

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

PATRICIA BOONE, :
 : C.A. No. K11A-10-003 WLW
 Claimant Below - :
 Appellant, :
 :
 v. :
 :
 SYAB SERVICES/CAPITOL NURSING: :
 :
 Employer Below - :
 Appellee. :

Submitted: May 2, 2012
Decided: August 23, 2012

ORDER

Upon an Appeal from the Decision of
the Industrial Accident Board.

Affirmed.

Walt F. Schmittinger, Esquire of Schmittinger and Rodriguez, P.A., Dover, Delaware;
attorney for the Appellant.

John J. Klusman, Jr., Esquire of Tybout Redfearn & Pell, Wilmington, Delaware;
attorney for the Appellee.

WITHAM, R.J.

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Having reviewed the parties' submissions as well as the record below, the Court concludes as follows:

1. This is an appeal from a decision of the Industrial Accident Board's ("Board") decision of October 5, 2011 ordering Patricia Boone ("Appellant") to obtain all future prescription medications related to her industrial accident injury through Express Scripts.

2. On August 12, 2001, Appellant sustained a work-related lower back injury while working for Syab Services/Capital Nursing ("Employer" or "Appellee"). Employer does not contest the treatment prescribed by her doctor but sought an order from the Board to have the prescription obtained and filled by its contracted "preferred provider" benefit program known as Express Scripts. Under the program, with no cost to the Appellant, she will be able to go to any pharmacy to have her prescription filled or mailed to her. The program saves costs to the carrier and the Appellee.

3. The sole issue at the hearing is whether the Appellant has a right to procure her prescriptions from a provider of her choice or whether she must utilize a benefit program called Express Scripts contracted with the insurance carrier at no cost to the Appellant.

4. The Board found that the Appellee's request was reasonable and permissible pursuant to 19 *Del. C.* §§ 2322 and 2323 and issued an order on October 5, 2011 for the Appellant to obtain all further prescription medications related to her industrial injury through Express Scripts.

5. A timely appeal was filed on October 19, 2011 from the Board's decision. On February 20, 2012, an opening brief was filed and on March 30, 2012, the answering brief was filed.

Standard of Review

6. It is well settled that the function of this Court on review is to determine whether the Board's decision is supported by substantial evidence.¹ The function of the Superior Court in evaluating an appeal from the IAB is to determine whether there exists substantial evidence free from legal error to support the finding of the Board.² Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a particular conclusion.³ It is more than a scintilla and less than a preponderance.⁴ In reviewing the record for substantial evidence, the Court will consider the record in the light most favorable to the party prevailing below.⁵ Only when no satisfactory proof in support of a factual finding of the Board exists may Superior Court overturn a decision of the Board.⁶ Superior Court does not hold responsibility as a trier of fact with authority to weigh evidence, determine credibility,

¹*General Motors v. Freeman*, Del. Supr., 164 A.2d 686, 688 (1960).

²*General Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. 1985).

³*Parks v. Wal-Mart*, 2004 WL 1427016, at *2 (Del. Super. June 24, 2004).

⁴*City of Wilmington v. Clark*, 1991 WL 53441, at *2 (Del. Super. Mar. 20, 1991)(citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

⁵*Benson v. Phoenix Steel*, 1992 WL 354033, at *2 (Del. Super. Nov. 6, 1992).

⁶*Johnson v. Chrysler Corp.*, 213 A.2d 64, 67 (Del. 1965).

or to make findings of fact and conclusions.⁷ An employer is obligated to pay the necessary and reasonable medical expenses related to an employee's work injury.⁸

Discussion

7. The Appellant argues that the Board does not have the authority to order the use of Express Scripts to obtain her prescriptions because the Appellant has a "superseding right" set forth in 19 *Del. C.* § 2322(a) to refuse reasonable medications. Additionally, Appellant argues that legislative policy somehow prohibits employers from contracting with providers to provide services at a reduced rate at or below the fee schedule provisions of the statute.

8. The Appellee contends the Board did not commit legal error by requiring the Appellant to use the prescription card furnished by Appellee. 19 *Del. C.* § 2322(a) provides in pertinent part that "[d]uring the period of disability the employer shall furnish reasonable surgical, medical, dental, optometric, chiropractic and hospital services . . ." Under 19 *Del. C.* § 2322(b), the subsection provides in pertinent part that "If the employer, . . . refuses to furnish the services, medicines and supplies mentioned in subsection (a) of this section, the employee may procure the same and shall receive from the employer the reasonable cost thereof within the above limitations." The Court notes as well that under 19 *Del. C.* § 2323, in pertinent part, "Any employee . . . shall have the right to employ a physician, surgeon, dentist,

⁷*Id.* At 66.

⁸19 *Del. C.* § 2322(a); e.g. *Waples v. state*, 2004 WL 2828279, at *3 (Del. Super. May 11, 2004).

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optometrist or chiropractor of the employee's own choosing." This section says nothing about the right of the employee to select a specific pharmacy or provider of prescriptions for medications prescribed by her chosen physician. Indeed, this section was enacted for the mutual benefit of both employer and employee.⁹ Sections 2322 and 2323 are "parallel sections related to medical services enacted for the mutual benefit of both the employer and employee."¹⁰

9. In this case the Board accepted information concerning the Pharmacy Benefit Management Program (Express Scripts) and the medication list for purposes of the proceeding. This Court does not see any error by the Board in accepting these materials for its legal consideration of the employer's request.

10. The Appellant for some time has been treated by her pain management physician for work-related injuries with medication as prescribed by the physician filled at her chosen pharmacy. The employer has sought and received an order from the Board to require all further prescription medications related to her work injury to be filled through Express Scripts.

11. There is no indication that the Express Scripts program will not provide reasonable medicinal supplies, to include drugs, at a pharmacy within the Express Scripts Retail Pharmacy network. The Court agrees that a pharmacy is not a medical provider under 19 Delaware Administrative Code 1341-4.0, definition section 4.18.1.

⁹*Collins & Ryan v. Hudson*, 75 A.2d 261 (del. Super. 1950).

¹⁰*Hill v. Archie's Thriftway*, 1997 WL 902839 (Del. Super.).

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12. Considering the facts of this case, the Court finds that the Board had satisfactory proof before it to find the Appellee's request reasonable and not otherwise prohibited by 19 *Del. C.* § 2322(b).

13. It would be an unreasonable reading of 19 *Del. C.* §§ 2322 and 2323 to argue that if the employer furnished reasonable medicine and supplies as and when needed that the employee may refuse to accept and then proceed to procure the medicine and supplies at a higher rate and thus be more expensive to the employer.

14. Therefore, the Board's decision below is clearly one of administrative discretion and there is substantial evidence to support the findings below. The Board's decision is *affirmed*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh