

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STEPHEN SHERWOOD,)
Claimant Below,)
Appellant,)
)
v.) C.A. No. N12A-03-010 PLA
)
ART FLOOR, INC.,)
Employer-Below,)
Appellee.)

Submitted: August 7, 2012
Decided: September 18, 2012

UPON APPEAL FROM A DECISION FROM THE
INDUSTRIAL ACCIDENT BOARD
AFFIRMED

Gary S. Nitsche, Esquire, and Michael B. Galbraith, Esquire, WEIK,
NITSCHKE & DOUGHERTY, Wilmington, Delaware, Attorneys for
Claimant Below, Appellant.

Wade A. Adams, III, Esquire, CHRISSINGER & BAUMBERGER,
Wilmington, Delaware, Attorney for Employer-Below, Appellee.

ABLEMAN, JUDGE

Before the Court is an appeal by Claimant Stephen Sherwood (“Sherwood”) from the February 17, 2012 decision of the Industrial Accident board (“the Board”) denying claimant’s Petition to Determine Additional Compensation Due and finding in favor of his employer, Art Floor, Inc. (“Art Floor”).

On December 21, 2009 Sherwood sustained a work injury to his lower back, which his employer acknowledged was compensable. Almost two years later, on October 24, 2011, Sherwood filed this Petition to Determine Additional Compensation Due. In his petition, Sherwood sought a determination from the Board that he had also sustained an injury to his right hand and elbow and that Art Floor be directed to pay all medical bills incurred as a result of those injuries.

Although Art Floor had earlier acknowledged that Sherwood’s injury to his lower back was compensable, it opposed his claims that the injuries he sustained to his right hand and elbow were causally related to the work accident. The sole issue before the Board, therefore, was whether those additional injuries were related to the December 21, 2009 accident.

The Board held a hearing on Sherwood’s Petition on January 6, 2012 at which expert witnesses testified for both Sherwood and Art Floor. On

February 17, 2012, the Board issued its decision denying claimant's Petition to Determine Additional Compensation Due in its entirety.

In this appeal, Sherwood argues that the Board's decision must be reversed because it is not supported by substantial evidence and was therefore legally erroneous. Furthermore, Claimant submits that the Board abused its discretion in admitting extrinsic evidence for the purpose of impeaching Sherwood's credibility.

After reviewing the transcripts, briefs, and the Board's ruling, the Court finds that the decision of the Board was supported by substantial evidence and is free from legal error. The Court further concludes that the Board did not abuse its discretion in admitting extrinsic evidence for the purpose of impeaching claimant. Therefore, for the reasons discussed herein, the Board's decision is AFFIRMED.

Factual and Procedural Background

The parties do not dispute that Sherwood was injured when he slipped and fell on December 21, 2009, nor is there any question that, at the time he was injured, he was working in the course and scope of his employment. The parties also do not dispute that, as a result of the accident, Sherwood sustained injuries to his lower back for which he has received workers' compensation benefits and reimbursement for related medical bills. The

only issue presented in this appeal concerns whether Sherwood's hand and elbow injuries were causally related to the work accident or whether they were the result of Sherwood's fall from a ladder at his home while putting up Christmas lights.

The sequence of events giving rise to the instant claim is significant to an understanding of the Board's decision and, in many respects, it also informed the Board's credibility determinations.

Only weeks prior to Sherwood's December 21, 2009 fall while in the course of his employment, he had also fallen from a ladder at his home. Although Sherwood did not immediately seek treatment for the earlier accident that occurred on December 1, 2009, a week later, on December 8, 2009, he presented to the Christiana Hospital Emergency Department with complaints of pain and numbness in his right hand.¹ His hand was wrapped, he was prescribed pain medication, and referred to a doctor for follow-up.

