

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
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September 4, 2012

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RE: *Smith v. Peninsula Oil & Propane*
C.A. No. S11A-11-004

Date Submitted: May 16, 2012
Date Decided: September 4, 2012

On Appeal from the Board's Decision on Claimant's
Petition to Determine Compensation Due: AFFIRMED

Dear Counsel:

David Smith appeals a decision from the Industrial Accident Board ("the Board") that granted his Petition to Determine Additional Compensable Due ("Petition") and awarded him compensation for sixteen percent permanent impairment to the lumbar spine. The Board's decision is affirmed for the reasons set forth below.

STATEMENT OF THE CASE

A. Factual & Procedural Background

The Petition alleged Mr. Smith suffered thirty percent permanent impairment to

the lumbar spine due to a compensable industrial accident that occurred on July 25, 2003, while Mr. Smith was working for Peninsula Oil & Propane Company (“Peninsula”). On September 1, 2011, the Board held a hearing on the Petition. At the hearing, Peninsula agreed Mr. Smith was entitled to permanent impairment compensation but alleged the correct rate of impairment was sixteen percent. By way of written decision mailed September 15, 2011, the Board awarded Mr. Smith \$19,856.64 for permanent impairment at a rate of sixteen percent. The Board also awarded an attorney’s fee in the amount of \$5,956.99, and reimbursement of Mr. Smith’s medical witness fees.

Peninsula filed a Motion for Reargument contesting the award of attorney’s fees in light of the settlement offer made in advance of the Board hearing. The Board granted the Motion for Reargument and amended its original decision to exclude the award of attorney’s fees.

Mr. Smith filed an appeal of the Board’s decision with the Superior Court on November 21, 2011. Briefing is complete and the matter is ripe for decision.

DISCUSSION

A. Standard of Review

The review of the Board’s decision is confined to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the

Board's findings of fact.¹ The Supreme Court and this Court have emphasized the limited appellate review of an agency's findings of fact. The reviewing Court must determine whether the administrative decision is supported by substantial evidence.² Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.³ The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.⁴ Questions of law are reviewed *de novo*.⁵

B. The Board Hearing

Mr. Smith testified on his behalf at the Board hearing. He stated that his knee gave out as he was exiting a truck that he drove for Peninsula in July of 2003. The knee problem was later determined to be a lower back issue. Ronald Sabbagh, M.D., operated on Mr. Smith's back in March of 2004. In October of 2004, Dr. Sabbagh released Mr. Smith to work. Mr. Smith returned to work at Peninsula in December of 2004 and retired in January of 2005. Mr. Smith was subsequently diagnosed with pulmonary problems.

¹ *Histed v. E.I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

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

³ *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994).

⁴ *Johnson*, 213 A.2d at 66.

⁵ *Delhaize America, Inc. v. Baker*, 2002 WL 31667611, at *2 (Del. Super.).

Mr. Smith, age sixty-nine, told the Board he has trouble dressing himself and bending over. He has been unable to fish or hunt since the accident. He opted to sell his motorcycle after his knee gave way causing him to fall off the bike while at a complete stop. Mr. Smith is unable to walk to his mailbox without stopping to rest. He currently uses over-the-counter pain medication to manage his pain, though he tries not to take more than half a pill per day.

Upon questioning by the Board, Mr. Smith stated he wore a back brace when he returned to work at Peninsula but implied he does not currently wear one. He did not experience any

pain during the hearing itself. He is able to drive a car with an automatic transmission. His daily activities involve walking to the mailbox and mowing the lawn.

Stephen Rodgers, M.D., a physician Board-certified in occupational medicine, testified via deposition on behalf of Mr. Smith. In connection with his report issued in February of 2011, Dr. Rodgers conducted a physical examination of Mr. Smith and reviewed all available medical records in connection with Mr. Smith's industrial accident. After summarizing Mr. Smith's injuries for the Board,⁶ Dr. Rodgers testified to his physical examination of Mr. Smith. Mr. Smith told Dr. Rodgers his symptoms were variable. He described a loss of motion in the back and general stiffness. When symptoms occur, Mr. Smith takes over-the-counter pain medication. His symptoms increase in the evening. His left leg has a burning sensation and Mr. Smith also occasionally has pain in his shin. At the time of Dr. Rodgers' examination of Mr. Smith, Mr. Smith was using supplemental oxygen, due to an unrelated medical condition.

