Associations' Guide to The Evaluation of **Permanent Impairment** ("AMA Guide"). Dr. Rodgers indicated that the **impairment** to the lower leg would be included in this rating under the DRE method. Dr. Rodgers testified that this method should be used if the 1988 injury was a new injury. Dr. Rodgers found that under the Range of Motion method, Claimant suffers from a 31% **impairment** to the back and a 10% leg **impairment**. Dr. Rodgers testified that this method should be used if the 1988 injury was a recurrence or aggravation of the initial 1983 injury.

Dr. Townsend found that under the Range of Motion method, Claimant suffered from an 18% **permanent impairment** to the back and a 5% **permanent impairment** to his leg. Dr. Townsend testified that the Range of Motion test should be used because Claimant suffered from multiple injuries to the same area. Dr. Townsend apportioned 2/3 to the 1988 accident and 1/3 to the 1983 accident. Dr. Townsend found that Claimant would be placed in DRE Category IV, under the DRE method. Dr. Townsend testified that the leg **impairment** would be included in the **permanency** rating under the DRE method.

***2** The Board awarded Claimant a 35% **permanent impairment** to his back, a 5% **permanent impairment** to his left leg, medical expenses sought, attorney fees and medical witness fees. The Board relied on the DRE method **permanency** rating of Dr. Rodgers in finding that Claimant suffered from a 35% **impairment** to his back. The Board relied on the Range of Motion **permanency** rating of Dr. Townsend in finding that Claimant suffered from a 5% **impairment** to his leg. Employer appeals this decision with the exception of the medical expenses.

ISSUES PRESENTED

1 Is the Board's decision that Claimant suffers from a 35% **permanent impairment** to the low back supported by substantial evidence and free from legal error?
2. Is the Board's decision that Claimant suffers from a **permanent** partial disability to the lower left extremity supported by substantial evidence and free from legal error?

3. Did the Board err in failing to assess a credit to Employer for the **permanent** partial disability benefits Claimant had previously received pursuant to **19** *Del.C.* § **2326**?

4. Did the Board err as a matter of law by awarding attorney fees and medical witness fees in this case?

DISCUSSION

A. *Standard of Review*
The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence. *Johnson v. Chrysler Corp.,* 312 A.2d 64, 66-67 (**Del.**1965); *General Motors v. Freeman,* 164 A.2d 686, 688 (**Del.**1960), and to review questions of law *de novo, In re Beattie,* 180 A.2d 741, 744 (Del.Super.1962). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oceanport Ind. v. Wilmington Stevedores,* 636 A.2d 892, 899 (**Del.**1994); *Battista v. Chrysler Corp.,* 517 A .2d 295, 297 (**Del.**), *app. dism.,* 515 A.2d 397 (**Del.**1986). The appellate court does not weight the evidence, determine questions of credibility, or make its own factual findings. *Johnson v. Chrysler Corp.,* 312 A.2d at 66. It merely determines if the evidence is legally adequate to support the agency's factual findings. 29 ***Del. C.*** § 10142(d).

B. ***Permanency** Rating of Back*
The Board's finding a 35% **permanent impairment** to Claimant's back is supported by substantial evidence and free from legal error. The Board has statutory authority to review an award "on the ground that the incapacity of the injured employee has subsequently terminated, increased, diminished or recurred." **19** *Del.C.* § 2347. Plaintiff has the burden of proving an increase in the capacity of the injured employee has subsequently terminated, increased, diminished or recurred." **19** *Del.C.* 2347. Plaintiff has the burden of proving an increase in the incapacity by a preponderance of the evidence. *Lawson v. Chrysler*

Corp., 199 A.2d 749, 751 (Del.Super.1964). The Claimant's disability is determined by the Board, not by the physician. Poor Richard Inn v. Lister, 420 A.2d 178, 180 (**Del**.1980). The Board fixes the percentage of Claimant's disability based on the evidence presented. Turbitt v. Blue Hen Lines, Inc., 711 A.2d 1214, 1215 (**Del**.1998).

*3 Moreover, "weighing evidence, determining the credibility of witnesses, and resolving any conflicts in testimony are functions reserved exclusively for the IAB." Klenk v. Med. Ctr. of Delaware, 702 A.2d 926 (**Del**.1997). In resolving conflicts in testimony, it is not an 'all or nothing' rule; the Board may accept a physician's testimony in whole or in part. *Lewis v. Formosa Plastics Corp.*, Del.Super., C.A. No. 98A-06-002, Carpenter, J. (July 8, 1999) (ORDER). However, if the Board chooses to discount the testimony of a witness based on credibility, "it must provide specific relevant reasons for doing so." *Turbitt v. Blue Hen Lines, Inc., supra.* The Board's credibility determination of an expert witness will be upheld so long as its "findings are supported by satisfactory proof in the underlying depositions." *Syed v. Hercules, Inc.*, Del.Super., C.A. No. 01A-01-013, Goldstein, J. (Aug. 23, 2001) (Mem.Op.).

Here, Claimant was previously found to have suffered a 22.5% **impairment** as a result of his 1988 work accident. The Board considered Claimant's testimony and the expert testimony of two physicians. The Board concurred with Dr. Rodgers that Claimant suffers from a 35% **permanent impairment** to his lower back. The Board was free to accept the testimony of one physician over another. Klenk, 702 A.2d at 926. The Board specifically found that Claimant is experiencing an acceleration of degeneration in his back as a result of the 1988 accident and its aftermath including the fusion surgery. Thus, the Board found that Claimant had met his burden of establishing an increase in the **permanency** rating. There is substantial evidence in the record to support the Board's conclusion.

C. ***Permanent** Partial Disability of Leg*

Here, Employer challenges the Board's finding of a 5% **impairment** to Claimant's leg.[1] Employer argues that the Board could not adopt Dr. Rodgers' **permanency** findings for Claimant's back based on the DRE method and then adopt Dr. Townsend's **permanency** findings for Claimant's leg based on the Range of Motion method. Employer asserts that under the DRE method, the 35% **permanency** rating includes Claimant's leg injuries. Employer argues that by awarding a separate 5% **permanency** rating for Claimant's leg, the Board permitted a double recovery.

Credibility determinations are within the province of the Board. *See* Unemployment Ins. Appeal Bd. v. Div. of Unemployment Ins., 803 A.2d 931 (**Del**.2002). This Court cannot assume a fact finding role or usurp the Board's function. *Id.* The Board may credit the medical testimony of one doctor over another. *Scott v. First USA Bank,* Del.Super., C.A. No. 01A-10-003, Alford, J. (April 30, 2002) (Mem.Op.) (accepting the medical opinion of one doctor over another). In considering the medical testimony of a physician, the Board may accept the testimony in whole or in part. *Hart v. Columbia Vending Serv.,* Del.Super., C.A. 97A-01-002, Graves, J. (May 1, 1998) (ORDER) (discrediting the physician's testimony regarding the **permanency** rating of the leg while accepting the rating of the back).

*4 There are two methods recognized by the AMA Guide to compute a **permanent** disability rating. *Verdijo v. Skyline Painting,* Del.Super., C.A. No. 99A-05-003, **Del** Pesco, J. (Jan. 28, 2000) (Mem.Op.). The first method, the DRE model is useful to evaluate "patients who have sustained traumatic injuries." *Id.* The second method is the Range of Motion model "which was used in previous editions of the Guide." *Id.* Depending on the type and nature of the injury, the AMA Guidelines may be applied differently. *Collins v. Giant Food, Inc.,* Del.Super., C.A. No. 98A-11-002, Cooch, J. (Oct. 13, 1999) (Mem.Op.).

The AMA Guide elaborates on this point:

> [a]ll persons evaluating **impairments** according to Guides criteria are cautioned that either one or the other approach should be used in making the final **impairment** estimate. If one component were used according to the Guides recommendations, then a final **impairment** estimate using the other component usually would not be pertinent or germane. However, if disagreement exists about the category of the Injury Model in which a patient's **impairment** belongs, then the Range of Motion Model may be applied to provide evidence on the question. *Id.*

Contrary to Employer's assertion of a double recovery, a Claimant may recover separately for an **impairment** to the lower back and an **impairment** to the leg. *Cross v. State,* Del.Super., C.A. No. 99A-09-005, Herlihy, J. (Oct. 17, 2000) (Mem.Op.), *aff'd* Cross v. State, 782 A.2d 263 (**Del**.2001). Thus, although the DRE method is used to find a lower back **impairment**, the Claimant may also recover separately for a leg **impairment** under the Range of Motion model. *Id.* Here, both physicians testified that Claimant suffered from a **permanent impairment** to the leg, but disagreed as to the **permanency** rating. While it is certainly true that Dr. Rodgers considered Claimant's injury to his leg in determining the **permanency** rating to the lower back, Dr. Rodgers' lower back **permanency** findings do not preclude a separate recovery for Claimant's **impairment** to the leg. The Board agreed with Dr. Townsend in finding that Claimant suffered from a 5% **permanent impairment** to the leg. The Board is free to accept the testimony of physicians in whole or in part. *Hart v. Columbia Vending Serv.,* Del.Super., C .A. No.

97C-01-002, Graves, J. (May 1, 1998) (ORDER). Accordingly, there is substantial evidence in the record to support the Board's finding of a 5% **permanent impairment** to the leg and such a finding will not be disturbed on appeal.

D. *Credit for Past Partial Disability Payments*

The Board is not required to provide a credit for past partial disability payments in determining whether Claimant has suffered an increase in **permanent impairment**. The Board's authority under Section 2347 to increase disability benefits is not "circumscribed by, or directly related to, a prior **impairment** finding or settlement ." *Poor Richard Inn v. Lister*, 420 A.2d at 180. The Board makes an award based on the "disability attributable to the accident then under consideration, as shown by the evidence in the record." *Brandywine School Dist. v. Hoskins*, 492 A.2d 1247, 1251 (**Del**.1985). The Court will not order an offset for previous benefits received unless statutorily required. *State v. Calhoun*, 634 A.2d 335, 337 (**Del**.1993).