At the time of this first fall, Sherwood did not have health insurance. Some months earlier in August of that year, he had requested a loan from

¹ The Board incorrectly noted in its decision that claimant sought treatment at the St. Francis Hospital Emergency Room on December 8, 2009. *See Sherwood v. Art Floor, Inc.*, No. 1352223, at 3 (Del. I.A.B. Feb. 17, 2012) (Sherwood "had been seen in St. Francis Hospital's Emergency Room on December 8, 2009[.]"). This is contradicted by the medical records included in the Board's Record submitted to this Court. The medical records conclusively establish claimant was treated at Christiana Hospital on that date. In addition, claimant's own testimony indicates he sought treatment at Christiana Hospital on December 8, 2009. Any confusion on the part of the Board regarding this discrepancy is insignificant to the Board's determination.

Art Floor's President, William Bartoshesky, so that he could obtain insurance. Bartoshesky loaned Sherwood the \$700.00 he requested but subsequently learned that he did not use the loan for that purpose.

Despite orders from the Emergency Department to see a physician, specifically Dr. Danyo, Sherwood did not do so, presumably because he lacked insurance. Instead, he returned to the emergency room on December 14, 2009 complaining of increased pain in his right hand.² At this visit, claimant's right hand was placed in a splint and his arm was placed in a sling. His pinky finger was described by his employer as crooked and bent at this time.

During this same time period, Sherwood filed a Petition in the State of Pennsylvania to set aside an annuity payment to which he had earlier agreed as a result of a prior workers' compensation accident in Pennsylvania. In his petition, he claimed financial hardship as he was facing foreclosure on his home.

By chance, claimant fell again, only a week after his last visit to the Christiana Emergency Room, but on this occasion he was working in the course and scope of his employment. This time he went to a different

² In his testimony, Sherwood denied the accuracy of the hospital records and claims that he went to the emergency room because his hand was getting better. However, the hospital records indicate Sherwood reported his pain as a seven out of ten, with ten being the worst, during the first visit on December 8, 2009. Then on December 14, 2009, he reported that his pain level was a six out of ten.

hospital, the St. Francis Hospital Emergency Department, because he considered it the “workers’ compensation hospital.” During this visit, he made no mention of his hand injury that had occurred only three weeks earlier and had required two separate visits to the Christiana Emergency Room. He also did not complain of any pain in his elbow.

Sherwood was referred by the treating staff at St. Francis to Dr. Peter Bandera whom he saw on January 4, 2010. Dr. Bandera began Sherwood on a course of physical therapy and medication for his back. Eventually, he was referred to Dr. Bruce Rudin who performed low back surgery on June 7, 2011.

Throughout the following year, Sherwood reported to his employer that he had sustained back injuries as a result of the latest fall but never mentioned any problem with his hand or elbow. Nor was his hand any different in appearance after the last fall.

Presumably because Sherwood complained to Dr. Bandera about his extended finger on his right hand and pain in his elbow, the doctor eventually referred Sherwood to a hand specialist, Dr. David Sowa. Sherwood first saw Dr. Sowa on August 1, 2011, approximately 20 months after the two falls he sustained in December of 2009. At the time of his initial visit to Dr. Sowa, Sherwood made no mention of his earlier fall from

the ladder while installing Christmas lights and only recounted the circumstances of his employment-related fall. Indeed, at the hearing before the Board, Dr. Sowa stated that the sole reason that he was of the opinion that Sherwood's hand and elbow injuries were related to his work accident was because Sherwood represented to him that the accident was the cause of his injuries. Dr. Sowa also stated that Sherwood minimized the prior fall when he gave his history to him, as he never mentioned it specifically.³ On the patient intake form he wrote only "three weeks prior fell on hand but healed prior to this fall." Nothing in the record shows that Sherwood informed Dr. Sowa of the two emergency room visits related to the first fall.

On August 29, 2011, Dr. Sowa operated on claimant's right hand and elbow. The surgery relieved the pressure on the nerve in his right elbow, which decreased his elbow pain and also relieved the pain and numbness in his hand.

