

IN THE SUPERIOR COURT OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NINA HARASIKA,)	
)	
Claimant-Below,)	
Appellant,)	
)	
v.)	C.A. No. N12A-04-007 WCC
)	
STATE OF DELAWARE,)	
)	
Employer-Below,)	
Appellee.)	

Submitted: October 10, 2012

Decided: February 28, 2013

Appeal from the Industrial Accident Board – AFFIRMED

OPINION

Gary S. Nitsche, Esquire and Michael B. Galbraith, Esquire. Weik, Nitsche & Dougherty, 305 North Union Street, Second Floor, Wilmington, DE 19899.
Attorneys for Appellant/Claimant.

Joseph Andrews, Esquire and William D. Rimmer, Esquire. Heckler & Frabizzio, P.A., 800 Delaware Avenue, Suite 200, P.O. Box 128, Wilmington, DE 19899.
Attorneys for Appellee/Employer.

CARPENTER, J.

Nina Harasika seeks additional compensation for alleged ongoing injuries to her left ring finger and left upper extremity that she claims to have sustained while working for Brandywine School District (“Brandywine”). The Industrial Accident Board (“IAB”) found that Harasika failed to prove she sustained cervical spine, shoulder, thoracic outlet syndrome, and/or brachial plexus injuries as a result of the incident at Brandywine. On appeal, Harasika alleges the IAB erred as a matter of fact and law and also improperly excluded photographic impeachment evidence.

For the reasons discussed below, the decision of the IAB is hereby

AFFIRMED.

FACTUAL BACKGROUND

Harasika was employed as a seventh grade science teacher at Talley Middle School at the time of her 2007 work accident. On January 29, 2007, Harasika was running through a classroom-door opening and caught her wedding band on the latch of the door, causing her to suffer an avulsion injury to her left ring finger.¹ Harasika was seen at the emergency room, sutured, and referred to Dr. J. Douglas Patterson, an orthopedic hand surgeon.

¹ Here, an avulsion injury to Harasika’s left ring finger occurred, meaning that Harasika’s wedding band cut down through the skin around the base of her ring finger and caused a degloving type of laceration.

Dr. Patterson first evaluated Harasika on January 31, 2007. Specifically, Dr. Patterson's physical examination revealed that Harasika had suffered a laceration over her left ring finger and that she had altered tactile sensation, particularly in the ulnar side of the finger. Dr. Patterson recommended physical therapy for Harasika and continued to treat her over the course of the next few months.

When Dr. Patterson saw Harasika on March 1, 2007, however, the top of her left ring finger was hypersensitive and the bottom of the finger had some numbness and tingling. Additionally, Harasika lacked sensitivity around the ring area and experienced numbness and tingling in the left small finger. Dr. Patterson examined Harasika to determine the cause of the numbness and tingling and found that she had positive findings with special tests for carpal and cubital tunnel syndromes. As a result, Dr. Patterson recommended obtaining a nerve conduction study, which was performed by Dr. Phoon on April 10, 2007. Specifically, the study showed that there was a problem with the nerves to the left ring finger, which has components from the median nerve and the ulnar nerve.

Dr. Patterson continued treating Harasika up through May 31, 2007; he noted that she was improving despite continued complaints of altered tactile sensation and weakness, numbness, and tingling and instructed her to follow up

with him as needed. As instructed, Harasika returned to see Dr. Patterson on October 30, 2007, reporting that she had decreased range of motion, shooting pains, and felt a cold sensation in her left ring finger. Dr. Patterson's examination findings were consistent with his prior visits and he recommended therapy and a new nerve conduction study, which was performed by Dr. Phoon on November 9, 2007. The new nerve study showed a picture of neuropathy of the distal sensory nerve in the left ring finger, improvement in the left median nerve sensory branch to the left ring finger, and entrapment or neuropathy of the left ulnar nerve at the elbow involving the motor and sensory components. Put simply, the new nerve study confirmed that there was still a detectable problem in the left ring finger and that, although the median nerve was improving, there was an emerging problem in the ulnar nerve at the elbow.

