

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

TERRAY MILLER,	)	
	)	
Claimant-Appellant,	)	
	)	
v.	)	Superior Court
	)	C.A. No. N12A-06-007 DCS
DELAWARE PSYCHIATRIC CENTER,	)	
	)	
Employer-Appellee.	)	

Submitted: December 3, 2012
Decided: March 28, 2013

*On Appeal from the Industrial Accident Board of the State of Delaware
In and For New Castle County – **AFFIRMED***

ORDER

Appearances:

Michael D. Bednash, Esquire, Christiana, Delaware
Attorney for Appellant Terray Miller

John J. Ellis, Esquire, Wilmington, Delaware
Attorney for Appellee State of Delaware

DIANE CLARKE STREETT
JUDGE

Factual and Procedural Background

Appellant Terray Miller (“Miller”) sustained an injury to her left hip and left knee after she slipped and fell at the Delaware Psychiatric Center on June 9, 2010 while working for Appellee the State of Delaware (the “Employer”). Miller reached an agreement with the Employer whereby Miller received total disability benefits from June 10, 2010 through December 27, 2010. On September 29, 2011, Miller filed a Petition to Determine Additional Compensation Due with the Industrial Accident Board (the “Board”) in which she sought permanent impairment benefits for a 13.3% loss of use to her lumbar spine as a result of the June 9, 2010 work accident.

At the hearing before the Board on March 20, 2012, Miller testified that she works at the Delaware Psychiatric Center where she performs “a lot of secretarial work” as a clinical support specialist and a CNA.¹ Prior to the work accident, Miller acknowledged that she sustained previous injuries to her low back in four prior motor vehicle accidents, and she only sought treatment from Dr. William R. Atkins, Jr. (“Dr. Atkins”) who specializes in physical medicine and rehabilitation and pain management.² Miller later testified that she was involved in six motor vehicle accidents that occurred between 1998 and 2008, all of which involved an

¹ Transcript of Administrative Hearing, 9 (Mar. 20, 2012).

² Tr. at 10-11; Deposition of Dr. Atkins, 7 (Mar. 12, 2012).

injury to her low back and none of which completely went away by the time of the next motor vehicle accident.³

There was testimony that Miller was seen by six medical health providers from 1998 through the date of the hearing before the Board; Dr. Ufberg, Dr. Atkins, Dr. Theam Tay (“Dr. Tay”), Dr. Chandler, Dr. Weisberg, and Dr. Robert Gordon (“Dr. Gordon”).

Miller has been treating with Dr. Atkins since 2004.⁴ Prior to the work accident, Dr. Atkins treated Miller for flare-ups, pain, and inflammation.⁵ Miller experienced “slight” spasms in the middle of her back.⁶ She has been prescribed the same dosage of Percocet since 2007.⁷ Miller agreed that there were some months where she had overlapping prescriptions for Xanax and indicated that Dr. Atkins’ testimony that he had no idea Miller’s psychiatrist was prescribing Xanax for her was inaccurate.⁸

Miller was continuing to receive treatment from Dr. Atkins for her low back injury when the June 9, 2010 work accident occurred.⁹ On that date, Miller slipped and fell on top of cut wet grass as she walked to her vehicle.¹⁰ She landed on her

³ Tr. at 22.

⁴ Tr. at 24.

⁵ Tr. at 12.

⁶ Tr. at 13.

⁷ Tr. at 25.

⁸ Tr. at 26. The record also shows that Miller was disabled from work due to mental health issues in January – February 2012, just a few months prior to her May 2012 hearing. *See* Tr. at 27.

⁹ Tr. at 12.

¹⁰ Tr. at 9.

left side and ended up on her back.¹¹ Miller testified that she immediately felt pain in her back.¹² Her entire left side was swollen and her knees and the sides of her thighs were scraped.¹³ At first, Miller claimed she sustained “laceration injuries” to her knees,¹⁴ but Miller clarified that she was actually referring to a scrape on her left knee.¹⁵ In addition, Miller testified that she had long-lasting spasms shooting from her low back through her left leg that differed from her previous pain symptoms.¹⁶

On the date of the work accident, Miller sought immediate treatment by reporting to two nurses, Clara Hollis (“Hollis”) and “Celeste,” at the Delaware Psychiatric Center.¹⁷ Miller also completed an injury/illness report in which she wrote that her left hip, leg, and knee were injured.¹⁸ Miller acknowledged that her report did not reference a low back injury, but claimed that she was trying to describe an injury to her back when she wrote “hip.” When questioned about Hollis’ report, which does not mention a low back injury, Miller testified that she reported a back injury to Hollis, but Hollis “wasn’t listening.”¹⁹

¹¹ *Id.*

¹² Tr. at 16.

¹³ Tr. at 9.

¹⁴ *Id.*

¹⁵ Tr. at 30-31.

¹⁶ Tr. at 13.

¹⁷ Tr. at 31 & 35. Miller testified that she was unable to recall Celeste’s last name.

¹⁸ Tr. at 17.

¹⁹ Tr. 18-19.

Following the work accident, Miller sought treatment for her injuries from her family physician, Dr. Tay, from June 10, 2010 through June 16, 2010.²⁰ Although Miller testified that she told Dr. Tay she suffered a back injury on June 9, 2010, there is no documentation of Miller's back injury in Dr. Tay's records.²¹ According to Miller, Dr. Tay's record of a physical examination on June 10, 2010 in which she reported no back pain is "inaccurate."²² On June 14, 2010, Miller returned to Dr. Atkins for the first time since the work accident.²³ Dr. Atkins' records indicate that Miller's physical examination was "unchanged," she was diagnosed as having chronic pain syndrome, and her prescriptions for Percocet and Xanax were refilled.²⁴ Despite her testimony that she told Dr. Atkins about her back injury, Dr. Atkins' records on that date do not reflect that Miller reported the injury.²⁵ Miller testified that Dr. Atkins' testimony was "inaccurate" concerning his assertion that she never told him about a back injury on June 14, 2010.²⁶

On June 29, 2010, Miller signed a petition that was submitted to the Board in which she reported an injury to her left side, hip, leg, knee, and "others."²⁷ Although her back is not specifically mentioned in the petition, Miller testified that

²⁰ Tr. 19; Parties' Stipulation of Facts/Statement of Issues, 1 (Mar. 20, 2012).