At the hearing before the Board, Dr. Sowa testified on behalf of Sherwood. He stated that, while he had completed his intake form by noting that he suffered a prior hand injury, he also reported that he had no residual effects to his hand or elbow from the earlier fall. In his testimony, Dr. Sowa made it clear that his opinion regarding the "post-traumatic swelling of the

³ There is some dispute in the evidence about whether Dr. Sowa was advised of this earlier accident but the Board did not credit claimant's testimony in this regard.

fifth metacarpal of the right hand, with possible traumatic tear of the radial collateral ligament or of the intrinsic tendon in the intrinsic tunnel” was causally related to the slip-and-fall work incident “based entirely on the history of the patient.” On cross-examination, Dr. Sowa agreed that he relies on a patient to provide an accurate history as the information helps in reaching a diagnosis. He also agreed that if a patient does not provide an accurate history, there is the possibility that he could misdiagnose the cause of an injury.

Dr. Mohammad Kamali was selected by the Employer to perform an independent medical examination of claimant and to provide a report of his findings. Dr. Kamali first examined Sherwood on March 17, 2011. On that occasion, Sherwood made no mention of the December 1, 2009 fall from the ladder and only provided information concerning his work-related fall. Based on the limited facts provided to Dr. Kamali, and the fact that he was entirely unaware of the first fall, he concluded that the hand injury was causally related to his slip and fall at work on December 21, 2009.

The parties were initially before the Industrial Accident Board for a hearing on September 8, 2011. At that hearing, Art Floor’s counsel informed the Board that the investigation into claimant’s accident was being reopened due to newly discovered information. Specifically, the

independent medical evaluation performed by Dr. Kamali, and the opinions he rendered as a result of his review of the records, had been rendered without knowledge of either the December 1, 2009 fall, or the following two visits to the Christiana Hospital Emergency Department, and without review of the medical records generated from those visits.

The hearing date was continued so that Dr. Kamali could examine Sherwood a second time. To his surprise, Dr. Kamali first learned of the prior fall at this follow-up examination.⁴ As a result of his thorough review of all of the records, including the Christiana Hospital records of December 8th and 14th of 2009, Dr. Kamali modified his opinion. He concluded that the prior fall at home on December 1, 2009 was the cause of Sherwood's hand and elbow injuries and his later need for surgery. In his opinion, the numbness of which Sherwood complained during his visit to the Christiana Emergency Department on December 8, 2009 supports his opinion.

The owner of Art Floor, Inc. testified at the hearing that Sherwood had informed him of his earlier fall from the ladder shortly after it happened, that his finger was bent and crooked and looked abnormal at the time, and that his son and his son's friend both witnessed the accident and it "scared them to death." Bartoshesky further recalled that after the work-related fall,

⁴ Sherwood disagrees that he did not advise Dr. Kamali of the earlier fall at the first examination in March of 2011.

Sherwood complained only of back pain, not of any arm or hand pain. Sherwood had missed a lot of work during the previous two years so that sick leave may have resulted from the first fall as well.

At the hearing, over objection by his counsel, Sherwood was questioned on cross-examination about a petition he had filed in Pennsylvania in which he sought to set aside an annuity he had received from workers' compensation for a 1995 accident. Sherwood's counsel objected on the basis of D.R.E. 403, and argued that it was improper for the Board to allow extrinsic evidence for the sole purpose of impeaching a party's credibility. The Board allowed limited questioning, deeming that such an inquiry was relevant and that the probative value was not substantially outweighed by the risk of undue prejudice.

The Board's Decision

The Board concluded that Sherwood's right hand and elbow injuries were not attributable to the December 21, 2009 work-related accident, but rather to the slip and fall from the ladder that had occurred earlier at his home on December 1, 2009. Sherwood's request for compensation for these injuries and the medical and surgical expenses related to them was therefore denied.

In reaching its decision the Board relied upon its conclusion that Sherwood was not honest with Dr. Kamali during his first defense medical examination as well his lack of candor with the Board. It specifically found Dr. Kamali's testimony that Sherwood did not inform him of the earlier accident to be credible and characterized this circumstance as a "significant omission" even if he had, as he claimed, mentioned the prior slip and fall to his treating physicians. The Board considered this withholding of information to undermine Sherwood's credibility.