***5** Although Claimant received an award from a prior compensable industrial accident in 1983, that award is not currently under consideration and is not relevant to the present determination. The present petition is to determine additional **compensation** due for the 1988 industrial accident. In making this determination, the Board is not required to offset an award by the prior **impairment** finding. *Poor Richard Inn v. Lister*, 420 A.2d at 180. Accordingly, the Board did not err in failing to award Employer a credit for past partial disability payments made to Claimant.

E. *Attorney's Fees and Medical Witness Fees*

The Board properly awarded medical witness fees to Claimant. In the event that the employee receives an award, the fees for medical witnesses testifying before the Board are assessed against the Employer. **19** *Del.C.* § 2322(e).[2] The Employer is assessed these fees for medical witnesses even if the Board denies some of the other claims presented, so long as the Claimant receives an award. *Wade v. Chrysler Corp.*, 533 A.2d 1254 (**Del**.1987). "[T]he Board may not consider whether the Claimant's witness was the basis for the award as a factor in deciding whether or not to award medical witness fees." *Keeler v. Metal Masters, Inc.*, Del.Super., C.A. No. 97A-06-002, Terry, J. (Dec. 31, 1997) (Mem.Op.). The Board may only deny medical witness fees "if it determines that a Claimant has called an unreasonable number of medical witnesses whose testimony is unreasonably cumulative or redundant." *Adams v.. Shore Disposal, Inc.*, Del.Super., C.A. No. 96A-10-001, Lee, J. (July 29, 1997) (Mem.Op.).

Here, Claimant received an award. The Board did not find that Claimant had called an unreasonable number of medical witnesses whose testimony was cumulative or redundant. Thus, Claimant was entitled to medical witness fees pursuant to **19** *Del.C.* § 2322(e).

An Employer must also pay all the necessary and reasonable medical expenses related to an employee's work injury. **19** *Del.C.* § 2322(a). "Disputes over the reasonableness of medical expenses are factual questions for the Board to decide." *Adams v. Shore Disposal, Inc., supra.* Here, Employer did not appeal the Board's award of a reimbursement of outstanding prescription expenses.[3] Accordingly, this portion of the Board's decision will not be reviewed on appeal.

The Board's award of attorney's fees to Claimant was proper. The Employer must also pay the employee's reasonable attorney's fees if the employee is awarded **compensation**. **19** *Del.C.* § 2320(10(a).[4] Here, Claimant received an award. Accordingly, Claimant is entitled to attorney's fees.

CONCLUSION

For the foregoing reasons, the decision of the Board is affirmed.

IT IS SO ORDERED.

All Citations

Not Reported in A.2d, 2003 WL 22232809

Footnotes

1 Employer also argues that the Board should not have considered Claimant's alleged **impairment** to the leg as the issue was not presented in a timely fashion pursuant to Board rules. The Superior Court does not consider on appeal matters outside of the record below. *See* Super. Ct. Civ. R. 72(g); **19** *Del.C.* § 2350(b). The Court will not consider evidence or issues not properly raised below. *Oakes v. Chrysler Corp.,* Del.Super., C.A. No. 98A-08-006, Barron, J. (Jan. 11, 1999) (Letter Op.). Thus, an issue is waived if it was not raised below. *Potts Welding & Boiler Repair Co. v. Zakrewski,* Del.Super., C.A. No. 01A-04-001, Herlihy, J. (Jan. 11, 2002) (Mem.Op.). Board Rule 9(E) states that modifications to pretrial memorandum must be made at least thirty days prior to the hearing.
Here, Claimant did not seek **compensation** for a **permanent** disability to the leg in the initial petition filed with the Board. Nor did Claimant raise this claim in the pretrial memorandum. While Claimant's actions violate IAB Rule 9, the alleged **impairment** to the leg was later fairly presented to the Board at the hearing. Thus, the issue was raised below and had not been waived. *Potts Welding & Boiler Repair Co. v. Zakrewski, supra.* Since the issue is part of the record, the Court will consider the issue on appeal. *See* Super. Ct. Civ. R. 72(g); **19** ***Del.*** *C.* 2350(b).

2 Section 2322(e) provides: "The fees of medical witnesses testifying before the Industrial Accident Board on behalf of an injured employee shall be taxed as a cost to the Employer or the Employer's insurance carrier in the event the injured employee receives an award." **19** *Del.C.* § 2322(e).

3 Employer argues that Claimant should not be permitted to rely on the award of prescription expenses to justify the award of medical witness fees. However, Employer did not appeal the award of prescription expenses and Claimant would be entitled to medical witness fees based on this award alone.

4 Section 2320(10(a) provides: "Attorney's fee. a. A reasonable attorney's fee in an amount not to exceed 30 percent of the award or 10 times the average weekly wage in Delaware as announced by the Secretary of Labor at the time of the award, whichever is smaller, shall be allowed by the Board to any employee awarded **compensation** under Part II of this title and taxed as costs against a party." **19** *Del.C.* § 2320(10)(a).

Nanticoke Homes v. Miller, Not Reported in A.2d (2003)

WESTLAW © 2017 Thomson Reuters. No claim to original U.S. Government Works.

Nanticoke Homes v. Miller, Not Reported in A.2d (2003)

Nanticoke Homes v. Miller, Not Reported in A.2d (2003)

WESTLAW © 2017 Thomson Reuters. No claim to original U.S. Government Works. 1

Simmons v. Delaware State Hosp., 660 A.2d 384 (1995)

660 A.2d 384
Supreme Court of Delaware.

Janet L.H. SIMMONS, Plaintiff Below, Appellant,
v.
DELAWARE STATE HOSPITAL, Defendant Below, Appellee.

No. 288, 1994.
|
Submitted: April 18, 1995.
|
Decided: May 23, 1995.
|
Revised: June 9, 1995.
|
Reargument Denied: June 9, 1995.

Claimant appealed from order of the Industrial Accident Board terminating her total disability benefits, awarding **permanent impairment** benefits for five percent **permanent** injury to her neck and from Board's failure to award her attorney fees for her **permanent** neck **impairment**. The Superior Court, New Castle County, affirmed, and claimant appealed. The Supreme Court, Holland, J., held that: (1) evidence supported termination of total disability benefits; (2) evidence supported award for **permanent** neck **impairment** of five percent; and (3) Board improperly denied attorney fees on **permanent impairment** claim.

Affirmed in part, reversed in part and remanded.

West Headnotes (16)

[1] **Workers' Compensation**
Conflicting evidence
Workers' Compensation
Weight of evidence and credibility of witnesses

Function of reconciling inconsistent testimony or determining credibility is exclusively reserved for Industrial Accident Board.

15 Cases that cite this headnote

[2] **Workers' Compensation**
Discretion

Industrial Accident Board's decision may not be disturbed by reviewing court absent abuse of discretion.

Cases that cite this headnote

[3] **Workers' Compensation**
Termination or decrease of disability

Termination of activity aide's total disability benefits was supported by testimony of her treating physician that he would have released aide to work at state hospital if job were available where she was not at risk of confrontation.

4 Cases that cite this headnote

[4] **Workers' Compensation**
Claim or petition for compensation and time for institution of proceedings

Award to activity aide at state hospital of benefits for five percent **permanent** neck **impairment** was supported by testimony of hospital's expert using American Medical Association (AMA) Guide.

1 Cases that cite this headnote

[5] **Workers' Compensation**
Expert testimony

It is entirely proper and appropriate for Industrial Accident Board to accept medical testimony of one expert over that of another.

6 Cases that cite this headnote

[6] **Workers' Compensation**
Attorney Fees

Statute providing that reasonable attorney fees "shall be allowed" by Industrial Accident Board to any employee compensation cannot support the complete denial of attorney fees. 19 Del.C. §

2127.

Cases that cite this headnote

[7] **Statutes**
Presumptions

When legislative amends prior enactment by material change in language, it is presumed that change in meaning was intended.

Cases that cite this headnote

[8] **Workers' Compensation**
Amount

Fact that claimant rejected earlier acquittal and settlement offer may properly be given some weight in Industrial Accident Board's determination of reasonable award of attorney fees.

1 Cases that cite this headnote

[9] **Workers' Compensation**
Weight and sufficiency

When claimant has valid reasons for rejecting settlement offer and presents some probative evidence or cogent legal argument in support of a position at hearing, Industrial Accident Board, in awarding successful claimant attorney fees, should accord little weight to fact that settlement offer was rejected in light of relationship of offer to actual award.

Cases that cite this headnote

[10] **Workers' Compensation**
Payment and commutation

Attorney who represents client before Industrial Accident Board may look only to Board, not claimant, to receive compensation for his or services. 19 Del.C. § 2127(b).

1 Cases that cite this headnote

[11] **Attorney and Client**
Settlements, Compromises, and Releases

Attorney for claimant must explain how attorney fee statute operates and, to extent possible, advise client of "break even" amount for Industrial Accident Board award in discussing likelihood of obtaining better result than that being offered in proposed settlement. 19 Del.C. § 2127; Rules of Prof.Conduct, Rules 1.4, 1.5, 1.7.

Cases that cite this headnote

[12] **Workers' Compensation**
Effect of claimant's conduct or misconduct

Industrial Accident Board cannot use rule permitting Board to consider claimant's rejection of settlement offer in determining reasonableness of attorney fees to encourage employers to settle at expense of violating statutory mandate that attorney fees be allowed when Board awards claimant compensation; Board must not penalize claimant's attorney for claimant's good faith rejection of settlement offer. 19 Del.C. § 2127.

4 Cases that cite this headnote

[13] **Attorney and Client**
Power and duty to control

Supreme Court alone has sole and exclusive responsibility over all matters affecting governance of Bar.

2 Cases that cite this headnote

[14] **Attorney and Client**
Right to compensation in general

Fees charged by members of Bar are subject to Supreme Court's regulation. Rules of Prof.Conduct, Rule 1.5.