²¹ Tr. at 19.

²² *Id.*

²³ Tr. at 20.

²⁴ *Id.*

²⁵ Tr. at 21.

²⁶ *Id.*

²⁷ Tr. at 23.

it is “considered an other.”²⁸ Miller agreed that she did not indicate information about her prior motor vehicle accidents on the petition despite being prompted to provide a description and the dates of previous and subsequent injuries.²⁹

Miller has since returned to performing her full duties at work, after missing six months following the work accident.³⁰ She testified that she presently experiences a lot of pain.³¹ Miller continues to treat with Dr. Atkins every four weeks and is prescribed Flexural, Percocet, and Xanax.³²

In addition, Miller presented expert deposition testimony from Dr. Atkins. Dr. Atkins agreed that Miller had been involved in four motor vehicle accidents between 2004 and 2008 but was unaware of her motor vehicle accidents which occurred in 1998 and 1999.³³ Dr. Atkins testified that he treated Miller for injuries resulting from motor vehicle accidents that occurred in February 2007 and January 2008.³⁴ Dr. Atkins was unable to recall whether he treated Miller for injuries she suffered as a result of the motor vehicle accidents that occurred in 2004 and 2005, because his records are archived after seven years.³⁵ However, Dr.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Tr. at 14-15.

³¹ Tr. at 14.

³² Tr. at 15-16.

³³ Deposition of Dr. Atkins at 71.

³⁴ *Id.* at 12.

³⁵ *Id.* at 21-22. In its decision, the Board noted that it intended to submit a letter to the Delaware Board of Medical Licensure and Discipline to investigate Dr. Atkins’ conduct before the Board. The Employer objected to Dr. Atkins’ deposition testimony on the basis that Dr. Atkins only produced records from February 2007 through the time of the hearing. Although Miller asserted that the medical records prior to February 2007 were subject to a “seven year rule” and shielded from production, the Board noted Dr. Atkins’ testimony that those records were “in storage or

Atkins acknowledged that an October 19, 2005 chiropractic record documented Miller as suffering from a low back injury that occurred in August 2005.³⁶ Also, a June 14, 2006 record indicates that Miller described “piercing pain” in her low back and received a prescription for Percocet from Dr. Atkins to treat cervical problems and a lumbosacral sprain and strain related to the 2005 motor vehicle accident.³⁷

On February 21, 2007, Dr. Atkins treated Miller for injuries to her left knee, neck, and back after she was involved in a motor vehicle accident on February 12, 2007.³⁸ At that time, Miller described sharp, shooting pain in her low back region, which Dr. Atkins diagnosed as a new lumbar strain and sprain injury.³⁹ Miller was disabled from work.⁴⁰ Dr. Atkins noted in his records that Miller’s pain from 2004 and 2005 had improved, but he did not indicate whether her symptoms were resolved or aggravated by the 2007 accident.⁴¹ The following month, in March 2007, Miller reported ongoing low back pain that radiated to her lower extremities.⁴² An EMG performed by Dr. Atkins on March 21, 2007 revealed bilateral L5 radiculitis.⁴³ Although Dr. Atkins’ records indicate Miller suffered

archives.” In a previous case before the Board, Dr. Atkins provided medical records in a “piecemeal manner.” *See* Decision on Petition to Determine Compensation Due, 5 (May 16, 2012).

³⁶ Deposition of Dr. Atkins at 21.

³⁷ *Id.* at 23-24.

³⁸ *Id.* at 25.

³⁹ *Id.* at 25 & 29.

⁴⁰ *Id.* at 28.

⁴¹ *Id.* at 26.

⁴² *Id.* at 29.

⁴³ *Id.* at 30-31.

back pain radiating to both lower extremities, Miller was released back to work on May 15, 2007.⁴⁴ Between April 4, 2007 and January 7, 2008, Miller sought treatment from Dr. Atkins on a monthly or bi-monthly basis.⁴⁵ Dr. Atkins' records from these visits reveal that Miller suffered from persistent back pain for which she continued to receive treatment in the form of the same narcotic medication.⁴⁶ In September 2007, Dr. Atkins began treating Miller with an additional prescription for Xanax.⁴⁷

Then, on January 31, 2008, Miller suffered another motor vehicle accident in which she injured her neck, low back, and both hips.⁴⁸ Dr. Atkins' records from February 4, 2008 indicate that Miller's diagnosis was aggravation of the lumbosacral strain and sprain injury and radiculitis.⁴⁹ He treated Miller with a prescription for Percocet and disabled Miller from all work.⁵⁰ Dr. Atkins testified that a February 18, 2008 MRI of Miller's lumbar spine showed that her low back injury was structurally and objectively within normal limits.⁵¹ Although Dr. Atkins conceded that his monthly records between October 2008 and September 2009 were not as detailed as his previous records, Dr. Atkins testified that some of

⁴⁴ *Id.* at 30 & 32.

⁴⁵ *Id.* at 31-33, 37-40.

⁴⁶ *Id.*

⁴⁷ *Id.* at 39.

⁴⁸ *Id.* at 40-41.

⁴⁹ *Id.* at 43.

⁵⁰ *Id.* at 42 & 43.