On January 22, 2008, Dr. Patterson evaluated Harasika, noting that her left upper extremity numbness and tingling had worsened and had progressed to the whole hand and up into the forearm. Because nerve compression/traction injuries do not usually cause numbness and tingling up into the forearm, Dr. Patterson believed that Harasika may have had nerve problems above her elbow and, therefore, began looking for problems in her shoulder and neck areas.

Additionally, Dr. Patterson initiated different therapy for thoracic outlet syndrome

or a brachial plexus problem based upon his clinical examinations and provocative findings from tests he performed.

In March 2008, Dr. Patterson discussed treatment options with Harasika regarding the thoracic outlet syndrome as well as the carpal and cubital tunnel syndromes. However, Harasika decided to continue with therapy before undergoing surgery. Additionally, Harasika sought a second opinion from another hand surgeon, Dr. Kahlon, on April 11, 2008. Dr. Kahlon assessed Harasika's left ring finger laceration but also wanted to rule out cubital tunnel syndrome and thoracic outlet syndrome.

On May 29, 2008, Dr. Patterson reviewed an MRI of Harasika's neck, which enabled him to rule out cervical radiculopathy as a cause of her symptoms. On May 30, 2008, Dr. Patterson performed surgery for carpal and cubital tunnel syndromes. On July 8, 2008, Dr. Patterson noted that Harasika was almost one hundred percent, had greatly improved, and could follow up with him as needed. On October 21, 2008, Harasika returned to Dr. Patterson, reporting that her numbness and tingling—while not as bad as before—had returned. Because Harasika, again, had all positive provocative testing for thoracic outlet syndrome, Dr. Patterson recommended getting a repeat nerve study to compare to the prior studies. On November 11, 2008, Dr. Phoon performed a nerve study, which

showed a picture of neuropathy in the left ring finger, mild carpal tunnel syndrome, and great improvement in the ulnar nerve at the elbow.

Harasika continued seeing Dr. Patterson up through February 2009 but, after having a left C6 selective nerve root block injection with Dr. Kim, did not return for several months. In December 2009, Harasika returned to Dr. Patterson, reporting left arm numbness, tingling, and pain and presenting with provocative signs for carpal tunnel, cubital tunnel, and thoracic outlet syndromes. As a result, another nerve study was performed on December 29, 2009, which showed a picture of neuropathy of the distal sensory nerve and the ulnar nerve branch to the left ring finger; however, there was no evidence of carpal tunnel entrapment, thoracic outlet entrapment, or radiculopathy. Again, on January 12, 2010, Dr. Patterson performed a nerve study; although the study was consistent with the previous one, Dr. Patterson did find positive provocative signs of thoracic outlet syndrome on physical examination.

In February 2010, Harasika saw both Dr. Patterson and Dr. Grossinger regarding continued numbness and tingling as well as cold sensations that radiated from her shoulder to her hand. In March 2010, Dr. Patterson referred Harasika to Dr. Freischlag, a thoracic outlet syndrome specialist at Johns Hopkins. Dr. Patterson reiterated this recommendation after his last visit with Harasika on

March 14, 2011, where she continued to have positive provocative testing for thoracic outlet syndrome. On July 6, 2011, a vascular laboratory procedure was performed at John Hopkins. Specifically, a left upper extremity venous duplex with bilateral thoracic outlet maneuvers was performed but showed no signs of vasculogenic thoracic outlet syndrome.

PROCEDURAL BACKGROUND

On July 27, 2011, Harasika filed a Petition to Determine Additional Compensation Due, seeking reimbursement for ongoing injuries from the 2007 work accident as well as an award of transportation expenses. Although Brandywine acknowledged that Harasika's left ring finger laceration, carpal tunnel syndrome, and cubital tunnel syndrome were causally related to the 2007 work accident, Brandywine denied that Harasika's other alleged injuries were compensable. A hearing was held before the IAB on January 13, 2012 and an Order was issued on March 30, 2012, finding that Harasika failed to meet her burden of establishing that her ongoing injuries were sustained as a result of the January 2007 work accident. However, the IAB found that her mileage was compensable. As a result, Harasika timely filed a partial appeal regarding the IAB's denial of additional compensation for her ongoing injuries.