Cases that cite this headnote

[15] **Workers' Compensation**
Attorney Fees

Once Industrial Accident Board determines number of issues which are subject to award of attorney fees, Board must award attorney fees for each issue in accordance with governing statute. 19 Del.C. § 2127.

6 Cases that cite this headnote

[16] **Workers' Compensation**
Amount

Claimant's rejection of employer's offer of settlement is only one factor to be considered in Industrial Accident Board's determination of reasonable fee to which claimant's attorney is entitled.

1 Cases that cite this headnote

***385** Upon appeal from the Superior Court. AFFIRMED in part, REVERSED in part, and REMANDED.

Attorneys and Law Firms

Harvey B. Rubenstein (argued), Wilmington, for appellant.

Nancy E. Chrissinger (argued), and John J. Klusman, Jr. of Tybout, Redfearn & Pell, Wilmington, for appellee.

William R. Peltz and Edward B. Carter, Jr. of Kimmel, Carter & Roman, Phillip E. Herrmann of Ament, Lynch & Carr and Christopher J. Curtin of Sawyer & Akin, Wilmington, on behalf of amicus curiae, Delaware Trial Lawyers' Ass'n.

David Curtis Glebe and Matthew F. Boyer, Office of Disciplinary Counsel, Wilmington, on behalf of amicus curiae, Office of Disciplinary Counsel.

Sherry V. Hoffman, Dept. of Justice, Wilmington, on behalf of amicus curiae, Dept. of Labor.

Cassandra Faline Kaminski and Natalie S. Wolf of Young, Conaway, Stargatt & Taylor, Wilmington, on behalf of amici curiae, employers and their insurance carriers.

Before VEASEY, Chief Justice, WALSH, HOLLAND, HARTNETT, and BERGER, Justices (constituting the Court en Banc).

ORDER

This ninth day of June, 1995, the Court has considered the appellant's motion for reargument.

1) The appellant has filed a motion for reargument and contends, *inter alia,* that it is not always possible to explain to a client the "break even" point of a settlement offer versus an award following a board hearing. The appellant also contends that attorneys who represent claimants in workmen compensation cases are required to adhere to the Delaware Lawyers' Rules of Professional Conduct and that a separate standard of professional conduct should not implicitly or explicitly be imposed upon those attorneys.

2) The Court has concluded that two sentences that appeared in the original draft opinion should be modified to read as follows: [Editor's Note: changes incorporated for purposes of publication.]

3) The Court has concluded that with the exception of the foregoing language in the opinion, regarding the explanation of settlement offers to a client, the motion for reargument is without merit.

4) The opinion as modified is attached hereto and shall supersede the opinion originally dated May 23, 1995.

***386 NOW, THEREFORE, IT IS HEREBY ORDERED** that in all other respects the motion for reargument is **DENIED.**

Before VEASEY, C.J., WALSH, HOLLAND, HARTNETT, and BERGER, JJ. (constituting the Court en Banc).

HOLLAND, Justice:

On March 8, 1990, the claimant, Janet L.H. Simmons ("Simmons"), suffered an injury while working as an employee of the Delaware State Hospital ("Hospital"). Simmons began receiving total disability benefits until March 28, 1992, when the Hospital filed a petition with the Industrial Accident Board ("Board") to terminate payments. Simmons contested the petition and sought additional compensation, including **permanent impairment** benefits for injury to her neck and the payment of certain medical expenses.

After hearing both petitions, the Board granted the Hospital's petition to terminate payments of total disability benefits, but awarded Simmons partial disability benefits of $109.62 per week. The Board granted Simmons' request for payment of medical expenses and also awarded her **permanent impairment** benefits based on its finding that she had suffered a 5% **permanent** injury to her neck. Lastly, the Board granted Simmons two attorney's fee awards, each in the maximum statutory amount, for her representation on the partial disability and medical expense claims. The Board declined to grant Simmons a third attorney's fee award for her representation on the **permanent impairment** claim.

Simmons appealed to the Superior Court from the termination of her total disability benefits, the award of benefits based on the Board's finding that she had suffered only a 5% **permanent** injury to her neck, and the Board's failure to award her attorney's fees for her **permanent** neck **impairment** claim. The Hospital filed a motion to affirm the Board's decision.[1] The Superior Court granted the Hospital's motion and this appeal followed.

In this appeal, Simmons raises three contentions: first, that the Board erred in its decisions regarding the disability and **permanent impairment** claims; second, that the Board erred in rejecting her medical expert's opinion regarding the extent of her **permanent impairment**; and third, that the Board erred in refusing to grant her an attorney's fee award with regard to her **permanent impairment** claim.

This Court has concluded that Simmons' first two contentions are without merit. The Board did err, however, by not granting any attorney's fee award with regard to her **permanent impairment** claim, since some form of award is mandated by statute. 19 *Del.C.* § 2127. Therefore, the judgment of the Superior Court is affirmed in part and reversed in part.

FACTS

Simmons was an activity aide at the Delaware State Hospital for thirteen years. On March 8, 1990, a male patient, wearing a cast on his arm, struck her three times on the left side of her neck and the back of her head. Simmons was injured and began receiving total disability benefits.

On July 8, 1993, the Board conducted a hearing in response to the Hospital's petition to terminate benefits. Dr. Andrew J. Gelman ("Dr. Gelman") testified for the Hospital in support of its termination petition. Dr. ***387** Gelman testified that he examined Simmons on September 28, 1990, and again on May 7, 1993. Based on both visits and his review of Simmons' medical records, Dr. Gelman concluded that Simmons was capable of returning to her job at the Hospital.

With regard to Simmons' claim for **permanent impairment** benefits, Dr. Gelman testified that Simmons had a 5% **permanent** injury to her neck. Dr. Gelman stated that he rated Simmons' **permanent** neck injury at 5% by using the American Medical Association Guide. Dr. Gelman indicated that no restrictions were necessary with regard to Simmons' ability to return to work at the Hospital as an activity aide.

Dr. Richard A. Kahlbaugh ("Dr. Kahlbaugh"), Simmons' treating physician, testified on behalf of Simmons. Dr. Kahlbaugh testified that he had released Simmons to return to light-duty work as of approximately April 1992. In Dr. Kahlbaugh's opinion, Simmons had suffered a 25% to 30% **permanent impairment** to her neck. He testified that his **permanency** assessment was based upon the "element of pain that she has. And, also the fact that certain movements, doing certain things, aggravate the muscle spasm and create more pain." Dr. Kahlbaugh did not use any particular guide in assessing the extent of the **permanent impairment** to Simmons' neck.

Simmons and her husband testified at the Board hearing. Simmons testified that Dr. Gelman did not conduct a physical examination of her on May 7, 1993. Instead, he had briefly told her that she would have to "live with" her pain before escorting her out the door. Simmons contends that her husband's testimony confirms her version of the events. Her husband testified that the May 7 office visit was brief, perhaps ten minutes. Simmons also contends that her testimony was confirmed by Dr. Kahlbaugh, who reviewed Dr. Gelman's hand-written notes and said that the notes, dated May 7, 1993, did not indicate that Dr. Gelman had conducted a physical examination of Simmons on that date.

The Board granted the Hospital's termination petition. The Board accepted Dr. Gelman's testimony, rather than Dr. Kahlbaugh's testimony, and attributed a 5% **permanent impairment** to Simmons' neck. The Board awarded Simmons partial disability benefits at the rate of $109.62 per week.

The Board also directed the Hospital to pay two attorney's fees to Simmons, in the maximum statutory amount, based upon its awards to Simmons for partial disability and for her unpaid medical bills. The Board declined to award any attorney's fees to Simmons, however, for the **permanent impairment** claim. Prior to the hearing, the Hospital had offered to settle that claim for 5% **permanent impairment**, in accordance with Dr. Gelman's report. In denying an award of attorney's fees for representation regarding the **permanent impairment** claim, the Board relied upon the provisions of Board Rule 24(D).[2]

TOTAL DISABILITY EVIDENCE SUPPORTS DENIAL

The first issue Simmons raises is that the Board erred by not resolving a conflict in the testimony. Dr. Gelman testified regarding the physical examination that he performed on May 7, 1993. Simmons testified that Dr. Gelman did not perform a physical examination of her on that date.

Dr. Gelman testified that his examination of Simmons began the moment he saw her. According to Dr. Gelman, his examination included observing Simmons' actions. Those actions included the manner in which Simmons walked into the examining room and her movements within the examining room itself.

Simmons contends that Dr. Gelman met her in the examining room. There, he told her that she would have to "get a life and deal with the pain." According to Simmons, ***388** Dr. Gelman indicated that he had already reviewed her x-rays, which were on the viewing screen. He then escorted her out to the reception area.

[1] [2] The record reflects that the Board dealt with this conflict in testimony summarily. The function of reconciling inconsistent testimony or determining credibility is exclusively reserved for the Board. *Breeding v. Contractors–One–Inc.*, Del.Supr., 549 A.2d 1102, 1106 (1988). The Board's decision may not be disturbed by a reviewing court absent an abuse of discretion. *Id.*

[3] Although Simmons alleges that the issue of total disability rested upon the factual conflict between the testimony of Simmons and Dr. Gelman, the Board appears to have based its decision upon the testimony of Simmons' own treating physician. Dr. Kahlbaugh testified that he would have released Simmons to work in April of 1992, if a job were available where she was not at risk of confrontation. The record does not reflect an abuse of discretion with respect to the Board's assessment of any credibility dispute.

PERMANENT DISABILITY BOARD ASSESSED EXPERTS

[4] The second issue Simmons raises concerns the Board's award for **permanent** neck **impairment** of only 5%. Dr. Gelman testified that Simmons had "less than 5% **permanent impairment** to the neck in accordance with the AMA Guide." Dr. Kahlbaugh testified that Simmons had a 25–30% **permanent impairment** to her neck. Dr. Kahlbaugh admitted that he did not use any specific guide in reaching his **permanent impairment** rating. Dr. Kahlbaugh testified as follows:

> My estimate is probably 25–30%, as I've previously stated. And this is based on the element of pain that she has. And also the fact that certain movements, doing certain things, aggravate the muscle spasm and create more pain.