⁵¹ *Id.* at 43-44.

his notes indicate that Miller was suffering from chronic pain.⁵² Dr. Atkins' treatment record from October 7, 2009 shows Miller's physical examination and diagnosis of persistent pain and chronic pain syndrome unchanged.⁵³ Dr. Atkins testified that Miller continued to treat with him on a monthly basis and continued receiving prescriptions for Percocet through the June 2010 work accident.⁵⁴ She also was prescribed a muscle relaxant in early 2010.⁵⁵ Less than one month before the work accident, on May 19, 2010, Dr. Atkins treated Miller for ongoing low back discomfort and pain management.⁵⁶ Dr. Atkins acknowledged that Miller had an extensive history of ongoing treatment to her low back prior to the work accident.⁵⁷

On June 14, 2010, Dr. Atkins treated Miller and was unaware that a work accident had occurred.⁵⁸ Dr. Atkins found that Miller's physical and neurological condition was unchanged from her previous visits, diagnosed Miller with chronic pain syndrome, and recommended that she continue treating with the same medications.⁵⁹ Then, on June 23, 2010, Dr. Atkins, apparently now aware of the June 9, 2010 work accident, treated Miller for her complaint of severe low back

⁵² *Id.* at 48-49.

⁵³ *Id.* at 50.

⁵⁴ *Id.* at 50-51.

⁵⁵ *Id.* at 51.

⁵⁶ *Id.* at 12-13.

⁵⁷ *Id.* at 19-20.

⁵⁸ *Id.* at 53 & 59.

⁵⁹ *Id.* at 53 & 56.

pain, which was primarily on her left side, radiating down her leg.⁶⁰ Dr. Atkins diagnosed Miller with a severe lumbosacral strain and sprain, left knee sprain, and lumbar radiculopathy.⁶¹ He recommended an MRI of Miller's lumbar spine and left knee and restricted Miller from work.⁶² Dr. Atkins testified that the MRI showed evidence of bulging discs and some facet arthrosis in Miller's low back.⁶³ He opined that disc bulges are caused by "something in someone's life activities" but conceded that disc bulges can resolve without active treatment.⁶⁴ In addition, Dr. Atkins agreed with the radiologist's report which indicated that the MRI showed minimal non-compressive disc bulges at multiple levels along with mild facet arthrosis.⁶⁵ After the radiologist concluded that the MRI results were similar to a 2008 study, Dr. Atkins referred Miller for chiropractic care and prescribed her anti-inflammatory medication, pain medication, and a muscle relaxant.⁶⁶ An August 11, 2010 EMG documented Miller's left L5 radiculopathy, which Dr. Atkins testified is "full-blown nerve root impairment" that differs from radiculitis, "mild irritation."⁶⁷ However, between March 2007 and August 2010, Dr. Atkins

⁶⁰ *Id.* at 8-9.

⁶¹ *Id.* at 11.

⁶² *Id.*

⁶³ *Id.* at 13.

⁶⁴ *Id.* at 63.

⁶⁵ *Id.* at 61-62.

⁶⁶ *Id.* at 13-14, 62.

⁶⁷ *Id.* at 30, 64.

performed no interim testing to confirm any resolution of radiculitis on Miller's left side.⁶⁸

Miller was disabled from work until October 2010 when she returned with restrictions.⁶⁹ On December 27, 2010, Dr. Atkins noted that Miller was at "maximum medical improvement" and discharged from workers' compensation care but testified he did not believe her condition returned to baseline, so she continued to receive treatment on a monthly basis.⁷⁰ Dr. Atkins acknowledged that Miller has been prescribed the same dosage of Percocet since January 31, 2011 and that he also began to prescribe her Relafen, which is used to treat arthritis and inflammation, in October 2011.⁷¹

In an August 26, 2011 report, Dr. Atkins opined that Miller suffered a 13.3% impairment to her lumbar spine.⁷² He based his assessment on the DRE Lumbar Category III of the *AMA Guides to the Evaluation of Permanent Impairment* (Fifth Edition) as well as Miller's MRI findings, EMG findings, and clinical assessment.⁷³ No portion of Dr. Atkins' permanency rating comes from Miller's previous automobile accidents, in which she suffered low back injuries, because Dr. Atkins did not rate Miller's permanency for any of those previous accidents.⁷⁴

⁶⁸ *Id.* at 64.

⁶⁹ *Id.* at 14.

⁷⁰ *Id.* at 64-65.

⁷¹ *Id.* at 66, 69.

⁷² *Id.* at 17.

⁷³ *Id.* at 16-17, 72.

⁷⁴ *Id.* at 17-18.

Dr. Atkins speculated that Miller might have additional impairment based on her prior automobile accidents but was unable to elaborate any further.⁷⁵

In forming his opinion, Dr. Atkins did not review Dr. Ufberg's records and was unaware that Miller had been diagnosed with fibromyalgia.⁷⁶ He also did not review Miller's 2005 lumbar x-ray, which showed osteoarthritis.⁷⁷ Dr. Atkins did not review Dr. Weisberg's records and was unaware that he and Dr. Weisberg prescribed Xanax for Miller at the same time.⁷⁸ Finally, Dr. Atkins was unaware that Dr. Tay treated Miller following the June 9, 2010 work accident, because he did not review Dr. Tay's records.⁷⁹

Hollis, a nurse manager/house supervisor at Delaware Psychiatric Center, testified on behalf of the Employer.⁸⁰ One of her duties as house supervisor is to complete accident investigation reports.⁸¹ Although she is not Miller's direct supervisor, Hollis was the house supervisor on June 9, 2010 and spoke with Miller following the work accident.⁸² Hollis testified that the box checked as verified on the June 9, 2010 accident investigation report indicates that Hollis spoke with Miller to ensure the accuracy of Hollis' report as well as the report Miller

⁷⁵ *Id.* at 74-75.

⁷⁶ *Id.* at 71-72.

⁷⁷ *Id.* at 66.

⁷⁸ *Id.* at 70.

⁷⁹ *Id.* at 71.

⁸⁰ Tr. at 64.

⁸¹ Tr. at 65.