In addition, Sherwood's failure to inform the St. Francis Hospital Emergency physician of his prior hand injury and fall, when he was seen there for the work-related accident, was also considered by the Board to affect Sherwood's credibility, as was the fact that he minimized the earlier incident when he described it to Dr. Sowa.

The Board was also persuaded by Dr. Sowa's testimony that his opinion about the cause of the injury may have been different had he known that Sherwood sought treatment more than once after he fell from the ladder. The Board also determined that Sherwood's explanation for the second visit that he was getting better and wanted to make sure he could remove the splint, was not believable, since it was inconsistent with the medical records, which document his pain level to be six out of ten. It characterized his

testimony that he reported to the emergency department merely to inquire about the splint as “dubious.”

Sherwood’s credibility was further undermined before the Board because Dr. Sowa was purposefully led to believe that Sherwood’s symptoms had resolved before the work accident even though his opinion may have been different had Sherwood provided all of his medical history, rather than just the portions upon which he wanted Dr. Sowa to focus. Since Dr. Sowa’s opinion about causation was based on Sherwood’s representations to him, the Board could not credit Dr. Sowa’s opinion due to Sherwood’s lack of candor.

The Board was also convinced by Dr. Kamali’s assessment of the cause of Sherwood’s hand and elbow injuries as the fall from the ladder at home, and that this accident, far from being trivial, was in fact significant. This opinion was also corroborated by Bartoshesky, who testified that Sherwood complained about his back pain and leg numbness after the fall at work, but not about his hand or elbow. The Board described this circumstance as “telling,” and expressly found Bartoshesky’s testimony to be “sincere and straightforward.”

Standard and Scope of Review

Upon appeal from a decision of the Board, this Court’s function “is confined to ensuring that the Board made no errors of law and determining whether there is ‘substantial evidence’ to support the Board’s factual findings.”⁵ Substantial evidence means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁶ The “substantial evidence” standard requires “more than a scintilla but less than a preponderance of the evidence.”⁷

The Court “does not weigh the evidence, determine questions of credibility, or make its own factual findings.”⁸ These functions are reserved exclusively for the Board.⁹ The Court must afford “a significant degree of deference to the Board’s factual conclusions and its application of those conclusions to the appropriate legal standards.”¹⁰ In reviewing the evidence, the Court must consider the record “in the light most favorable to the

⁵ *Bermudez v. PTFE Compounds, Inc.*, 2006 WL 2382793, at *3 (Del. Super. Aug. 16, 2006).

⁶ *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154, 156 (Del. 1998) (quoting *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

⁷ *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988) (citing *DiFilippo v. Beck*, 564 F.Supp. 110 (D. Del. 1983)).

⁸ *Hall v. Rollins Leasing*, 1996 WL 659476, at *2 (Del. Super. Oct. 4, 1996) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).

⁹ *Giofre v. G.C. Capital Group*, 1995 WL 264585, at *3 (Del. Super. Apr. 17, 1995), *aff’d*, 670 A.2d 1338 (Del. 1995) (TABLE).

¹⁰ *Bermudez*, 2006 WL 2382793, at *3 (citing 29 *Del.C.* § 10142(d)).

prevailing party below.”¹¹ The Court reviews questions of law *de novo* “to determine whether the Board erred in formulating or applying legal precepts.”¹²

In applying the standard of review, the Court must search the entire record to determine whether, on the basis of all the testimony and exhibits, the Board could fairly and reasonably reach its conclusions.¹³ The Board may adopt the opinion testimony of one expert over another and that opinion will constitute substantial evidence for purposes of review.¹⁴ Where the evidence is sufficient to support the Board’s conclusions, its decision will not be disturbed absent an error of law.¹⁵

Analysis

The Court’s decision that Sherwood’s hand and elbow injuries were related to the accident where he fell from a ladder at his home, and not to the slip and fall in the course of his employment three weeks later, was clearly supported by substantial evidence. Indeed, the bulk of Sherwood’s argument on appeal can best be described as an effort to convince this Court to substitute its own findings of fact for that of the Board, and to ignore the

¹¹ *Id.* (quoting *General Motors Corp. v. Guy*, 1991 WL 190491, at *3 (Del. Super. Aug. 16, 1991)).