STANDARD OF REVIEW

On appeal, the Court’s review of the IAB’s decision is limited to determining whether the IAB’s findings and conclusions are supported by substantial evidence and free of legal error.² Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”³ Specifically, “[i]t is more than a scintilla of evidence, but less than a preponderance.”⁴ Additionally, questions of law are reviewed *de novo*.⁵ However, the Court “does not weigh the evidence, determine questions of credibility, or make its own factual findings.”⁶ Further, the Court “must give deference to ‘the experience and specialized competence of the Board,’ and must take into account the purposes of the Workers’ Compensation Act.”⁷ Therefore, if substantial evidence exists and there is no error of law, the Court must affirm the IAB’s decision.⁸

² See e.g., *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

³ *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

⁴ *Id.*

⁵ See *Baker v. Allen Family Foods*, 1997 WL 818015, at *2 (Del. Super. Dec. 2, 1997) (citations omitted).

⁶ *ILC of Dover, Inc. v. Kelley*, 1999 WL 1427805 (Del. Super. Nov. 22, 1999) (citing *Johnson*, 213 A.2d at 66 (Del. 1965)).

⁷ *Del. Transit Corp. v. Hamilton*, 2001 WL 1448239 (Del. Super. Oct. 31, 2001) (citing *Histed*, 621 A.2d at 342 (Del 1965)).

⁸ See *Stevens v. State*, 802 A.2d 939, 944 (Del. Super. 2002).

DISCUSSION

Although the IAB agreed that Harasika's mileage was compensable, the main issue on appeal is whether additional compensation for Harasika's alleged ongoing injuries is warranted. Specifically, Harasika argues that the IAB's denial of additional compensation was not supported by substantial evidence and, therefore, constitutes legal error. Additionally, Harasika alleges the IAB erred by improperly excluding photographic impeachment evidence. In particular, Harasika contends the IAB deprived her of the opportunity to rebut Dr. Mattern's testimony, which implied that Harasika had provided inconsistent accounts of her mechanism of injury. Conversely, Brandywine contends that the IAB's decision to deny Harasika's petition for additional compensation was supported by substantial evidence and that the IAB justifiably excluded the photographic evidence. The Court will address each of these issues in turn.

1. Additional Compensation

Here, there was no dispute that Harasika sustained an avulsion injury to her left ring finger, which Brandywine accepted as compensable. Specifically, Brandywine paid workers' compensation benefits, which included medical expenses for left carpal tunnel and ulnar nerve releases, permanency, and corresponding total disability. However, the parties dispute as to whether

additional compensation should be paid for medical expenses relating to Harasika's alleged cervical spine, shoulder, thoracic outlet syndrome, and/or brachial plexus injuries, which she claims also stem from the January 2007 work accident.

Under Delaware law, an injury must both arise out of and occur in the course of one's employment in order to be compensable.⁹ Specifically, "[t]here clearly must be shown a causal relation between the injury and the employment, and that the injury arose out of the nature, conditions, obligations or incidents of the employment, or that a connection exists between the employment and the injury, by which the employment was a substantially contributing, but not necessarily the sole or proximate, cause of the injury."¹⁰ Further, the claimant bears the burden of establishing, by a preponderance of the evidence, that there is a causal connection between the accident and the injury.¹¹ If it is determined that an employee suffered a compensable injury, the employer is required to pay for *reasonable* and *necessary* medical services related to that injury.¹² "Whether medical services are necessary and reasonable or whether the expenses are

⁹ See *Rose v. Cadillac Fairview Shopping Ctr. Prop. (Del.) Inc.*, 668 A.2d 782, 786 (Del. Super. 1995).

¹⁰ *Dravo Corp. v. Strosnider*, 45 A.2d 542, 544 (Del. Super. 1945).

¹¹ See *Hines v. Del. Recyclable Prod.*, 2003 WL 22293656, at *4 (Del. Super. Oct. 1, 2003) (citing *Gen. Motors Corp. v. Freeman*, 157 A.2d 889, 892 (Del. Super. 1960)).