⁸² Tr. at 64-65. The Board identifies Hollis as Miller's direct supervisor. *See* Decision on Petition to Determine Compensation Due, 10. Hollis testified that, at various times, she is "everyone's direct supervisor." *See* Transcript of Administrative Hearing, 74.

completed.⁸³ In Hollis' report, there is no mention of Miller suffering an injury to her low back.⁸⁴ There is also no reference to a low back injury in the report Miller completed herself and subsequently reviewed with Hollis.⁸⁵ Hollis testified that everything Miller told Hollis regarding her injury was included in Hollis' report and that there was no reason for her to talk over Miller or not listen to her since Hollis needed to get the information from her in order to complete the report.⁸⁶

With regard to Dr. Chandler's record indicating that Miller told him that she was regularly required to lift over one hundred pounds as part of her job, Hollis testified that it was inaccurate.⁸⁷ Hollis said that Miller is not expected to lift more than twenty-five pounds, devices are provided and used to assist in lifting patients, and furthermore, Miller is not expected to lift a patient by herself.⁸⁸

In addition, Elizabeth Riccardi, a nurse manager at Delaware Psychiatric Center, testified on behalf of the Employer.⁸⁹ Riccardi has been Miller's supervisor for several years and would observe her on a daily basis.⁹⁰ She has never observed Miller lift one hundred pounds.⁹¹ Riccardi testified that Miller does not regularly lift one hundred pounds because Miller's primary job involves

⁸³ Tr. at 65-66.

⁸⁴ Tr. at 66.

⁸⁵ Tr. at 68.

⁸⁶ Tr. at 66-67.

⁸⁷ Tr. at 70.

⁸⁸ Tr. at 69-70.

⁸⁹ Tr. at 75.

⁹⁰ Tr. at 75-76.

⁹¹ Tr. at 77, 80.

documentation and preparing and filing forms and because devices are provided for lifting heavy weights.⁹²

The Employer also presented expert deposition testimony from Dr. Gordon who is board certified in orthopedic surgery.⁹³ Dr. Gordon examined Miller on July 21, 2010 and November 16, 2011.⁹⁴ He testified that, during the first examination, Miller told him that she slipped and fell at work on June 9, 2010, injuring her left thigh and that she initially treated with her family physician who felt she had soft tissue injuries.⁹⁵ Miller told Dr. Gordon that she had some back problems from previous motor vehicle accidents but she thought that she had completely recovered prior to the June 9, 2010 work accident.⁹⁶ This is so despite the fact that Miller continued to receive treatment in the form of “narcotics” up until the time of the work accident.⁹⁷ Dr. Gordon performed a normal objective examination of Miller’s back and found that Miller’s subjective complaints had no anatomical basis.⁹⁸ Although Dr. Gordon found that Miller was suffering from morbid obesity because she carried 280 pounds on her 5’5” frame, Miller had a “good range of motion of her back for someone her size.”⁹⁹ In his report, Dr. Gordon did not document any objective findings to Miller’s low back; instead, he

⁹² *Id.*

⁹³ Deposition of Dr. Gordon, 5 (Mar. 13, 2012).

⁹⁴ *Id.* at 7.

⁹⁵ *Id.* at 9-10.

⁹⁶ *Id.* at 9.

⁹⁷ *Id.* at 25.

⁹⁸ *Id.* at 13 & 15.

⁹⁹ *Id.* at 11-12.

wrote that there were “multiple nonanatomic findings indicating an enormous functional component to her complaints.”¹⁰⁰ He explained that “functional overlay” is a term used by doctors when there is no physical basis for the patient’s complaints and are the result of malingering or a psychological condition.¹⁰¹ When Dr. Gordon examined Miller again in November 2011, he found that her ongoing complaints of pain in her low back radiating into her lower extremities again had no anatomic basis.¹⁰²

Dr. Gordon testified that he reviewed all available medical records in forming his opinion.¹⁰³ Records from Dr. Ufberg and Saint Francis Hospital document Miller suffering strain and sprain injuries to the low back as a result of motor vehicle accidents that occurred in 1998 and 1999.¹⁰⁴ The records also show that Miller had been diagnosed with fibromyalgia, a type of chronic pain syndrome.¹⁰⁵ Based on his review of the records, Dr. Gordon testified that Miller treated with Dr. Atkins for a continuous period since at least early 2005 for low back complaints as a result of motor vehicle accidents in 2004, 2005, 2007, and

¹⁰⁰ *Id.* at 14.

¹⁰¹ *Id.* at 14-15.

¹⁰² *Id.* at 23-24.

¹⁰³ *Id.* at 7-8.

¹⁰⁴ *Id.* at 43.

¹⁰⁵ *Id.* at 44.

2008.¹⁰⁶ The treatment, in which Miller is prescribed the same dosage of Percocet or Vioprofen, has continued monthly at least since the beginning of 2007.¹⁰⁷

Following the June 9, 2010 work accident, the initial treating physician, Dr. Tay, documented soft tissue injuries only.¹⁰⁸ Although Dr. Tay examined Miller, Dr. Tay did not document Miller's alleged low back injury, and in fact, the records indicate that Miller told Dr. Tay during one of her two visits to him that she suffered no back pain related to the work accident.¹⁰⁹ Dr. Gordon noted that five days after the work accident, Dr. Atkins treated Miller and made no mention of a new injury.¹¹⁰ Dr. Atkins' records indicate that he treated Miller, whose physical examination was unchanged that day, for ongoing chronic pain complaints with Percocet.¹¹¹ In comparison to the 2008 MRI, Dr. Gordon testified that the 2010 MRI showed no evidence of herniation, stenosis, or nerve compression.¹¹² In light of Miller's "significant weight problem," Dr. Gordon testified that the MRI looked better than he had expected, and he noted that the radiology report indicated that the findings were very similar to the 2008 MRI.¹¹³ Dr. Gordon opined that any minimal disc bulges that developed in Miller over the years were related to normal

¹⁰⁶ *Id.* at 44-45.

¹⁰⁷ *Id.* at 45-46.

¹⁰⁸ *Id.* at 13.

¹⁰⁹ *Id.* at 13, 54.

¹¹⁰ *Id.* at 25.