The Board indicated that it "did not find the testimony of Dr. Kahlbaugh persuasive because he did not rely on any guides." Simmons argues that the Board's decision is contrary to the decision in *Wilmington Fibre Specialty Co. v. Rynders*, Del.Super., 316 A.2d 229 (1974), *aff'd*, Del.Supr., 336 A.2d 580 (1975). Simmons' reliance upon the *Rynders* case is misplaced.

The *Rynders* case does not stand for the proposition that testimony based upon the AMA Guide should not be accepted as credible. In *Rynders*, the Superior Court held that **permanent impairment** must be determined based upon "the ability of the employee to use the member or part, and conversely, the loss of use represents that degree of normal use which is beyond the ability or capability of the employee." *Wilmington Fibre Specialty Co. v. Rynders*, 316 A.2d at 231. This Court affirmed the decision of the Superior Court in *Rynders*, holding that, since the proper focus is the "employee's actual capability," the Board *may* properly rely on a medical expert's testimonial assessment of the claimant's pain without regard to a statistical chart. *Wilmington Fibre Specialty Co. v. Rynders*, 336 A.2d at 580. This Court's decision in *Rynders* does not support Simmons' contention that the Board *must* rely on such testimony.

[5] The Board did not err in accepting Dr. Gelman's testimony and rejecting Dr. Kahlbaugh's testimony regarding the extent of **permanent impairment** to Simmons' neck. It is entirely proper and appropriate for the Board to accept the medical testimony of one expert witness over that of another. *General Motors Corp. v. Veasey*, Del.Supr., 371 A.2d 1074 (1977), *overruled on other grounds by Duvall v. Charles Connell Roofing*, Del.Supr., 564 A.2d 1132 (1989). *Accord DiSabatino Bros., Inc. v. Wortman*, Del.Supr., 453 A.2d 102 (1982). Simmons' challenge on this issue is without merit.

ATTORNEY'S FEE MANDATED BY STATUTE BOARD RULE 24(D) A VALID FACTOR

Simmons' final contention is that the Board erred, as a matter of Delaware law, in failing to award her attorney's fees with regard to its award for **permanent impairment** to her neck. The Board characterized Simmons' case before it as involving three separate claims, each of which qualified for a ***389** potential award of attorney's fees. For the first two issues, compensation for partial disability and the payment of medical bills, the Board awarded Simmons the maximum possible attorney's fees permitted by statute. 19 *Del.C.* § 2127. It directed the Hospital to pay Simmons an attorney's fee for each award equal to the lesser of $2250 or 30% of the amount awarded on her first two claims. *Id.* For the third claim, compensation for **permanent** neck **impairment**, the Board relied on Board Rule 24(D) and declined to award Simmons any attorney's fees.

Industrial Accident Board Rule 24(D) provides as follows:

> When an offer of settlement is made by an employer or its insurance carrier and such offer is at least equal to the award ordered by the Board, and said offer has been communicated to the employee's attorney in writing at any time more than 21 days prior to the hearing before the Board, the Board shall consider such facts in its determination of reasonableness of the attorney's fees.

In this case, Simmons had rejected a settlement offer from the Hospital, extended more than 21 days prior to the hearing, to compensate her based on 5% **permanent** neck **impairment**. Because the Board ultimately awarded her compensation based on 5% **permanent impairment**, the Board declined to award Simmons attorney's fees on the **permanency** issue, citing Rule 24(D).

Board Rule 24(D) Simmons' Contention

In this appeal, Simmons contends that the Board's refusal to award an attorney's fee on the **permanency** issue violated 19 *Del.C.* § 2127. That section provides:

> (a) A reasonable attorney's fee in an amount not to exceed 30% of the award or $2250, whichever is smaller, shall be allowed by the Board to any employee awarded compensation under this chapter and Chapter 23 of this Title and taxed as costs against a party.
>
> (b) No compensation, other than the fee provided by subsection (a) of this section, may be received by an attorney for services before the Board; provided, however, that this limitation shall not apply to any fee for services rendered by an attorney on appeal from an award or a denial of an award by the Board.

19 *Del.C.* § 2127. According to Simmons, Board Rule 24(D) is invalid because the Board rule denies an award of attorney's fees where the statute dictates that such an award "*shall* be allowed." 19 *Del.C.* § 2127(a). (emphasis added). Simmons argues that because Section 2127(b) prohibits an attorney from receiving any payment other than the Board's award, the Board's absolute denial of an attorney's fee pursuant to Rule 24(D) unfairly punished the attorney for the client's decision to reject a settlement offer.

Attorney's Fee Statutory Mandate

[6] This Court has held that the word "shall" in a statute authorizing attorney's fees is "mandatory and leaves no room for the exercise of judicial discretion regarding that right." *Heil v. Nationwide Mutual Ins. Co.*, Del.Supr., 371 A.2d 1077 (1977). In *Heil,* this Court held that a statute, worded similarly to Section 2127, permitted discretion over the amount of the attorney's fees to be awarded depending upon the circumstances of a given case. However, the discretion permitted by the statute's dictate that attorney's fees "shall" be awarded did not extend to the *absolute* denial of attorney's fees.

The legislative history of Section 2127 supports our conclusion that the Board may not completely deny the award of an

attorney's fee. In 1962, Section 2127 provided that the Board "may" award attorney's fees to successful claimants. 53 Del.Laws Ch. 381. In 1966, the General Assembly amended the statute to its present form, directing that the Board "shall" award attorney's fees to successful claimants.

[17] When a legislative body amends a prior enactment by a material change in the language, it is presumed that a change in the meaning was intended. *Giuricich v. Emtrol Corp.*, Del.Supr., 449 A.2d 232, 237 (1982); ***390** *Daniel D. Rappa, Inc. v. Engelhardt,* Del.Supr., 256 A.2d 744, 746 (1969). The present version of the statute is unambiguous. It "must be held to mean that which it plainly states." *See A & P Stores v. Hannigan,* Del.Supr., 367 A.2d 641, 642 (1976); *Balma v. Tidewater Oil Co.*, Del.Supr., 214 A.2d 560, 562 (1965). We hold that the Board's decision to award Simmons no attorney's fee on the **permanent impairment** claim violated Section 2127. *Accord Heil v. Nationwide Mutual Ins. Co.*, 371 A.2d at 1078.

Board Rule 24(D)

The Superior Court previously held that Board Rule 2, a precursor to Board Rule 24(D), violated Section 2127 and was void. *Ellison v. City of Wilmington,* Del.Super., 301 A.2d 303 (1972). At that time, Board Rule 2 stated:

> If a hearing is had before the Industrial Accident Board and an award is made in favor of the injured employee the maximum amount of the statutory attorney's fee will be allowed to the employee and taxed against the employer or his carrier except when the offer of settlement made by the employer or his carrier is equal to the award offered by the Industrial Accident Board and such offer of settlement has been communicated to the employee's attorney no later than ten days before the date set for the hearing.

The Superior Court held that, to the extent the Rule permitted the Board to automatically deny attorney's fees and thereby avoid its duty under Section 2127 to award a reasonable attorney's fee, the rule was void. *Id.* at 306.

The Board thereafter changed the provisions of its prior Rule 2 to Rule 24(D) in its present form. In Rule 24(D), the Board purported to address the Superior Court's concern. The rejection of a settlement offer is now one factor the Board can consider in determining the "reasonable fee" to which the claimant's attorney is entitled. Therefore, the applicability of Rule 24(D) does not automatically result in the denial of an attorney's fee.

Board Rule 24(D) Purpose and Operation

This Court has previously acknowledged the proper purposes served by Board Rule 24(D). *State v. Drews,* Del.Supr., 491 A.2d 1136, 1139 (1985). In *Drews,* this Court stated:

> Board Rule 24 makes clear that the issue of fees is before the Board whenever a settlement offer is communicated within 21 days of the hearing. The purposes of this rule are: (1) to encourage early settlement by employers before claimants' attorneys must engage in substantial pre-hearing preparation, and (2) to prevent abuses by claimants' attorneys, who do not accept valid settlement offers, and thereby force unnecessary Industrial Accident Board hearings.

Id. at 1139. The proper purposes of Rule 24(D) were reviewed again in *Seaford Feed Co. v. Moore,* Del.Supr., 537 A.2d 184 (1988).

[18] Although the purposes of Rule 24(D) are proper, the Rule must not operate as a presumption that whenever a claimant exercises his or her right to proceed before the Board, and the Board ultimately awards the claimant an amount equal to or less than a prior rejected settlement offer, the claimant or the claimant's attorney necessarily committed an "abuse" by rejecting the offer and pursuing the claim before the Board. In certain instances, under the simplified **worker's compensation** statutory recovery scheme, the Board's ultimate award is based on either a schedule or a straight-forward mathematical computation. As to such claims, the fact that a claimant rejected an earlier equivalent settlement offer *may* properly be given some weight under Rule 24(D) in the Board's determination of a "reasonable" attorney's fee award.[3]

[19] Nevertheless, there will be other instances in which the amount of the claimant's recovery is not clearly prescribed by a statutory formula or schedule and, thus, the Board's ultimate award is not foreordained, ***391** e.g., soft tissue injuries. In those more complex, unpredictable cases, the claimant may have ample justification for rejecting a settlement offer. Accordingly, when the claimant has valid reasons for rejecting a settlement offer and presents some probative evidence or cogent legal argument in support of a position at a hearing, the Board should accord little weight to the fact that a settlement offer was rejected in light of the relationship of the offer to the actual award.