Mr. Smith's lower back showed no tenderness to light palpation. Ranges of motion, when measured using dual inclinometers, showed forward flexion at half the normal measurement, backward flexion at twenty percent of normal and side bending to

⁶ The physical evidence of injury is not disputed and may be briefly summarized. After tests revealed herniated discs with extrusion at the L1-2 level and the L2-3 level, Dr. Sabbagh performed a laminectomy for decompression and a neural foraminotomy at L1-2 and L2-3, as well as a discectomy at L-1 on March 4, 2004. A follow-up EMG on July 19, 2004, was abnormal and showed, at a minimum, radiculopathy at L2-3.

the right and to the left at forty percent of normal. Dr. Rodgers was unable to obtain reflexes, with the exception of a trace at the right Achilles. Dr. Rodgers observed atrophy of Mr. Smith's left thigh

and calf, though the atrophy is considered mild by medical standards. Dr. Rodgers testified Mr. Smith walked with a limp, favoring his left leg.

In August of 2004, Mr. Smith took a functional capacity exam. As a result, he was restricted to medium duty work. A notation made on the report indicated that many of the tests given to Mr. Smith were limited due to poor cardiac response and/or elevated blood pressure.

Dr. Rodgers testified his measurement of Mr. Smith's range of motion using dual inclinometers resulted in a permanency rating of thirty percent. Dr. Rodgers testified he followed the procedure outlined in the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition ("the Guides") to reach the permanency rating. Specifically, Dr. Rodgers used the range of motion ("ROM") method for determining the rating because the Guides direct that the ROM method be used to evaluate multi-level injuries; to wit, when a patient has injuries beyond the area of surgery or when a patient has had surgery on multiple levels. Mr. Smith had surgery on multiple levels. The Guides also dictate the use of an inclinometer versus a goniometer to measure range of motion. Dr. Rodgers explained to the Board that if an injury may be measured by either the ROM method or the Diagnosis Related Estimates Method ("DRE") method, the Guides require the numbers to be compared and the larger number to be used when reaching a conclusion as to permanency. The ROM measurement is reached by combining a percentage of one's range of motion and a percentage based upon one's surgical history

and diagnostic test results. If Dr. Rodgers were to exclude his measurements from the range of motion tests, his permanency rating would have been roughly

half of the thirty percent rating. Dr. Rodgers has significant experience in interpreting and applying the Guides.

Michael Mattern, M.D., testified via deposition on behalf of Peninsula. Dr. Mattern, a board-certified orthopedic surgeon, examined Mr. Smith on June 6, 2011. Mr. Smith accepted Dr. Mattern as an expert without objection. Mr. Smith told Dr. Mattern he still had issues with pain in his back and left leg. The pain was described as an aching feeling that varied from day to day. He complained of his knee buckling frequently and he has to pull his left leg up with his hands when getting into a vehicle.

Dr. Mattern described Mr. Smith's gait as "fairly normal." His posture was also "fairly normal." Mr. Smith had minimal tenderness in the back to palpation and percussion, and Dr. Mattern did not detect any spasm. Mr. Smith had a fairly limited range of motion in his back and could only reach down until his fingertips were level with his knees. Dr. Mattern also observed atrophy of Mr. Smith's left thigh muscles. In sum, Dr. Mattern observed abnormal findings that, in his opinion, resulted from Mr. Smith's industrial accident.

Dr. Mattern also used the Guides to determine a permanency rating. Specifically, Dr. Mattern stated Mr. Smith fell into DRE Category III for permanency of lumbar spine with a range of thirteen to seventeen percent permanency. Dr. Mattern made a judgment call because he felt Mr. Smith had significant problems and placed Mr. Smith in the upper end of Category III with a sixteen percent permanency rating.

Upon cross-examination, Dr. Mattern stated that he did not believe a reviewing physician was limited to the ROM in multilevel cases. Although Dr. Mattern looked at Mr. Smith's range of motion using a goniometer, he did not record his results. Dr. Mattern testified that the use of the Guides is more of an art than an exact science. He stated he felt that the DRE method better measured Mr. Smith's problems as his pain was not isolated to his lower back but was present in his entire lower extremity.

C. Merits

Mr. Smith now argues the Board's decision was not supported by substantial evidence in the record and the Board erred as a matter of law in choosing the rating of Dr. Mattern over that of Dr. Rodgers. Specifically, Mr. Smith contends the Board did not properly accept Dr. Mattern's permanency rating because Dr. Mattern did not strictly adhere to the Guides' methodology in rating Mr. Smith's permanency. Because Dr. Mattern did not follow the Guide's methodology, Mr. Smith contends his testimony cannot constitute substantial evidence to support the Board's decision. Naturally, Peninsula argues the Board was entitled to rely on Dr. Mattern's testimony and the Board's acceptance thereof constitutes substantial evidence to support the Board's decision.