¹¹¹ *Id.* at 25.

¹¹² *Id.* at 33.

¹¹³ *Id.* at 33-34.

wear and tear changes as well as Miller's obesity.¹¹⁴ Likewise, mild facet arthrosis tends to result from wear and tear changes in those who are "markedly obese," including Miller.¹¹⁵ Dr. Gordon maintained that mild facet degenerative changes had nothing to do with Miller's work injury.¹¹⁶ Dr. Gordon testified that EMGs are extremely subjective tests that depend upon the reliability and experience of the person conducting them.¹¹⁷ After reviewing the 2007 and 2010 EMGs that Dr. Atkins performed, Dr. Gordon found there was no indication that Miller's condition had worsened.¹¹⁸ Dr. Gordon testified that "radiculopathy" is used to explain a patient's symptoms while "radiculitis" indicates there is an objective confirmation of radiculopathy.¹¹⁹ In his opinion, Miller has no evidence of radiculitis, radiculopathy, or anything else physically wrong with her back related to the June 9, 2010 work accident.¹²⁰ Dr. Gordon also noted that Dr. Atkins' record from May 19, 2010 diagnosed Miller as having chronic pain syndrome and being treated with Percocet and Xanax.¹²¹ Based upon his review of Dr. Weisberg's records, Dr. Gordon determined that Miller had received overlapping prescriptions for Xanax from Dr. Weisberg as well as Dr. Gordon.¹²²

¹¹⁴ *Id.* at 34.

¹¹⁵ *Id.* at 35.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 37-38.

¹¹⁸ *Id.* at 36-37.

¹¹⁹ *Id.* at 37.

¹²⁰ *Id.* at 38.

¹²¹ *Id.* at 20.

¹²² *Id.* at 57.

Dr. Gordon testified that Dr. Atkins' permanency rating had no medical or scientific basis.¹²³ In addition, Dr. Gordon testified that the chiropractic records of Dr. Chandler, who treated Miller from August 2005 through 2011, rate Miller on May 9, 2011 as having a 5% whole person impairment to the low back but find no contributing factors from any pre-existing condition.¹²⁴ Specifically, there was neither evidence that Miller's condition related to the June 2010 work accident nor evidence to indicate permanency as a result thereof.¹²⁵ Dr. Gordon's permanency rating was zero based on the fact that Miller had no radicular complaints, the June 2010 MRI scan did not show nerve root compression, Miller was neurologically intact, Miller had no objective findings on examination, Miller had no pain with straight leg raising, and there was nothing to indicate electrodiagnostic changes.¹²⁶ As to the DRE Lumbar Category III that Dr. Atkins relied upon in making his permanency rating, Dr. Gordon testified there was no evidence that would put Miller under any category other than zero.¹²⁷

On May 16, 2012, the Board issued its decision denying Miller's petition.¹²⁸ It found that Miller was not entitled to permanent benefits for her lumbar spine

¹²³ *Id.* at 27.

¹²⁴ *Id.* at 49. Dr. Chandler's record from May 11, 2011 indicates that Miller reported lifting over one hundred pounds regularly at her job. However, Miller testified before the Board that she primarily performs "a lot of secretarial work." Additionally, the testimony of Miller's supervisors suggests that Miller's representations to Dr. Chandler were not accurate. Hollis testified that Miller was only expected to lift twenty-five pounds while Riccardi testified that she never observed Miller lift over one hundred pounds.

¹²⁵ *Id.* at 27.

¹²⁶ *Id.* at 27-28.

¹²⁷ *Id.* at 29-30.

¹²⁸ Decision on Petition to Determine Compensation Due, 19.

because Miller failed to establish a causal relationship between the June 9, 2010 work accident and her low back complaints.¹²⁹ The Board determined that Miller's testimony, wherein she complained of a back injury as a result of the June 2010 work accident, was incredible.¹³⁰ The Board also found Dr. Gordon's causation opinion more persuasive than the opinion of Dr. Atkins, which the Board rejected.¹³¹ The Board agreed with Dr. Gordon's opinion that Miller has a zero permanency related to the June 2010 work accident and determined that Miller does not merit a permanency award.¹³²

Miller has timely petitioned the Court to overturn the Board's decision.

Contentions of the Parties

Miller maintains that the Board's decision was not supported by substantial evidence. Specifically, Miller asserts that the Board abused its discretion when it did not accept Miller's testimony that her low back injury was worsened by the work accident. In addition, Miller argues that the Court should grant less deference to the Board because it lacked the ability to observe the demeanor of both medical experts who testified via deposition. Miller also contends that it was an abuse of discretion for the Board to have not afforded greater weight to the treating physician's opinion. Finally, Miller argues that the Board erred when it

¹²⁹ *Id.* at 18-19.

¹³⁰ *Id.* at 17.

¹³¹ *Id.* at 15 & 17.

¹³² *Id.* at 16 & 18.

agreed with Dr. Gordon's permanency opinion, which Miller claims is not based on substantial evidence.

The Employer asserts there is substantial medical and factual evidence to support the Board's decision as to causation. Moreover, because the Board determined that Miller's low back injury was not causally related to the June 2010 work accident, the Board was correct in holding the issue of permanent impairment as moot.

Standard of Review

On appeal from the Board's decision, the role of the Court is to determine whether substantial evidence supports the Board's findings of fact and conclusions of law.¹³³ Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹³⁴ Absent an abuse of discretion or an error of law, a Board decision that is supported by substantial evidence will not be overturned by the Court.¹³⁵ Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹³⁶ Where satisfactory evidence supports the Board's factual findings, its decision will stand.¹³⁷ The Court does not weigh evidence, determine questions

¹³³ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

¹³⁴ *Histed v. E.I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993) (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1998)).

¹³⁵ *Stanley v. Kraft Foods, Inc.*, 2008 WL 2410212, *2 (Del. Super. Mar. 24, 2008).

¹³⁶ *Histed* at 342.