[10] In applying Rule 24(D), the Board must be careful not to exacerbate the potential conflict of interest claimants' attorneys already confront as a result of the provisions contained in 19 *Del.C.* § 2127. Section 2127(a) provides that the Board shall allow attorney's fees to a claimant "awarded compensation" and that the employer must pay the attorney's fee award. Section 2127(b) relieves the claimant of any private, contractual arrangement to pay attorney's fees for "services before the Board." Therefore, an attorney who represents a client before the Board may look only to the Board, not the claimant, to receive compensation for his or her services. Conversely, Section 2127 has been construed as not applying to settlements. *See Anderson v. Wheeler Constr.*, Del.Super., 267 A.2d 616 (1970).

Accordingly, a Board award equal in amount to a settlement offer is *always* financially more advantageous to a claimant because it is not reduced by the payment of an attorney's fee. In fact, a Board award in an amount significantly less than a settlement offer may actually result in a greater net dollar recovery for the claimant. For example, where a claimant has agreed to pay attorney's fees in the amount of 30% of the recovery, the claimant would be $500 better off receiving an $18,000 award from the Board than by accepting a $25,000 offer of settlement. The opposite is true for the attorney, who would receive $7,500 pursuant to the fee agreement, but could only be awarded a maximum of $2,250 after prevailing in a Board hearing. Rule 24(D) adds the risk that the Board will award the attorney only a nominal fee because the claimant rejected the settlement offer.

[11] Claimants are protected in such situations by the Delaware Lawyers' Rules of Professional Conduct promulgated by this Court. *See* Del.Rules Ann. 1121–99 (1995 ed.). Due to the ethical concerns created by Section 2127 and Rule 24(D), attorneys are required to disclose fully their conflict of interest when discussing the merits of any settlement proposal. *See* Del.R.Prof.C. 1.7. Consequently, attorneys must explain how Section 2127 operates and, to the extent possible, advise their clients of the "break even" amount for a Board award in discussing the likelihood of obtaining a better result than that being offered in a proposed settlement. *Id.* This should be done in accordance with Rules 1.4 and 1.5 of the Delaware Lawyers' Rules of Professional Conduct.

[12] [13] [14] The validity of Section 2127 was not raised as an issue in this appeal. We are also not called upon to decide whether the Superior Court properly interpreted Section 2127 in *Anderson.* Accordingly, we decline to decide either of those issues in this case.[4] We do hold, however, that the Board cannot use Rule 24(D) to encourage employers to settle at the expense of violating Section 2127's mandate that an attorney's fee *shall* be allowed when the Board awards a claimant compensation; and, that the Board must not penalize the claimant's attorney for the claimant's good faith rejection of a settlement offer.

This Case Rule 24(D) Improperly Applied

[15] Once the Board determines the number of issues which are subject to an award of attorney's fees, the Board must award attorney's fees for each *issue* in accordance with Section 2127.[5] As this Court ***392** stated in *Heil,* "[t]he amount [awarded] may be minimal or even nominal; but the statute may not be disregarded entirely." *Heil v. Nationwide Mutual Ins. Co.*, 371 A.2d at 1078. The factors that the Board should consider in determining an award of attorney's fees are set forth in *General Motors Corp. v. Cox,* Del.Supr., 304 A.2d 55 (1973).

[16] As a further matter, we hold that the Board erred in relying solely on Rule 24(D) in deciding whether to award an attorney's fee. The applicability of Rule 24(D) is only one factor to be considered in the Board's determination of what constitutes a "reasonable fee" in a given case. In Simmons' case, the Board must also consider that her medical expert opined that she had suffered a 25% to 30% **permanent impairment** to her neck, whereas the Hospital's medical expert believed she had only a 5% **permanent impairment**. This divergence of medical opinions would appear to be particularly relevant to determining the weight the Board should accord to Rule 24(D) in assessing a reasonable attorney's fee to award.

Board Rule 24(D) does not, *per se,* violate Section 2127(a) by making the rejection of a settlement offer a relevant but not dispositive consideration in making an award of attorney's fees. In this case, however, the Board's decision reflects three compound errors: first, it relied exclusively on Rule 24(D); second, it applied Rule 24(D) without considering Simmons' good faith in rejecting the settlement offer; and third, the absolute denial of *any* attorney's fee on the **permanent impairment** claim violated Section 2127's mandate. On remand, the Board is directed to award an attorney's fee and to set forth explicitly the *ratio decidendi* for the amount that it decides to award. *General Motors Corp. v. Cox,* 304 A.2d at 57–58. *See Tate v. Miles,* Del.Supr., 503 A.2d 187 (1986).[6]

CONCLUSION

The judgments of the Superior Court with regard to the Hospital's petition to terminate total disability payments and with regard to Simmons' claims for disability and **permanent impairment** benefits are AFFIRMED. The judgment of the Superior

Court with regard to Simmons' claim for an attorney's fee for her representation on the **permanent impairment** claim is REVERSED. This matter is remanded to the Superior Court for remand to the Board and further proceedings in accordance with this opinion.

All Citations

660 A.2d 384

Footnotes

1 Superior Court Civil Rule 72.1 provides for expedited dispositions in appeals on the record. Section (b) of that rule states, in part:

> (b) **Motion to Affirm.** Within 10 days after receipt of appellant's opening brief, appellee may, in lieu of a brief, serve and file a motion to affirm the order, award, determination, or decree or part thereof appealed from. The filing of the motion tolls the time for filing of appellee's brief. The sole ground for such motion shall be that it is manifest on the face of appellant's brief that the appeal is without merit because:
> (1) The issue on appeal is clearly controlled by settled Delaware law;
> (2) The issue on appeal from a court is factual, and clearly there is sufficient evidence to support the jury verdict or findings of fact below;
> (3) The issue on appeal from a commission or board is factual, and clearly there is substantial evidence to support the findings of fact below; or
> (4) The issue on appeal is one of judicial or administrative discretion, and clearly there was no abuse of discretion.

2 Board Rule 24(D) states:

> When an offer of settlement is made by an employer or its insurance carrier and such offer is at least equal to the award ordered by the Board, and said offer has been communicated to the employee's attorney in writing at any time more than 21 days prior to the hearing before the Board, the Board shall consider such facts in its determination of reasonableness of the attorney's fees.

3 We note that the proper application of the statute to "schedule" claims can frequently lead to legitimate differences of opinion which the parties are entitled to have adjudicated by the Board.

4 A fundamental constitutional principle in Delaware is that "this Court, alone, has sole and exclusive responsibility over all matters affecting governance of the Bar." *In Re Appeal of Infotechnology, Inc.*, Del.Supr., 582 A.2d 215, 220 (1990). Thus, the fees charged by members of the Delaware Bar are subject to this Court's regulation. *See* Del.R.Prof.C. 1.5 regarding fees.

5 The Board has discretion in deciding the number of issues in a case that it will treat separately for the purpose of awarding attorney's fees. *See General Motors Corp. v. Burgess*, Del.Supr., 545 A.2d 1186, 1194 (1988); *Mountaire of Delmarva, Inc. v. Glacken*, Del.Supr., 487 A.2d 1137, 1142 (1984). In this case, the Board concluded that three issues potentially warranted attorney's fee awards.

6 This Court is unable to fulfill its appellate function properly when the reasonableness of discretionary action is under review, unless reasons are given for the decision reached by the trier of fact. *General Motors Corp. v. Cox*, 304 A.2d at 57–58.

Adams v. F. Schumacher and Co., Inc., 886 A.2d 1277 (2005)

886 A.2d 1277 (Table)
Unpublished Disposition
(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')
Supreme Court of Delaware.

Linda ADAMS, Employee/Appellant,
v.
F. SCHUMACHER AND CO., INC., Employer/Appellee.

No. 272,2005.
|
Submitted Sept. 7, 2005.
|
Decided Nov. 1, 2005.

Synopsis
Background: Workers' compensation claimant sought review of a decision of the Industrial Accident Board (IAB) that found that claimant had not suffered **permanent impairment** to her lumbar spine or brain. The Superior Court, New Castle County, 2005 WL 1654359, affirmed the IAB's decision. Claimant appealed.

Holdings: The Supreme Court, Ridgely, J., held that:

[1] decision of IAB finding that claimant had not suffered **permanent impairment** to her lumbar spine or brain was supported by substantial credible evidence, and

[2] medical expert's opinion that claimant suffered **permanent impairment** of her brain was not supported by sufficient information that would allow IAB to assess reasonableness of opinion.

Affirmed.

West Headnotes (2)

[1] **Workers' Compensation**
Head, Neck, or Shoulder Injuries

Workers' Compensation
Back Injuries

Decision of Industrial Accident Board (IAB) finding that **workers' compensation** claimant had not suffered **permanent impairment** to her lumbar spine or brain was supported by substantial credible evidence; two medical experts testified that claimant did not suffer **permanent impairment** to lumbar spine and, while one expert testified that claimant suffered **permanent impairment** to her brain, IAB had discretion to disregard that testimony in favor of testimony of other medical expert who opined that claimant had not suffered **permanent** brain **impairment**.

3 Cases that cite this headnote

[2] **Workers' Compensation**
Head, Neck, or Shoulder Injuries

Medical expert's opinion that **workers' compensation** claimant suffered **permanent impairment** of her brain was not supported by sufficient information that would allow Industrial Accident Board (IAB) to assess reasonableness of opinion, and thus IAB did not err when it determined that claimant had not suffered **permanent impairment** to her brain.

1 Cases that cite this headnote

Court Below: Superior Court of the State of Delaware in and for New Castle County, C.A. No. 05A-03-001.

Before STEELE, Chief Justice, HOLLAND and RIDGELY, Justices.

ORDER

***1** This 1st day of November 2005, upon consideration of the briefs of the parties, it appears to the Court that:

(1) The employee-appellant, Linda Adams ("Claimant") appeals a judgment of the Superior Court upholding a decision of the Industrial Accident Board ("Board")[1] in favor of employer-appellee, F. Schumacher and Co. Inc. ("Employer"). On November 6, 2003, the Board determined that Claimant sustained a 20% **impairment** to the cervical spine, but no **permanent impairment** to the lumbar spine or brain. The Claimant has filed this appeal challenging the Board's determination that Claimant suffered no **permanent impairment** to the brain. Claimant contends that the Board's decision was not supported by substantial credible evidence and that the Board erred by failing to recognize that in determining **permanency** ratings, physicians may employ a variety of methods. Because we find no merit in these arguments, we affirm.