¹² See DEL. CODE ANN. Tit. 19, § 2322.

incurred to treat a condition causally related to an industrial accident are pure factual issues within the purview of the Board.”¹³

As noted by the IAB, the issues in this case relate to causation and credibility, and the IAB found Harasika to be lacking on both accounts. Specifically, the IAB concluded that Harasika failed to meet her burden regarding the alleged cervical spine, shoulder, thoracic outlet syndrome, and/or brachial plexus injuries. In support of this finding, the IAB stated that: 1) Harasika had not been under any restrictions since she was released from Dr. Patterson’s care in July of 2008; 2) Harasika’s subjective complaints were not supported by objective findings; 3) Harasika was not referred to a specialist until March of 2010, which was over three (3) years after the January 2007 work accident; 4) Harasika now claims that her symptoms are comparable to her immediate post-surgical symptoms, even though her medical record reflects that she was almost at one hundred percent following her surgeries; 5) Harasika had significant gaps in periods in which she sought treatment; 6) Harasika did not persistently pursue either treatment or a diagnosis from John Hopkins, where she was last seen before the hearing; and 7) Harasika had not been under Dr. Patterson’s care for over ten (10) months at the time of the hearing. Although Harasika claims the IAB

¹³ *Bullock v. K-Mart Corp.*, 1995 WL 339025, at *3 (Del. Super. May 5, 1995).

incorrectly summarized and/or disregarded several underlying facts, the Court cannot agree.

As further support, the IAB relied upon the testimony of Dr. Mattern, the employer's expert. Although Dr. Patterson was Harasika's treating physician, Dr. Mattern had seen Harasika three times over a three-year period and, therefore, was familiar with her treatment. The IAB concluded that Dr. Mattern was more credible and persuasive, and there is no basis to overturn that finding. It is well accepted that when the parties present competing experts in a workers' compensation case, the IAB is free to rely on either expert's testimony.¹⁴ Further, "[i]t is not within the purview of this Court to resolve issues of credibility and assign weight to evidence presented."¹⁵ "As a general rule, the credibility of the witnesses, the weight of their testimony, and the reasonable inferences to be drawn therefrom are for the Board to determine."¹⁶ Therefore, "[o]nly when insufficient facts in the record exist to support a factual finding will the Court overturn the Board's findings."¹⁷ Despite Harasika's claims that the IAB mischaracterized and/or overlooked Dr. Patterson's testimony, the Court finds there are sufficient

¹⁴ See *San Juan v. Mountaire Farms*, 2007 WL 2759490, at *3 (Del. Super. Sept. 18, 2007) (citations omitted).

¹⁵ *Christiana Care Health Sys, VNA. v. Taggart*, 2004 WL 692640, at *12 (Del. Super. Mar. 18, 2004) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 67 (Del. 1965)).

¹⁶ *Clements v. Diamond State Port Corp.*, 831 A.2d 870, 878 (Del. 2003).

¹⁷ *Christiana Care*, 2004 WL 692649, at *12 (citing *Johnson*, 213 A.2d at 67).

facts in the record to support the IAB's decision to afford greater weight to Dr. Mattern's testimony and, therefore, the Court accepts the IAB's credibility and causation determinations.

In this case, there was conflicting expert testimony regarding the causal relationship between Harasika's alleged cervical spine, shoulder, thoracic outlet syndrome, and/or brachial plexus injuries and the January 2007 work accident. Specifically, Dr. Patterson testified on Harasika's behalf, stating that he diagnosed Harasika with an avulsion injury to her left ring finger, cubital and carpal tunnel syndromes, thoracic outlet syndrome, and brachial plexopathy, all of which he related to the January 2007 work accident.¹⁸ However, in addition to concluding that there was no evidence of cervical radiculopathy, Dr. Patterson confirmed that neither he nor another physician diagnosed Harasika as having a shoulder injury.¹⁹ Admittedly, Dr. Patterson recognized that many of Harasika's subjective complaints, which he relied upon for his diagnoses, were not proven by objective testing.²⁰ In particular, Dr. Patterson suggested that Harasika's thoracic outlet syndrome, which multiple nerve studies did not establish, was "below the threshold of detectability," yet could not be "rule[d] out" based upon her positive

¹⁸ Dr. Patterson Dep. 33-34.