¹³⁷ *Johnson* at 67.

of credibility, or make findings of fact.¹³⁸ In its review of the record, the Court will evaluate it “in the light most favorable to the prevailing party below.”¹³⁹ An abuse of discretion occurs where the Board’s decision has “exceeded the bounds of reason in view of the circumstances.”¹⁴⁰ Questions of law are reviewed *de novo*.¹⁴¹

Discussion

The Board Did Not Abuse Its Discretion By Finding Miller’s Testimony Incredible

Delaware law permits a claimant to recover compensation for a personal injury resulting from an accident that occurred within the course of employment.¹⁴² The claimant must demonstrate, by a preponderance of the evidence, that the claimant’s injury would not have occurred “but for” the work accident.¹⁴³ A preexisting injury is compensable even though the work accident is neither the sole nor the “substantial cause of [claimant’s] injury” if the work accident aggravated, accelerated, or combined with the preexisting injury to produce the disability.¹⁴⁴ The element of causation is satisfied if the work accident provides the “setting” or “trigger” of the claimant’s injury.¹⁴⁵

¹³⁸ *Id.* at 66.

¹³⁹ *General Motors Corp. v. Guy*, 1991 WL 190491, *3 (Del. Super. Aug. 16, 1991).

¹⁴⁰ *Stanley*, 2008 WL 2410212 at *2.

¹⁴¹ *Id.*

¹⁴² 19 Del. C. § 2304. In its decision, the Board quotes § 2304 but incorrectly cites 19 Del. C. § 2303 as the applicable statute. *See* Decision on Petition to Determine Compensation Due, 15.

¹⁴³ 29 Del. C. § 10125(c); *Goicuria v. Kauffman’s Furniture*, 1997 WL 817889, *2 (Del. Super. Oct. 30, 1997); *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).

¹⁴⁴ *Reese*, 619 A.2d at 910.

¹⁴⁵ *Id.*; *Hoffecker v. Lexus of Wilmington*, 2012 WL 341714, *2 (Del. Feb. 1, 2012).

As the trier of fact, the Board determines the credibility of witnesses as well as the appropriate weight to accord witness testimony and the reasonable inferences to be drawn therefrom.¹⁴⁶ This function is reserved exclusively for the Board.¹⁴⁷ The Court will accept the Board's credibility determinations as long as there are sufficient facts in the record to support the Board's findings.¹⁴⁸

Although Miller maintains that her preexisting low back pain was worsened by the June 9, 2010 work accident, the Board did not find Miller's testimony credible for several reasons.

First, the Board noted that Miller did not immediately complain of her low back to her medical providers. This is so despite Miller's claim that she felt pain in her back immediately after the work accident. Miller, nonetheless, maintains that she informed two doctors of her back injury and that their records are inaccurate. Although she sought treatment from Dr. Tay the day after the work accident and through June 16, 2010, there is no reference of Miller suffering a back injury in Dr. Tay's records. Similarly, the Board found that Miller did not mention the work accident or complain of a low back injury five days after the work accident when she saw Dr. Atkins for ongoing treatment of her preexisting condition on June 14, 2010. In fact, Dr. Atkins' records from that date reflect that Miller's physical

¹⁴⁶ *Saunders v. DaimlerChrysler, Corp.*, 2006 WL 390098, *4 (Del. Feb. 17, 2006); *Christiana Care Health Sys., VNA v. Taggart*, 2004 WL 692640, *12 (Del. Super. Mar. 18, 2004) (citing *Clements v. Diamond State Port Co.*, 831 A.2d 870, 878 (Del. 2000)).

¹⁴⁷ *Opportunity Ctr., Inc. v. Jamison*, 2007 WL 3262211, *3 (Del. May 24, 2007) (citing *Johnson*, 213 A.2d at 66).

¹⁴⁸ *Taggart*, 2004 WL 692640, *12.

exam indicated that her issues were unchanged and her diagnosis was chronic pain syndrome.

In addition to the lack of documentation in her medical records, the Board also found that Miller failed to report a low back injury to Hollis on June 9, 2010, immediately after Miller's fall. Both Hollis and Miller each prepared a report on the day of the accident, but neither report documents Miller as suffering a low back injury. In fact, Hollis reviewed Miller's report with her. As noted by the Board, Hollis' report includes all of the information that Miller discussed with her. Although Miller claims that she told Hollis that her low back was injured and that Hollis was not listening to Miller as Hollis gathered and verified the information, Hollis represented that she had to listen to Miller in order to complete the report. The Board determined that Hollis' testimony was credible.

Finally, the Board observed that Miller did not reference a low back injury in her initial petition to the Board, which she signed. She also acknowledged her failure to report her prior motor vehicle accidents in the petition. Miller conceded during her testimony that all of her prior motor vehicle accidents involved low back complaints, none of which were resolved prior to the work accident, and she continued to see Dr. Atkins for treatment of low back pain, inflammation, and flare-ups up to the time of the work accident. Therefore, noting the lack of documentation of Miller's low back injury following the work accident, and

having observed Miller as she gave her testimony, the Board found Miller's testimony incredible. The Board had the exclusive authority to make the determination as to Miller's credibility, which is supported by sufficient factual evidence.¹⁴⁹

In light of the foregoing, the Board did not abuse its discretion by not finding Miller's testimony credible.

The Board Acted Within Its Discretion By Finding Dr. Gordon's Expert Opinion Testimony as to Causation More Persuasive

In its role as fact-finder, the Board must resolve conflicting medical expert testimony.¹⁵⁰ The Board may accept one medical expert's opinion testimony as more persuasive than that of another.¹⁵¹ However, where the expert medical testimony is by deposition only and the Board has not had the opportunity to observe the demeanor of the witnesses, it is insufficient for the Board to rely solely on the persuasiveness of one of the witnesses.¹⁵² Under those circumstances, as in this case, the Board must provide specific factual reasons based on the evidence for discounting one expert's opinion and accepting the other's.¹⁵³ As long as the

¹⁴⁹ It should also be noted that Witness Riccardi eluded to instances where Miller's assertions of timeliness were contradicted by her co-workers. See Transcript of Administrative Hearing, 77-78.