(2) Claimant was injured in an industrial accident on January 23, 2001. Claimant slipped, fell, and injured her back while exiting her vehicle in parking lot of the Employer. Following the accident, Claimant began to experience chronic headaches. In addition, Claimant suffered from memory loss and dizziness. Claimant's daily activities and her ability to perform her duties at work were affected negatively by the headaches. Claimant sought **permanent impairment** benefits for 20% loss of use to the cervical spine, a 10% loss of use to the lumbar spine, a 7% loss of use to the left upper extremity, and a 10% loss of use to the

brain. Claimant withdrew the request for **permanent impairment** benefits related to the left upper extremity.

(3) At the Board hearing, two medical experts testified, Dr. Stephen Rodgers and Dr. Alan Fink. Dr. Rodgers found 10% **permanent impairment** to the brain based on Claimant's medical records and examination of Claimant. In reaching his conclusion, Dr. Rodgers did not use the **permanency** rating of the American Medical Association Guides to the Evaluation of **Permanent Impairment** ("AMA Guides"). Dr. Rodgers explained that the AMA Guides offered "little guidance as to a numerical quantification of the severity of [the] post-traumatic headaches suffered by [Claimant]." In establishing the **permanency** rating, Dr. Rodgers used his clinical judgment and referenced the AMA Pain Guides.

(4) Dr. Fink testified that Claimant did not have any **permanent** brain **impairment**. Dr. Fink based his opinion on the AMA Guides. Dr. Fink acknowledged that Claimant initially had some difficulty with her memory after the accident, but has improved. Dr. Fink noted that the Claimant was able to work full-time, take care of herself, and conduct her daily activities. Dr. Fink opined that Claimant's headaches were result of her excessive use of Excedrin and Tylenol and that if Claimant stopped taking the medicine, the symptoms would improve.

(5) Weighing the testimony of Dr. Rodgers, Dr. Fink, and the testimony of Claimant, the Board found that the Claimant had no **permanent impairment** to the brain. The Board found the testimony of Dr. Fink to be more persuasive than that of Dr. Rodgers. In reaching its conclusion, the Board noted that Dr. Rodgers' opinion "without any specific discussion as to what procedure or which table or charts were followed, does not give [me] sufficient information from which [I] can properly evaluate the reasonableness of the assessment."

**2 (6) The standard of review for the legal conclusions of the Board is *de novo*.[2] The Superior Court, as an appellate court, reviews the Board's factual findings to determine whether they are supported by substantial credible evidence.[3] Substantial evidence is more than a mere scintilla, but less than a preponderance of the evidence.[4] Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[5] This Court does not sit as the trier of fact nor does it have authority to weigh the evidence, determine questions of credibility, or make factual findings and conclusions.[6] Moreover, due deference should be given to the experience and specialized competence of the Board.[7]

[1] (7) Claimant's first argument on appeal is that the Board's decision is not based on substantial credible evidence. The Claimant alleges that the Board erred when it failed to consider Dr. Rodgers' testimony concerning the **permanent impairment** of the Claimants' brain injury simply because Dr. Rodgers did not utilize the AMA Guides for **permanency** ratings. The Claimant contends that the Board should have at least considered Dr. Rodgers' testimony even if the Board was eventually persuaded by the testimony of Dr. Fink. The Claimant argues that the Board should not have wholly disregarded Dr. Roberts' testimony merely because it did not comply with the principles normally utilized by the Board in determining a **permanency** rating.[8]

(8) The Employer contends that the Board's decision regarding the **permanency** of Claimant's brain injury was based on substantial credible evidence. The Employer claims that the Board had discretion to rely on Dr. Fink's credible opinion over Dr. Rodgers' opinion. Contrary to Claimant's argument, the Board did not completely disregard Dr. Rodgers' testimony. The Board considered Dr. Rodgers' testimony but found it unreliable with respect to the **permanency** of brain **impairment**. The Board accepted Dr. Rodgers' testimony regarding the degree of **permanent impairment** to Claimant's cervical spine. Dr. Rodgers' opinion was supported by his reliance on the AMA Guides.

(9) As the Superior Court recognized, this is a classic battle of the experts case. When there are conflicting expert testimonies, the Board is free to choose to accept one and reject the other.[9] When determining the reliability of an expert's opinion, the Board must make a determination of the reliability of the sources on which the expert relied.[10] Thus, the Board was entitled to rely upon Dr. Fink's opinion that claimant did not have **permanent** injury to the brain and reject Dr. Rodgers' opinion as unreliable.

[2] (10) Claimant's second argument on appeal is that the Board erred by failing to recognize that physicians may employ a variety of methods other than those commonly used in determining a **permanency** record. The Claimant cites to an unpublished opinion of the Board,[11] in which the Board declared that going outside the AMA Guides was sometimes necessary.[12] Claimant argues that the AMA Guides provide little guidance with regard to **permanent impairment** ratings for the headaches Claimant suffered. Therefore, Claimant contends that the facts of this case require the Board to deviate from the AMA Guides.

**3 (11) The Employer argues that the issue whether the Board should strictly follow the AMA Guides is not relevant to the appeal. Rather, the Employer contends that the real issue is whether the Board's opinion was supported by substantial evidence. Here, the Board's decision is based on substantial evidence. The Board acted within its discretion in accepting Dr. Fink's testimony to be more persuasive.

(12) The Board committed no error in reaching its opinion that Claimant did not suffer from **permanent impairment** to the brain. The Board did not disregard Dr. Rodgers' opinion completely. Rather, the Board explained that it was not supported by

sufficient information that would allow the Board to assess its reasonableness. Furthermore, Dr. Rodgers' rating was not supported by Claimant's own complaints as to headaches several times a week, more than two years after the accident. Weighing the testimony of Dr. Rodgers, Dr. Fink and Claimant herself, the Board did not err in concluding that Claimant suffered no **permanent impairment** to the brain. The Superior Court did not err when it affirmed the decision of the Board.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

All Citations

886 A.2d 1277 (Table), 2005 WL 2895105

Footnotes

1 Pursuant to the parties' stipulation, the Matter was decided by a **Workers' Compensation** Hearing Officer in lieu of the Board, pursuant to the Delaware Code.

2 *Scheers v. Indep. Newspapers,* 832 A.2d 1244, 1246 (**Del**.2003).

3 *A. Mazzatti & Sons, Inc. v. Ruffin,* 734 A.2d 1120 (**Del**.1981); *Walden v. Georgia-Pacific Corp.,* 738 A.2d 239 (**Del**.1999).

4 *Olney v. Cooch,* 425 A.2d 610, 614 (**Del**.1981).

5 *Id.*

6 *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66 (**Del**.1965).

7 2.29 **Del**. C. § 10142(d); *Histed v. E.I. duPont de Nemours & Co.,* 621 A.2d 340, 342 (**Del**.1993).

8 *Jackson v. State,* 1997 WL 1048181 at *5 (Del.Super.Ct.).

9 *Reese v. Home Budget Center,* 619 A.2d 907, 910 (**Del**.1992); *DiSabatino Bros., Inc. v. Wortman,* 453 A.2d 102, 105-6 (**Del**.1982).

10 *Fensterer v. State,* 509 A.2d 1106, 1110 (**Del**.1986).

11 *Fogbawah v. Carman Ford,* IAB, No. 1148704, 2001 Wright, Hearing Officer, Daniello, Hearing Officer (March 8, 2001).

12 "While normally the Board considers the AMA Guides to be a useful tool in evaluating **impairments**, it is important to remember that it is only a tool." *Id.* at 210.

981 A.2d 1159
Supreme Court of Delaware.

Sandra PERSON-GAINES, Claimant/Appellant,
v.
PEPCO HOLDINGS, INC., Employer/Appellee.

No. 282, 2009.
|
Submitted: Sept. 9, 2009.
|
Decided: Sept. 28, 2009.

Synopsis

Background: **Workers' compensation** claimant appealed from decision of the Superior Court, New Castle County, affirming the Industrial Accident Board's decision denying her petition for additional work-related injury compensation.

[Holding:] The Supreme Court, Steele, C.J., held that substantial evidence supported Board's decision denying claimant's petition for additional work-related injury compensation.

Affirmed.

West Headnotes (10)

[1] **Workers' Compensation**
In general; questions of law or fact
Workers' Compensation
Substantial evidence

Upon review of a **workers' compensation** decision of the Industrial Accident Board, appellate courts examine the record for errors of law and determine whether substantial evidence exists to support the Board's finding of fact and conclusions of law.

30 Cases that cite this headnote

[2] **Workers' Compensation**
Substantial evidence

Substantial evidence to support Industrial Accident Board's **workers' compensation** decision equates to such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

82 Cases that cite this headnote

[3] **Appeal and Error**
Credibility of Witnesses
Appeal and Error
Province of trial court
Appeal and Error
Authority to find facts

On appeal, appellate court will not weigh the evidence, determine questions of credibility, or make its own factual findings.

59 Cases that cite this headnote

[4] **Appeal and Error**
Cases Triable in Appellate Court

Errors of law are reviewed de novo.

18 Cases that cite this headnote

[5] **Workers' Compensation**
Discretion

Absent error of law, the standard of review for Industrial Accident Board's **workers' compensation** decision is abuse of discretion.

15 Cases that cite this headnote

[6] **Workers' Compensation**
⇐Discretion

Industrial Accident Board has abused its discretion in **workers' compensation** case only when its decision has exceeded the bounds of reason in view of the circumstances.

