

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

EDWARD BREEDING, :
 : C.A. No. K13A-03-004 WLW
 Claimant-Below, :
 Appellant, :
 :
 v. :
 :
 ADVANCE AUTO PARTS, :
 :
 Employer-Below, :
 Appellee. :

Submitted: October 29, 2013

Decided: January 27, 2014

ORDER

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

Craig T. Eliassen, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware;
attorney for the Appellant.

Christian G. McGarry, Esquire and Elissa A. Greenberg, Esquire of Elzufon Austin
Tarlov & Mondell, P.A., Wilmington, Delaware; attorneys for the Appellee.

WITHAM, R.J.

ISSUE

The issue before the Court is whether the Industrial Accident Board's denial of Appellant's Petition for Additional Compensation Due is supported by substantial evidence and free from legal error.

FACTUAL AND PROCEDURAL BACKGROUND

This is an appeal by Claimant-Below Edward Breeding (hereinafter "Breeding") from the decision of the Industrial Accident Board (hereinafter "the Board" or "IAB") denying Breeding's Petition to Determine Additional Compensation Due. The medical history surrounding Breeding's injuries is a long and a tortuous one, involving numerous doctors and multiple MRIs since the date of Breeding's original injury. The Board's summary of the evidence outlines this history in painstaking detail; thus, the Court shall only discuss the facts most relevant to the issues on appeal.

Breeding was employed as a general manager with Advance Auto Parts (hereinafter "Employer"), and worked at various store locations throughout the Delmarva Peninsula. On January 15, 2007, while working at one of Employer's stores in Smyrna, Breeding injured his back while attempting to lift a case of windshield solvent. Specifically, Breeding felt a sharp and sudden pain in the lower region of his back, that spread to his lower extremities, abdomen and groin. The pain was more severe on Breeding's right side than on his left. Breeding was ultimately diagnosed with a herniated disc at the "L3-4" area of his back. After a series of injections did little to relieve Breeding's pain, Breeding received lumbar spine

surgery on March 5, 2007. The surgery solely focused on the L3-4 region. Employer acknowledged Breeding's accident and paid him workers' compensation benefits for the injury and the surgery. Breeding returned to work approximately three and a half months after his surgery on a part-time basis, but ultimately had to complete a "work hardening" program before returning to work full-time in August of 2007.

Breeding's back pain ultimately returned; at the IAB hearing, the parties disputed how soon after the initial surgery Breeding began feeling pain. Breeding testified that the pain was almost constant immediately after his surgery; Employer, relying on comments Breeding made to at least two different doctors, argued that Breeding actually made a full recovery following the surgery and felt relief from his pain until December of 2008. The Board found that Breeding "felt relief after the surgery for about a year and then his symptoms returned."¹ Breeding's symptoms were also different than they were in January of 2007—the pain was worse on Breeding's left side than on his right, and his back pain was worse than his lower extremities pain.

In December of 2009, Breeding's primary care physician referred Breeding to Dr. Michael Sugarman (hereinafter "Dr. Sugarman"), a board-certified neurosurgeon. Relying on film from a MRI performed in November of 2009, Dr. Sugarman noticed evidence of degenerative disc disease at the L4-5 and L5-S1 levels of Breeding's back. Dr. Sugarman also noticed further evidence of injury at the L5-S1 level. On February 1, 2010 Dr. Sugarman performed surgery on the L5-S1 region. By June of

¹ Board's decision at 3.

2010, Breeding continued to complain of worsening back pain, but in August of 2010 Dr. Sugarman returned Breeding to work. It was at this time that Breeding and Dr. Sugarman began discussing whether the L5-S1 surgery and the original 2007 workplace injury were connected. Relying on film from Breeding's more recent MRIs, Dr. Sugarman could not find a causal relation between the 2007 injury and the 2010 surgery. However, Dr. Sugarman told Breeding that he would reassess his opinion if provided with other information and films.

Breeding's pain worsened to the point that he could no longer work. On February 7, 2011 Dr. Sugarman performed a lumbar decompression and fusion surgery on the L3-4 and L4-5 levels of Breeding's back. Dr. Sugarman also removed an instrumentation from the L5-S1 level that had been inserted in the 2010 surgery, and extended the fusion from L5-S1 up to the other two levels.

On August 8, 2011 Dr. Sugarman revisited the issue of whether there was a causal connection between the 2007 accident and the L5-S1 symptoms. Breeding and his wife had provided Dr. Sugarman with more MRI films and a timeline of Breeding's injury. Breeding created the timeline himself. For the first time, Dr. Sugarman examined film from MRIs performed on February 2, 2007 and June 28, 2007. Put simply, Dr. Sugarman believed these MRIs showed evidence of swelling and injury to the L5-S1 that was originally overlooked, leading the original surgeon to only concentrate on the L3-4 level of Breeding's back when the L5-S1 level should also have been a priority. While Dr. Sugarman believed Breeding had naturally degenerative changes to the L5-S1 level before the 2007 accident, Dr. Sugarman

concluded that the accident precipitated the pain and further degenerative changes to Breeding's L5-S1 level. Thus, Dr. Sugarman changed his initial opinion and concluded that both the L3-4 and L5-S1 levels of Breeding's back were injured in the 2007 workplace accident.

Dr. John B. Townsend, III (hereinafter "Dr. Townsend"), another board-certified neurologist, examined Breeding on behalf of Employer on December 7, 2009 and November 27, 2012. Dr. Townsend reviewed Breeding's medical records on both occasions. Dr. Townsend also reviewed the 2007 MRIs that Dr. Sugarman had relied upon in changing his opinion regarding causal relation.