¹² *Bermudez*, 2006 WL 2382793, at *3.

¹³ *National Cash Register v. Riner*, 424 A.2d 669, 674-675 (Del. Super. 1980).

¹⁴ *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009).

¹⁵ *General Motors Corp. v. Freeman*, 164 A.2d 686, 689 (Del. 1960).

significant evidence considered by the Board in making its credibility determinations. This strategy must fail because it seeks to have this Court function as the trier of fact, which is precisely what it is not permitted to do.

The Board did not find Sherwood's testimony to be credible and it provided ample evidence to justify this finding. This lack of credibility in turn undermined the opinions of Sherwood's expert, Dr. Sowa, because he admittedly based his causation findings on the subjective reports provided by Sherwood, who deliberately omitted critical aspects of his medical history in order to bolster the significance of the work-related accident while minimizing the potential for the prior ladder accident to be the cause of his hand and elbow injuries. The Board thoroughly outlined the reasons for its finding that Sherwood was not credible. Even if this Court was permitted to ignore the Board's credibility findings, and substitute its own, it agrees that the Board had plenty of legitimate and persuasive bases to discredit Sherwood's testimony. These have been described in detail in the Court's discussion of the Board's decision, *supra*, and need not be repeated here. It is sufficient to point out that Sherwood's deliberate exclusion of vital health information from the physicians involved in this case, his unreasonable explanation for his second visit to Christiana Hospital Emergency Department after his first fall at home, his withholding of vital information

from Dr. Kamali, requiring the Board to recess the hearing for a second evaluation, his lack of health insurance, and his dire financial circumstances all support the Board's conclusion that Sherwood was plainly attempting to conceal his prior hand injury so that he could be compensated for it as if it were work-related. The Board's decision to discredit Sherwood's testimony was sound and supported by more than substantial evidence.

Sherwood's second argument on appeal is that the Board abused its discretion in admitting extrinsic evidence for the purpose of impeaching his credibility. The Court finds this claim to be similarly without merit.

In this appeal, Sherwood submits that the Board should not have permitted his employer's counsel to question him about the reasons for filing to rescind an annuity that resolved an earlier Pennsylvania Workers' Compensation case. In support of his argument, Sherwood relies upon three cases. None of these decisions are dispositive of the issue in this case and all are distinguishable on their facts. For example, in *Williams v. Warren Brothers Construction*,¹⁶ the Court disallowed efforts by the defense to relitigate whether an injury was a valid workers' compensation injury because the second injury related to the first. Likewise, *Mosley v. Gateway*

¹⁶ 412 A.2d 334 (Del. 1980).

*House*¹⁷ dealt with whether an accident occurred in the scope of the claimant's employment and evidence that the claimant was not a good employee was clearly not relevant to that inquiry.

The evidence of Sherwood's effort to "undo" his prior annuity settlement was directly relevant to his motive. When all was said and done, his financial hardship and lack of insurance most certainly provided him with the impetus to claim that his hand was injured at work so the injury would be covered by workers' compensation. All of this evidence neatly fits together and explains why Sherwood would be motivated to provide less than full disclosure to his physicians. The Board's conclusion, although its rationale was not specifically articulated, was consistent with D.R.E. 403 in that the probative value of this evidence is not substantially outweighed by any potential prejudice. Moreover, even if the Board had not allowed this line of questioning, the other evidence, independent of this motive evidence, was sufficient to support the Board's conclusions.

¹⁷ 2011 WL 4344241 (Del. Super. Sept. 13, 2011).

Conclusion

For the foregoing reasons, the decision of the Board denying Sherwood's Petition to Determine Additional Compensation Due is hereby AFFIRMED.

IT IS SO ORDERED.

PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary
cc: Counsel via File & Serve