21 Cases that cite this headnote

[7] **Workers' Compensation**
⇐Back and spine injuries

Substantial evidence supported Industrial Accident Board's decision denying **workers' compensation** claimant's petition for additional work-related injury compensation; doctor acknowledged an increase in the **permanent impairment** of claimant's lumbar spine, but he attributed that increase to changes in the medical guidelines or congenital, degenerative factors and not the work accident, and Board viewed physician's opinion as unreliable because he did not provide specific examples or medical records showing objective change in claimant's symptoms justifying increased **permanent impairment** rating and he had opined that claimant had 5% **permanent impairment** to her lumbar spine when she was already receiving benefits based on 10% **permanent impairment**.

1 Cases that cite this headnote

[8] **Workers' Compensation**
⇐Substantial evidence

Industrial Accident Board's **workers' compensation** decision stands unless no substantial evidence supports it.

3 Cases that cite this headnote

[9] **Workers' Compensation**
⇐Credibility and conflict with other evidence
Workers' Compensation
⇐Expert testimony

In **workers' compensation** case, Industrial Accident Board may adopt the opinion testimony of one expert over another, and that opinion, if adopted, will constitute substantial evidence for purposes of appellate review.

12 Cases that cite this headnote

[10] **Workers' Compensation**
⇐Credibility and conflict with other evidence

In **workers' compensation** case, Industrial Accident Board may accept or reject an expert's testimony in whole or in part.

5 Cases that cite this headnote

***1160** Court Below: Superior Court of the State of Delaware, in and for New Castle County, C.A. No. 08A-08-11.
Upon appeal from the Superior Court. **AFFIRMED.**

Attorneys and Law Firms

Michael D. Bednash, Kimmel, Carter, Roman, & Peltz,

P.A., Newark, Delaware for claimant/appellant.

Elizabeth A. Saurman, Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware for employer/appellee.

Before STEELE, Chief Justice, HOLLAND and BERGER, Justices.

Opinion

STEELE, Chief Justice.

Sandra Person-Gaines appeals from the judgment of the Superior Court affirming the Industrial Accident Board's decision denying her petition for additional work-related injury compensation.[1] The IAB limited Person-Gaines to previously accepted benefits based on a 10% **permanent impairment** to her lumbar spine and a 2.5% **permanent impairment** to her lower back. Person-Gaines contends that the Superior Court erred because the Board's decision was not supported by substantial evidence. Because her petition and the expert testimony failed to establish any additional **permanent impairment** related to her 1988 work injury, we also AFFIRM.

Factual and Procedural Background

Person-Gaines sustained a work-related injury to her low back in March 1988 and began receiving benefits in 1993. In July 2007, Person-Gaines petitioned the Board for additional compensation for a 17% **permanent impairment** to her lumbar spine. At the hearing, the IAB heard testimony from two medical experts-Dr. Pierre LeRoy and Dr. John Townsend, III.

Dr. LeRoy testified for Person-Gaines. He opined that the current **permanent impairment** to her lumbar spine was 13-17% but would have been around 5% in 1997. He noted that she previously had problems on the left side but was now experiencing symptoms on both sides. He testified that her MRIs showed deteriorating spinal herniations, stenosis, and scar tissues and concluded the progressing nature of her condition merited a finding for increased benefits.

Dr. Townsend testified for Pepco. At Pepco's request, he saw Person-Gaines on several occasions to monitor her medical ***1161** status. He concluded the current **permanent impairment** to her lumbar spine was 15%. Although Dr. Townsend agreed the current rating was higher than the 1993 rating, he disagreed with Dr. LeRoy's conclusion that the increasing **impairment** correlated to her 1988 injury. Rather, he suggested two lines of reasoning for the **impairment** increase: (1) changes in the AMA guidelines falsely inflated Person-Gaines **permanent impairment** rating and (2) congenital, degenerative factors exacerbated the condition of her spine.

The Board accepted the opinion of Dr. Townsend, rejected the opinion of Dr. LeRoy, and held that Person-Gaines had not met the burden of proving that she sustained additional **permanent impairment** because of the 1988 work accident.

Standard of Review

[1] [2] [3] [4] [5] [6] Upon review of a decision, we examine the record for errors of law and determine whether substantial evidence exists to support the Board's finding of fact and conclusions of law.[2] Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[3] On appeal, this Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.[4] Errors of law are reviewed *de novo.* Absent error of law, the standard of review for a Board's decision is abuse of discretion.[5] The Board has abused its discretion only when its decision has "exceeded the bounds of reason in view of the circumstances."[6]

Discussion

[7] On appeal, Person-Gaines reiterates her position that the Board's decision was not supported by substantial evidence. Specifically, she characterizes the Board's decision as inconsistent and argues that the Board erred by denying additional compensation while relying on the opinion of Dr. Townsend, who testified she had an increase in **permanent impairment**.

[8] [9] [10] The only issue before us is whether there is

substantial evidence to support the Board's finding. An IAB decision stands unless no substantial evidence supports it.[7] Furthermore, the IAB may adopt the opinion testimony of one expert over another; and that opinion, if adopted, will constitute substantial evidence for purposes of appellate review.[8] Similarly, the IAB may accept or reject an expert's testimony in whole or in part.[9]

The issue before the Board was whether Person-Gaines had increased **permanent impairment** causally related to the 1988 ***1162** work injury. The Board concluded that there was an increased **permanent impairment**, but that that increase was not attributable to the 1988 injury. In arriving at this conclusion, the Board relied upon the testimony of Dr. Townsend who agreed that Person-Gaines' current **impairment** rating was higher than the 1993 rating but not because of the 1988 work injury.

After examining the record, we find no reason to disagree with the findings of the IAB or the well reasoned opinion of the Superior Court. The record shows that the IAB's decision was consistent with Dr. Townsend's testimony. Likewise, the record shows substantial evidence supported the IAB's conclusion that Person-Gaines's increased **impairment** was not related to the 1988 work injury.

The Superior Court judge found that Person-Gaines's characterization of the IAB's decision failed to consider Dr. Townsend's *complete* testimony. In his testimony, Dr. Townsend acknowledged an increase in the **permanent impairment** of Person-Gaines's lumbar spine; however, he attributed that increase to changes in the AMA guidelines or congenital, degenerative factors and not the 1988 work accident. The IAB's decision that Person-Gaines suffered from an increased **permanent impairment** not related to the 1988 work injury is entirely *consistent* with Dr. Townsend's testimony.

Also, the Superior Court judge pointed out that the IAB chose Dr. Townsend's testimony over Dr. LeRoy's testimony. The IAB viewed Dr. LeRoy's opinion as unreliable because he did not provide specific examples or medical records showing an objective change in Person-Gaines' symptoms justifying an increased **permanent impairment** rating. Furthermore, Dr. LeRoy opined that Person-Gaines had a 5% **permanent impairment** to her lumbar spine when she was already receiving benefits based on a 10% **permanent impairment**. Dr. LeRoy's unreliable, unsupported opinion persuaded the IAB to choose Dr. Townsend's testimony as the basis for its decision; and substantial evidence supports that choice.

Conclusion

Because the record shows the IAB's findings of fact were based on expert testimony it deemed reliable and those findings were supported by substantial evidence, the judgment of the Superior Court is AFFIRMED.

All Citations

981 A.2d 1159

Footnotes

1 The hearing was held on March 12, 2008 by a **Workers' Compensation** Hearing Officer, in accordance with 19 *Del. C.* 2301(B)(a)(4).

2 *Stanley v. Kraft Foods, Inc.*, 2008 WL 2410212, at *2 (Del.Super.Mar.24, 2008) (citing *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del.1993)).

3 *Olney v. Cooch*, 425 A.2d 610, 614 (Del.1981) (quoting *Consolo v. Federal Mar. Comm'n*, 383 U.S. 607, 620, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966)).

4 *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del.1965).

5 *Stanley,* 2008 WL 2410212, at *2 (citing *Digiacomo v. Bd. of Pub. Educ.,* 507 A.2d 542, 546 (Del.1986)).

6 *Id.* (citing *Willis v. Plastic Materials Co.,* 2003 WL 164292, *1 (Del.Super.Jan.13, 2003)).

7 *See Johnson v. Chrysler Corp.,* 213 A.2d 64, 67 (Del.1965).

8 *Bolden v. Kraft Foods,* 2005 WL 3526324, at *4 (Del. Dec.21, 2005) (TABLE) (citing *Reese v. Home Budget Center,* 619 A.2d 907, 910 (Del.1992)).

9 *Lewis v. Formosa Plastics Corp.,* 1999 WL 743322, at *3 (Del.Super. July 8, 1999).

End of Document

2012 WL 6846555
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware,
Sussex County.

Re: The ESTATE OF Herbert MITCHELL
v.
ALLEN.

C.A. No. S12A–05–001 RFS.
|
Submitted: Oct. 17, 2012.
|
Decided: Nov. 28, 2012.

Appeal of a Decision of the Industrial Accident Board. *Decision Affirmed. Appeal Denied.*

Attorneys and Law Firms

Gary S. Nitsche, Esquire, Michael B. Galbraith, Esquire, Wilmington, DE.

Anthony M. Frabizzio, Esquire John J. Ellis, Esquire, Heckler & Frabizzio, Wilmington DE.

Opinion

RICHARD F. STOKES, JUDGE.

*1 Dear Counsel:
This is my decision denying the appeal of a petition filed by the Estate of Herbert Mitchell ("Estate") for **permanency** benefits. The death of Herbert Mitchell ("Mr. Mitchell" or "Decedent") occurred June 4, 2008 as the result of a compensable work accident. The Estate, consisting of Mr. Mitchell's three daughters after his wife died, receives statutory death benefits. The Board denied the petition for **permanency** benefits, and the Court affirms.

Facts and posture. While Mr. Mitchell was working inside an empty grain bin, 20 tons of soybean meal poured over him into the bin, killing Mr. Mitchell within several minutes. An agreement for death benefits pursuant to 19 *Del.C.* § 2330 was reached by Employer Allen[1] and Decedent's Estate on January 19, 2009. On May 6, 2011 the Estate filed a petition for a 100 percent **permanent impairment** award for each lung based on the opinion of Stephen J. Rodgers, MD. Employer filed a motion to dismiss the petition, which the Board denied, finding that the issue was a fact question requiring a full hearing.