The Board held:

After studying all of the testimony, the Board accepts Dr. Mattern's opinions over the opinions of Dr. Rodgers as to the permanent impairment of Claimant's lumbar spine. Given Claimant's condition and level of

functioning, the Board finds that the sixteen-percent [sic] rating is more reasonable under the circumstances of this case than a thirty-percent [sic] rating. Although Claimant has limitations in his range of motion in the lumbar spine and has left leg weakness, he testified that he was not in pain at the hearing and he only takes aspirin once a day for his symptoms and does not require stronger medication. In 2004, Claimant was released to work in a medium duty capacity. Dr. Mattern explained that the DRE method of assessment was the most appropriate method in this case because it better describes Claimant's problems and condition.

The first question presented is whether Dr. Mattern was required to rely upon the methodology as described in the Guides in reaching a permanency rating. Mr. Smith argues this Court must consider whether the underlying methodology of the Guides comports with 19 *Del. C.* § 2326, which requires a workers' compensation award be based upon the "lost of use" standard.

At the outset, the Court finds this question is not properly before the Court having not been raised below. Mr. Smith stipulated to Dr. Mattern's qualifications as an expert and failed thereafter to object to his testimony, specifically as to whether the methodology underlying Dr. Mattern's opinion was scientifically valid. "The proper time to make objections to an expert's qualifications or proffered testimony is at trial; not on appeal."⁷ While the rules of evidence do not strictly apply to a Board hearing, "[a]n objection before the Board to the admissibility of evidence gives the Board the opportunity to determine the merits of the issue, to exclude unreliable evidence and

⁷ *State v. Stevens*, 2001 WL 541473, at *3 (Del. Super.).

preserve any evidentiary issue for appellate review.”⁸ Counsel for Mr. Smith did argue Dr. Mattern’s method was unreliable in closing arguments before the Board but it is notable that he did so in the context of challenging Dr. Mattern’s credibility.

Nevertheless, there is no authority for Mr. Smith’s argument that the Guides must be strictly followed.⁹ Mr. Smith, himself, acknowledges that fact. The Board, and the testifying physicians, frequently use the Guides as what it is: a *guide* to help determine the degree to which a person has lost the use of one or more body parts. Experts may rely on the Guides in different ways.¹⁰

Mr. Smith now contends the issue before the Board was not one of credibility but it was, in fact, exactly that. “It is well-settled that issues of credibility rest solely within the Board’s discretion and will not be disturbed absent a showing of unreasonable or capricious circumstances.”¹¹ The Board “is free to adopt the opinion testimony of one expert over another, and that opinion, if adopted, will constitute substantial evidence for

⁸ *Standard Distributing, Inc. v. Hall*, 897 A.2d 155, 157-58 (Del. 2006).

⁹ See *Hildebrandt v. Daimler Chrysler*, 2006 WL 3393588, at *4 (Del. Super.) (“[T]he AMA guidelines are merely that, guidelines, to be used as helpful tools in deciding a claimant’s impairment levels.”).

¹⁰ *Bolden v. Kraft Foods*, 2005 WL 3526324, at *3 (Del.).

¹¹ *Hart v. Columbia Vending Serv.*, 1998 WL 281241, at *4 (Del. Super.).

purposes of appellate review.”¹² This Court defers to the experience and specialized competence of the Board.¹³

Dr. Mattern testified he used Mr. Smith’s symptoms to fit him into DRE Category III of lumbar spine permanency impairment. Dr. Mattern testified as to why he used the DRE method: specifically, he felt the DRE analysis allowed him to take into account the bigger picture presented by Mr. Smith’s condition, namely pain in Mr. Smith’s entire lower extremity rather than solely his lower back. All parties testified to Mr. Smith’s continued issues with strength in his left leg. Dr. Mattern testified that, in his experience, there are portions of the Guides that are not strictly followed by a number of practicing physicians. It is true that Dr. Rodgers likewise testified as to his reasons for relying upon the ROM method for rating Mr. Smith’s permanency. While his methodology may have been more in keeping with the technical language of the Guides, the Board was not bound to accept his testimony. Once the Board rejected Dr. Rodgers’ testimony, it needed only to explain its reasons for doing so. The Board clearly cited its observations of Mr. Smith’s condition and Mr. Smith’s own testimony in concluding Dr. Mattern’s testimony was

¹² *Bolden v. Kraft Foods*, 2005 WL 3526324, at *4 (Del.); *see also Jepsen v. University of Delaware – Newark*, 2003 WL 22139774, at *2 (Del. Super.) (“[A]s a finder of fact, the Board is entitled to discount the testimony of any witness on the basis of credibility, provided it states specific, relevant reasons for so doing.”).

¹³ 29 Del. C. § 10142(d); *Histed v. E.I. duPont Newmours & Co.*, 621 A.2d 340, 342 (Del. 1993).

more reliable. As the trier of fact, it was entitled to do so; no further clarification is required.

D. Conclusion

For the reasons set forth above, the Board's decision is free from legal error and supported by substantial evidence and, as such, the decision is AFFIRMED.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

oc: Prothonotary
cc: Industrial Accident Board