¹⁹ Dr. Patterson Dep. 18-19, 53-55.

²⁰ Dr. Patterson Dep. 24, 61, 63-64.

provactive testing.²¹ Nonetheless, Dr. Patterson acknowledged he could not definitively state that Harasika had not magnified or exaggerated her symptoms.²²

Dr. Mattern testified on behalf of Brandywine, stating there was no evidence that Harasika's January 2007 accident caused cervical radiculopathy, thoracic outlet syndrome, or any other injury aside from the avulsion injury to her left ring finger.²³ Further, Dr. Mattern noted that the lack of objective findings caused him to question Harasika's subjective complaints and, therefore, believe she was exaggerating her symptoms.²⁴ Specifically, Dr. Mattern explained that diagnoses of cervical radiculopathy and thoracic outlet syndrome, in addition to the other injuries, cannot be established without positive objective findings.²⁵ Moreover, Dr. Mattern stated that even if Harasika's alleged ongoing injuries do exist, they are unrelated to the January 2007 work accident.²⁶

Because the IAB is free to rely on either expert, the IAB was entitled to accept Dr. Mattern's opinion as more persuasive regarding the causal relationship between Harasika's alleged ongoing injuries and the January 2007 work accident. As previously discussed, the IAB, as the trier of fact, determines the weight to be

²¹ Dr. Patterson Dep. 25.

²² Dr. Patterson Dep. 38.

²³ Dr. Mattern Dep. 29.

²⁴ Dr. Mattern Dep. 43, 46, 48.

²⁵ Dr. Mattern Dep. 50-51.

²⁶ Dr. Mattern Dep. 89.

given to expert testimony.²⁷ Further, it is the IAB's function to resolve conflicts in expert testimony.²⁸ Here, the IAB articulated its reasons for accepting Dr. Mattern's causation opinion. Specifically, the IAB noted that Dr. Mattern's testimony regarding the lack of objective findings to support Dr. Patterson's diagnoses was convincing.²⁹ Additionally, the IAB stated that it found "Dr. Patterson's vague testimony that he thinks she may have a brachial plexus injury now five years after the work accident" to be unbelievable.³⁰ Accordingly, the IAB did not err as a matter of law or fact in relying, in part, on Dr. Mattern's testimony to conclude that there was no causal relationship between Harasika's alleged ongoing injuries and the January 2007 work accident. Finding that there is substantial evidence in the record to support the IAB's conclusion, the Court, therefore, will not disturb the IAB's decision on appeal.

2. **Photographic Evidence**

In addition to challenging the IAB's credibility and causation determinations, Harasika claims that the IAB erred by ruling that photographs of Harasika's forehead and hip, which were taken by Harasika's husband shortly after the January 2007 accident, were inadmissible. Specifically, Harasika

²⁷ See *Clements v. Diamond State Port Corp.*, 831 A.2d 870, 877 (Del. 2003) (citing *Bd. of Pub. Educ. in Wilmington v. Rimlinger*, 232 A.2d 98, 100 (Del. 1967)).

²⁸ See *id.* at 877 (citations omitted).

²⁹ See Hr'g Tr. 21.

³⁰ See Hr'g Tr. 22.

contends the IAB deprived her of the ability to impeach Dr. Mattern's testimony, which she claims cast doubts on whether she actually fell to the floor and bruised her hip. Brandywine, however, argues that the IAB was justified to exclude the photographs because they were: 1) not properly noticed pursuant to the IAB's procedural rules; 2) irrelevant; and 3) unfairly prejudicial.

Although Brandywine received the photographs as part of its requested discovery, Brandywine objected to their use at the IAB hearing. Specifically, Brandywine stated that Harasika did not reserve the right under IAB Rule 9(B)(5)(f)³¹ to present these photographs at the IAB hearing. As explained by Brandywine, this rule specifically requires pre-trial notice of a party's intent to use photographic evidence at an IAB hearing. Harasika countered that the photographs were not intended to be introduced as evidence but, instead, constituted impeachment evidence. Despite acknowledging a party's general ability to use photographs as impeachment evidence, the IAB ruled that the photographs were inadmissible here; the IAB reasoned that Harasika was required to provide pre-trial notice of the intent to use the photographs, even if only for impeachment purposes.