After having an unnoticed autopsy performed October 10, 2011, the Estate filed a second petition seeking 100 percent **permanency** awards for the kidneys, brain, heart and digestive systems. Employer motioned to exclude the autopsy results based on the unfair advantage to the Estate.

A hearing was held on Employer's motion to exclude January 4, 2012. The Board found that the prejudice to Employer by lack of notice of the autopsy was not so great as to bar the autopsy results from the hearing. However, the Board ordered that an adverse inference would be applied so that reasonable doubts about the autopsy evidence would be resolved in Employer's favor. Employer filed a motion for reargument.

Hearing on the merits. On March 14, 2012, the Board convened a hearing on the **permanency** petitions and the motion for reargument on exclusion of the autopsy results.

Stephen J. Rodgers, MD, testified for the Estate. He was hired to provide a **permanency** evaluation on the Estate's behalf. He is board certified in disability evaluation and occupational medicine. He generally uses the American Medical Association ("AMA") Guidelines to determine **permanency** ratings, but the Guidelines do not address cases where the individual dies within minutes of the accident or event. Dr. Rodgers assigned a 100 percent **permanency** rating to each of Decedent's lungs based on compression of the lungs, which also caused small lacerations on the lungs and lung collapse.

Richard Callery, MD, testified by deposition on behalf of the Estate. He is the State's Chief Medical Examiner, who performed the autopsy acting in his personal capacity. He agreed that the cause of death was suffocation, and stated that Decedent's lungs were irreparably damaged by the accident prior to death and that the lung damage would

have caused **permanent impairment** to the heart, kidneys, brain and digestive system. The lungs were collapsed and a tear was found in each lung consistent with a compression injury. The tears were not consistent with the hole that results from a standard embalming tool called a trocar sword, which drains blood and fluids from the body. Crushed soy meal was present in Decedent's mouth, throat, trachea and bronchi.

*2 Dr. Callery's opinion was that torn, collapsed lungs which are full of grain will never work again, assuming the individual survives the accident. He also stated that without oxygenation, other bodily systems are in turn 100 percent **permanently impaired**.

Judith Tobin, MD, a forensic pathologist, was acting assistant medical examiner when Mr. Mitchell died. Dr. Tobin examined Decedent's body and completed the death certificate June 5, 2008. She did not perform an autopsy because it was clear that the death was accidental. She found no evidence of crushing of the body by the weight of the grain.

Dr. Tobin testified that Mr. Mitchell died within several minutes of being fully submerged in the grain and that a more specific answer would be speculative. As to the autopsy, she stated that a second medical examiner would be at a disadvantage because of the unnatural state of the organs. Dr. Tobin concluded that the cause of death was asphyxia due to an occlusion of the nose and mouth. That is, the grain blocked the air passage, causing suffocation, and there was no evidence of other injury.

Michael Walkerstein, MD, is board certified in internal medicine, pulmonary medicine and critical care medicine. He testified on Employer's behalf. Dr. Walkerstein agreed that the death was due to suffocation because oxygen could not reach Mr. Mitchell's lungs. Suffocation causes all other bodily organs to fail, and no evidence showed that either the weight of the grain or the presence of grain in the airways caused physical injury to the lungs. In fact, before his head was covered with grain, Mr. Mitchell was speaking to co-workers, showing that he was able to breathe.

The Board's decision. On April 13, 2012, the Board denied the **permanency** petition, finding that the Estate failed to show by a preponderance of the evidence that, with or without any adverse inference, Claimant's lungs or other organs were **permanently** injured apart from failure due to lack of oxygen. The Board found all four expert medical witnesses to be credible and accepted the opinions of Dr. Tobin, the medical examiner who certified Claimant's death, and Dr. Walkerstein, the pulmonologist who testified on Employer's behalf.

Standard of review. On appeal of a decision of the Board, the Court is bound by the Board's findings if they are supported by substantial evidence and absent abuse of discretion or error of law.[2] Substantial evidence is relevant evident that a reasonable mind might accept as adequate to support a conclusion.[3] The Court does not weigh the evidence, determine questions of credibility, or make factual findings.[4] As the trier of fact, the Board is responsible for resolving conflicts in the testimony[5] and is entitled to accept the testimony of one expert and reject the testimony of another expert.[6]

Discussion. An employee may claim compensation for certain **permanent** injuries, pursuant to 19 *Del. C.* § 2326. The Board may award compensation based on the loss or loss of use of any part of the claimant's body.[7] The claimant bears the burden of proof to show the percentage of **permanent impairment**.[8]

*3 A decedent's estate which is receiving statutory death benefits may petition for and receive **permanency** awards pursuant to 19 *Del. C.* § 2332 and 10 *Del. C.* § 3707.[9] In *Estate of Watts,* the Delaware Supreme Court found that when read in light of the purpose of **workers' compensation** laws, these two statutes permit **permanent impairment** awards to a claimant's estate.[10] The *Watts* Court was not presented with the question of the burden of proof on a **permanency** petition. This Court applies the substantial evidence standard to **permanent impairment** petitions.[11]

The Estate argues first that the Board found that **permanency** awards could not be made if an employee dies as a result of a work accident. In fact, the Board correctly stated that such **permanency** petitions are viable if there is evidence of injury distinct from suffocation, which was without dispute the cause of death. The Estate submits that the Board did not use the correct burden of proof but does not identify an alternative to the preponderance of the evidence standard, which the Board applied.

The Estate also argues that there is substantial evidence to show that the Board erred as a matter of law in finding that the Estate failed to meet its burden of proof. This is an incorrect statement of the standard of review on appeal

of an administrative decision. If there is substantial evidence to support the Board's findings, this Court will not disturb those findings on appeal. The Board hears the evidence and is free to accept the opinion of one expert witness over that of another without explanation.[12] This Court does not determine the credibility of experts or other witnesses or make factual findings of its own.

Despite this recognized standard, the Estate argues that Dr. Callery's testimony provided substantial evidence to support a finding in the Estate's favor. This fact, if so it be, is irrelevant. The Board accepted the testimony of Dr. Tobin and Dr. Walkerstein over that of Dr. Rodgers and Dr. Callery. The Board explained its reasoning in full.

The Estate argues that the Board cannot make credibility determinations based on differences presented by deposition testimony as there is no basis to judge the manner and demeanor of the witnesses. Although a credibility determination as to deposition testimony is not given the deference generally ascribed to live testimony because the deponent is not physically present at the hearing and cannot be "sized up" against appearing witnesses,[13] deposition testimony can still be persuasive and carry weight. The Estate's principal expert Dr. Callery testified via deposition. Employer's principal expert, Dr. Walkerstein, testified in like manner. Other experts appeared at the hearing, including Dr. Tobin for Employer and Dr. Rodgers for the Estate. The Board found Drs. Tobin and Walkerstein to be more persuasive and explained its rationale. Dr. Walkerstein is a pulmonologist, and the Board could give weight to his credentials and the live testimony of Dr. Tobin over Dr. Rodgers who testified in person and over the deposition testimony of Dr. Callery.

***4** If the Estate's position were accepted, then the Board will always be constricted to prefer live over deposition testimony. It is central to the Board's function to resolve conflicts in the medical testimony.[14] In this case, the Board performed this function and made clear findings on a wealth of conflicting medical evidence.

Finally, the Estate argues that the Board erroneously ruled that an adverse inference would be applied to any questions about the autopsy results. In its decision, the Board found that with or without an adverse inference, the Estate had not carried its burden of proof. That is, the Board did not use the adverse inference, so questions of its applicability are moot.

The Board's decision is based on substantial evidence and free from legal error. The Board acted well within its discretion in accepting the opinions of Dr. Tobin and Dr. Walkerstein that suffocation that caused the death and that no evidence existed to show **permanent impairment** distinct from suffocation.

Conclusion. The Board's decision denying the Estate's petition for **permanency** awards is **AFFIRMED,** and the Estate's appeal is **DENIED.**

IT IS ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

All Citations

Not Reported in A.3d, 2012 WL 6846555

Footnotes

1 Although the caption names the employer as "Allen" the record shows that the name is "Allen Family Foods."

2 *Ohrt v. Kentmore Home,* 1996 WL 527213 (Del.Super.).

3 *Oceanport Ind. v. Wilmington Stevedores,* 636 A.2d 892 (Del.1994).

4 *Johnson v. Chrysler Corp.,* 213 A.2d 64 (1965).

5 *General Motors Corp. v. McNemar,* 202 A.2d 803 (Del.1964).

6 *Standard Distributing Co. v. Nally,* 630 A.2d 640 (1993).

7 *Wilmington Fibre Specialty Co. v. Rynders,* 316 A.2d 229 (Del.Super.), *aff'd* 336 A.2d 580 (Del.1975).

8 *Hildebrandt v. Daimler Chrysler,* 2006 WL 3393588 (Del.Super.).

9 902 A.2d 1079 (Del.2006).

10 *Id.*

11 *See, e.g., Elliott v. State,* 2012 WL 2553327 (Del.Super.); *Lopez v. Parkview Nursing Home,* 2011 WL 900647 (Del.Super.); *Bromwell v. Chrysler, LLC,* 2010 WL 4513086 (Del.Super.).

12 *Di Sabatino Bros., Inc., supra.*

13 *Lindsey v. Chrysler Corporation,* 1994 WL 750345 (Del.Super.) (cited with approval, *Rhinehardt–Meredith v. State,* 2008 WL 5308388 (Del.)).

14 *Id.* (citing *Anchor Motor Franchise v. Unemployment Insurance Appeal Bd.,* 325 A.2d 374 (Del.1974) and *GMC v. McNemar,* 202 A.2d 803 (Del.1964).

End of Document