¹⁵⁰ *Miller v. Broadmeadow Health Care*, 2012 WL 1405698, *5 (Del. Super. Feb. 1, 2012) (citing *Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136 (Del. 2006)).

¹⁵¹ *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009); *Reese*, 619 A.2d 907 at 910. See also *Peden v. Dentsply Intern.*, 2004 WL 2735461, *5 (Del. Super. Nov. 1, 2004).

¹⁵² *Rhinehardt-Meredith v. State*, 2008 WL 5308388, *5 (Del. Dec. 22, 2008) (discussing *Lindsay v. Chrysler Corp.*, 1994 WL 750345 at *3 (Del. Super. Dec. 7, 1994)).

¹⁵³ *Penden*, 2004 WL 2735461 at *5.

Board's determination is supported by substantial evidence, the Court will not "second-guess such credibility determinations."¹⁵⁴

In this case, Dr. Gordon examined Miller on two different occasions, including one time just over a month after the June 9, 2010 work accident occurred. During the first examination, Miller provided information regarding her previous low back injury that conflicted with the records which Dr. Gordon had available to him. In addition, Dr. Gordon reviewed Miller's entire medical record, including the records of the physician who first treated Miller following the work accident. As the Board noted, there is no indication in Dr. Tay's medical records that Miller complained of, or suffered from, a low back injury as a result of the work accident.

In Dr. Gordon's opinion, Miller's low back injury was not causally related to the June 9, 2010 work accident. Miller had been involved in several previous motor vehicle accidents, all of which involved a low back injury, and she also had been receiving continuous treatment for her low back injury from Dr. Atkins since at least 2004. In fact, Miller has been receiving the same or similar narcotic prescriptions since at least 2007 as treatment for her chronic condition. Moreover, Dr. Atkins' records do not reflect Miller's low back injury even though he treated Miller four days after the work accident for the treatment of chronic pain

¹⁵⁴ *Sharp v. Bayshore Ford Truck Sales*, 2010 WL 28832, *3 (Del. Super. Jan. 5, 2010).

syndrome. Indeed, the physical exam that Dr. Atkins conducted of Miller on June 14, 2010 demonstrated no change in Miller's complaint or condition.

Dr. Gordon's opinion regarding Miller's low back injury was also based in part on the results of an MRI and an EMG study conducted in 2010. When compared with earlier results, the Board found that both demonstrated that Miller's low back injury was not connected to the June 9, 2010 work accident. Dr. Gordon testified that the minimal difference between the 2008 MRI and the 2010 MRI was the result of normal wear and tear and less than what he expected for a markedly obese patient presenting such as Miller. Additionally, the EMG study conducted in 2010 showed that Miller's low back injury was no worse. Dr. Gordon concluded that EMG studies are extremely subjective and inaccurate in nature unless the results are supported by objective findings. Although Dr. Gordon's opinion differed from Dr. Atkins' regarding the radiologist's findings, the Board found that the difference of opinion amounted to a matter of semantics.

While Miller argues that the Board was "stripped of the opportunity to observe and evaluate the demeanor" of both medical experts because their depositions were used, the Board summarized the experts' opinions and articulated reasons for its acceptance of Gordon's opinion over Dr. Atkins'.¹⁵⁵ The Board is

¹⁵⁵ *Johnson Controls v. Evans*, 2009 WL 1964941, *2 (Del. Super. May 13, 2009).

not required to do anything further.¹⁵⁶ Therefore, the Board did not abuse its discretion by finding Dr. Gordon's opinion as to causation credible and more persuasive than Dr. Atkins'.

The Board Did Not Abuse Its Discretion By Rejecting the Treating Physician's Expert Opinion Testimony

Delaware has not explicitly adopted the "treating physician rule," in which a treating physician's expert opinion is granted more weight under the presumption that a treating physician is more familiar with the patient's condition.¹⁵⁷ Although the Board has found the testimony of treating physicians more credible than the testimony of non-treating physicians in certain cases, the Board's determination is dependent upon the facts of each case.¹⁵⁸ As fact-finder, the Board has the flexibility to make credibility determinations as to expert witnesses.¹⁵⁹ When the Board is presented with varying expert medical opinions, it is free to accept or reject the testimony, in whole or in part.¹⁶⁰ The Board may reject the opinion of a medical expert if it determines that opinion is primarily based on what the claimant has told the doctor and the underlying facts suggest otherwise.¹⁶¹ As long as

¹⁵⁶ *Hildebrandt v. Daimler Chrysler*, 2006 WL 3393588, *3 (Del. Super. Mar. 31, 2006).

¹⁵⁷ *Noel-Liszkiewicz v. La-Z-Boy, Inc.*, 2012 WL 4762114, *5 (Del. Super. Oct. 3, 2012), *aff'd*, 2013 WL 519603 (Del. Feb. 12, 2013).

¹⁵⁸ *Id.* (citing *Diamond Fuel Oil v. O'Neal*, 734 A.2d 1060, (Del. 1999); *Valmont Structures v. Mode*, 2010 WL 4188303 (Del. Super. Oct. 8, 2010); *Diocese of Wilm. v. Williams*, 2009 WL 989175 (Del. Super. Apr. 13, 2009).

¹⁵⁹ *Clements v. Diamond State Port Corp.*, 831 A.2d 870, 877-78 (Del. 2003).

¹⁶⁰ *Johnson Controls*, 2009 WL 1964941 at *2.