³¹ The Court notes that, effective December 12, 2011, the IAB amended its Rules and, therefore, the current IAB Rule 9(B)(5)(f) was previously codified as IAB Rule 9(D)(6).

First, the Court finds it important to emphasize that the IAB is not bound by the traditional rules of evidence because, to some degree, it appears that Harasika is attempting to hold the IAB to that standard.³² Although the IAB is free to use this Court’s rules of evidence as a guide, strict adherence is not required. The IAB’s failure to make evidentiary decisions as if the litigation had occurred in this Court, therefore, does not provide a basis to reverse the IAB’s decision. Because the IAB has crafted its own unique set of rules, the Court here looks to IAB Rule 9(B)(5)(f), which requires pre-trial memorandum to contain “notice of the intent to use any movie, video or still picture and either a copy of the same or information as to where the same may be viewed”³³ The Court notes that the IAB’s procedural rules “are promulgated for the ‘more efficient administration of justice’ and thus are to be followed and enforced by this Court.”³⁴ Further, this Court has previously held that it is not an abuse of discretion for the IAB to enforce well-known procedural rules in order to preserve the interests of order and efficiency and also prevent unfair surprise.³⁵ Like the IAB, the Court does not read this to allow for an exception regarding photographic evidence being used as

³² See IAB Rule 14(C) (stating that “[t]he Board may, in its discretion, disregard any customary rules of evidence and legal procedures so long as such a disregard does not amount to an abuse of discretion”).

³³ IAB Rule 9(B)(5)(f).

³⁴ *K-Mart, Inc. v. Bowles*, 1995 WL 269872, at *2 (Del. Super. Mar. 23, 1995) (citations omitted).

³⁵ See e.g., *Conley v. Capitol Homes, Inc.*, 2006 WL 2997535 (Del. Super. Aug. 31, 2006); *Malinowski v. Ponns*, 1993 WL 189483 (Del. Super. May 6, 1993).

impeachment evidence. Moreover, the Court does not find that Harasika was unfairly prejudiced by the photographs' exclusion, particularly since Dr. Mattern testified that his opinions regarding causation did not change even after viewing the photographs. Although "at times the Court will recognize an exception to the strict enforcement of a Board rule where 'fairness' so requires," the Court finds that the IAB was well within its authority in refusing to permit Harasika's use of these photographs here.³⁶ Additionally, the Court believes that the photographs' admissibility would not serve Harasika's stated intentions; the issue on appeal is not whether Harasika also suffered a cut on her forehead and a bruise on her hip during the January 2007 accident but, instead, whether Harasika's alleged ongoing injuries are causally related to that accident. However, even if Harasika had argued that the photographs provided context to establish this causal relationship—which she did not—this argument would be moot. Harasika was required to properly notice the photographs pursuant to IAB Rule 9(B)(5)(f) and she failed to do so. As a result, the Court will not disturb the IAB's decision to rule the photographs inadmissible.

³⁶ *K-Mart, Inc.*, 1995 WL 269872, at *2 (citing *Cole v. Dep't of Corr.*, 1984 WL 547838, at *2 (Del. Super. Feb. 27, 1984)).

CONCLUSION

It is not disputed that Harasika suffered an avulsion injury to her left ring finger during the January 2007 work accident. However, this does not automatically entitle Harasika to additional compensation from Brandywine for her alleged ongoing injuries. Harasika was required to prove that her cervical spine, shoulder, thoracic outlet syndrome, and/or brachial plexus injuries stem from the 2007 work accident, and she failed to do so. As a result, the IAB denied Harasika's petition for additional payment. The Court finds that substantial evidence on the record supports this decision and that it is free of legal error.

Based on the foregoing reasons, the decision of the Industrial Accident Board is, therefore, **AFFIRMED**.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.