¹⁶¹ *Flowers v. Daimler Chrysler Corp.*, 2005 WL 2303811, *4 (Sept. 20, 2005) (citing *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988)).

substantial evidence supports the Board's determination, the Board may "accord more weight to a non-treating expert over a conflicting treating expert."¹⁶²

Dr. Atkins opined that Miller's low back injury was exacerbated by the June 9, 2010 work accident. Unlike Dr. Gordon, however, Dr. Atkins did not review Miller's entire medical record, including Dr. Tay's treatment records following the work accident. Dr. Atkins also did not review a 2005 lumbar x-ray that showed Miller as having osteoarthritis and he was unaware that Miller had been previously diagnosed with fibromyalgia. Dr. Atkins agreed that his own records are not very detailed. Furthermore, due to his office policy of only keeping records in house for seven years, Dr. Atkins was unable to recall whether he treated Miller in 2004 or 2005 for her low back injury.¹⁶³

Moreover, Dr. Atkins was also unaware that Miller was being prescribed the same medication in the same month by another physician. Furthermore, there were several times during her testimony where Miller claimed that the testimony of her witness, Dr. Atkins, was inaccurate.

Thus, the Board was free to reject Dr. Atkins' testimony despite the fact he is Miller's treating physician. Dr. Atkins' opinion is based on an incomplete review of Miller's medical records as well as the subjective information Miller, who the Board found to be incredible, relayed to him. As the Board correctly

¹⁶² *Noel-Liszkiewicz*, 2012 WL 4762114, *5 (citing *Clements*, 831 A.2d 870 at 877).

¹⁶³ There is no indication in the record that Dr. Atkins made any attempt to retrieve Miller's records from archives.

noted, it was permitted to consider Miller's credibility, or lack thereof, when it discounted Dr. Atkins' testimony because his diagnosis and opinion were based on the integrity of Miller's subjective complaints.¹⁶⁴ There is substantial evidence in the record to support the Board's decision to reject Dr. Atkins' testimony, and the Board did not abuse its discretion.

The Board Did Not Abuse Its Discretion By Accepting Dr. Gordon's Permanency Opinion and Rejecting the Permanency Opinion Of Dr. Atkins.

Unless accompanied by loss of use, evidence of pain alone is not a compensable permanent impairment.¹⁶⁵ The claimant bears the burden of proving a compensable loss of use that results from a work accident.¹⁶⁶ As previously noted, in cases where the Board is presented with conflicting testimony from two medical experts, it is free to accept or reject the testimony in whole or in part in its role as fact-finder. Although the Board is not required to accept an expert's opinion, it may not rely on its own experience and make its own conclusion as to the claimant's permanent impairment rating.¹⁶⁷ Where the Board accepts one expert's testimony, it must provide reasons based on evidence in the record for its preference.¹⁶⁸ The Board makes the ultimate determination of an employee's level

¹⁶⁴ *Penden*, 2004 WL 2735461 at *5. See also *Diaz v. Beneficial Nat'l Bank*, 1997 WL 717768, *4 (Del. Super. Nov. 6, 1997).

¹⁶⁵ *Munyan*, 909 A.2d at 136-37.

¹⁶⁶ *Id.* at 136.

¹⁶⁷ *Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214 (Del. 1998).

¹⁶⁸ *Johnson v. E.I. Dupont de Nemours & Co.*, 2000 WL 33115805, *5 (Del. Oct. 4, 2000).

of impairment and it will not be disturbed by the Court as long as substantial evidence supports the Board's decision.¹⁶⁹

In this case and this decision, the Board rejected Dr. Atkins' causation conclusions as to what, if any, low back injury Miller suffered as a result of the work accident, provided reasons for its rejection, and agreed with Dr. Gordon that Miller did not merit a permanency award. Miller argues that the Board's decision is not supported by substantial evidence solely because Dr. Gordon was unable to refer to a specific table in the *AMA Guides to the Evaluation of Permanent Impairment, 5th or 6th Editions* to support his zero permanency rating. The Board gave credence to Dr. Gordon's testimony that there was no evidence that would place Miller in any category other than zero. Dr. Gordon noted that there was no anatomic basis for Miller's low back complaint because any soft tissue injuries had since resolved.¹⁷⁰ The MRI findings were very similar and showed Miller's condition as better than Dr. Gordon expected given her age and weight. He also noted that Dr. Atkins performed both EMGs, which are, in Dr. Gordon's opinion, highly subjective tests. The Board, citing a difference in semantics between the two experts as to the meaning of "radiculitis" and "radiculopathy," agreed with Dr. Gordon that the EMG findings showed no worsening of Miller's condition.

¹⁶⁹ *Bromwell v. Chrysler LLC*, 2010 WL 4513086, *2 (Del. Super. Oct. 28, 2010).

¹⁷⁰ Although Miller raised a *Daubert* issue, the Board noted that the parties had stipulated to Dr. Gordon's qualifications. See Transcript of Administrative Hearing, 81-84 (wherein Miller's counsel cites *Crawhorn v. Boyle*, 793 A.2d 422 (Del. 2002) and *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)); Decision on Petition to Determine Compensation Due, 11.

The Board rejected Dr. Atkins' opinion that Miller had a 13.3% permanency loss of use of the lumbar spine related to the work accident, which he based on MRI findings, EMG findings, and clinical assessment. Dr. Atkins did not rate Miller's loss of use for any of the prior motor vehicle accidents for which he treated Miller. He also did not apportion any permanency rating between Miller's pre-existing low back injury and the June 2010 work accident.

In this case, the Board summarized the opinions of both experts, referred to the testimony of both in its decision, and explained why it found Dr. Gordon's zero permanency opinion more persuasive.¹⁷¹ Dr. Gordon's opinion was based on substantial evidence and the Board was permitted to rely on it in reaching its decision regarding Miller's permanent impairment rating.

Therefore, based on its determination that Miller's testimony lacked credibility, its rejection of Dr. Atkins' opinion, which was partly derived from Miller's subjective complaints, and its acceptance of Dr. Gordon's testimony regarding causation and permanency as more persuasive, the Board's decision is supported by substantial evidence.

¹⁷¹ *Bromwell*, 2010 WL 4513086 at *5.

ACCORDINGLY, the Board's decision is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Diane Clarke Streett

Diane Clarke Streett

Judge

Original to Prothonotary