Dr. Townsend concluded that Breeding's 2010 and 2011 surgeries, while reasonable and necessary, were not causally related to the 2007 workplace injury. Dr. Townsend found that the pain that Breeding began having in December of 2008 was different than the pain that immediately followed his workplace injury in that the pain affected the left side of Breeding's body rather than his right. Dr. Townsend believed that Breeding had made a full recovery from his workplace injury following the 2007 surgery, hence why Breeding was able to return to work full-time. Based on the different pain symptoms and the different back level involved, Dr. Townsend believed that the 2010 and 2011 surgeries were precipitated by degenerative changes that come with age, rather than trauma suffered in the 2007 workplace accident. Dr. Townsend reviewed the same 2007 MRI films and reports that had led Dr. Sugarman to change his position on causation, and found no symptoms relating to the L5-S1 level that could be attributed to the workplace injury, rather than natural

degeneration. In sum, the different symptoms that arose in December of 2008, the lack of persistent pain throughout 2008, and the indication that the L5-S1 symptoms noted on the 2007 MRIs were degenerative rather than related to the workplace injury led Dr. Townsend to conclude that the 2010 and 2011 surgeries were unrelated to the 2007 accident.

Breeding filed his Petition for Additional Compensation Due on September 6, 2012. The Board held a hearing on February 4, 2013. Breeding testified at the hearing, and the foregoing conclusions of Dr. Sugarman and Dr. Townsend were presented via deposition testimony. Dr. Sugarman testified as an expert on Breeding's behalf, and Dr. Townsend testified as an expert on Employer's behalf. On February 18, 2013 the Board issued its decision in which it accepted the testimony of Dr. Townsend over Dr. Sugarman and denied Breeding's Petition for Additional Compensation Due. Specifically, the Board found Dr. Townsend's opinion "more persuasive as it is consistent with the facts of this case and [Breeding's] overall condition."² The Board accepted Dr. Townsend's conclusion that the 2007 MRIs were indicative of mere degenerative changes to the L5-S1 level, rather than symptoms of herniation relating to the 2007 injury.

The Board also found that medical records from two different doctors Breeding had consulted—Dr. Roberts and Dr. Downing—corroborated Dr. Townsend's conclusion that Breeding had made a complete recovery to his L3-4 injury following the 2007 surgery, and that Breeding's complaints of pain after the surgery were

² Board's decision at 21.

symptomatic of a different injury to a different level. This, combined with Breeding's full return to work in 2007, led the Board to accept Dr. Townsend's opinion that the L5-S1 symptoms and the 2010 and 2011 surgeries were not causally related to the 2007 workplace injury.

This appeal followed. Breeding argues that the Board's acceptance of Dr. Townsend's testimony is not supported by substantial evidence, because Breeding had persistently claimed of pain to his left side as early as June of 2007, and the Board concluded that Dr. Townsend "did not see any records to suggest [Breeding] had persistent low back or leg complaints throughout 2008."³ Breeding also contends that Dr. Townsend and the Board failed to address the significance of Dr. Sugarman's conclusions relating to the 2007 MRIs.

STANDARD OF REVIEW

It is well settled that this Court's appellate review of the IAB's factual findings is limited to determining whether the Board's decision is supported by substantial evidence.⁴ Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁵ The Court views the facts in the

³ Board's decision at 22.

⁴ *Bullock v. K-Mart Corp.*, 1995 WL 339025, at *2 (Del. Super. May 5, 1995) (citing *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960)).

⁵ *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

light most favorable to the prevailing party below.⁶ The Court does not weigh the evidence, determine questions of credibility or make its own factual findings.⁷ Absent any errors of law, which are reviewed *de novo*, a decision of the IAB supported by substantial evidence will be upheld unless the Board abused its discretion.⁸ The Board abuses its discretion when its decision exceeds the bounds of reason in view of the circumstances.⁹

DISCUSSION

Pursuant to 19 *Del. C.* § 2322(a), when an employee is injured in a workplace accident, the employer is liable for all medical costs that are reasonable, necessary and causally related to the accident.¹⁰ When there is an identifiable workplace accident, the appropriate standard for causation is the “but for” standard.¹¹ In determining causation, the Board is free to accept the opinion of one party’s expert

⁶ *Chudnofsky v. Edwards*, 208 A.2d 516, 518 (Del. 1965).

⁷ *Bullock*, 1995 WL 339025, at *2 (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

⁸ *Hoffecker v. Lexus of Wilmington*, 36 A.3d 349, 2012 WL 341714, at *2 (Del. Feb. 1, 2012) (TABLE) (citing *Person-Gaines v. Pepco Holdings, Inc.*, 981 A.2d 1159, 1161 (Del. 2009)).

⁹ *Id.*

¹⁰ *Bullock*, 1995 WL 339025, at *2.

¹¹ *State v. Steen*, 719 A.2d 930, 932 (Del. 1998) (citing *Reese v. Home Budget Ctr.*, 619 A.2d 907, 910 (Del. 1992)).

witness over contrary testimony presented by the other party's expert.¹² The appellant's reliance on countervailing expert testimony may not be considered on appeal, "since it was the proper function of the [B]oard to resolve any conflicts in the factual evidence presented to it."¹³ Stated differently, when the Board indicates that it found the approach and testimony of one expert more persuasive than that of the other, no further clarification of why the Board rejected the testimony of the appellant's expert is needed.¹⁴

Applying these principles to the instant case, the Court finds that Breeding has failed to establish that the Board lacked substantial evidence in denying Breeding's Petition for Additional Compensation Due. The Board was faced with a choice between two experts: Dr. Sugarman, who concluded that the 2010 and 2011 surgeries were causally related to the trauma Breeding suffered in the 2007 workplace accident; or Dr. Townsend, who concluded that naturally degenerative changes necessitated the later surgeries rather than the workplace accident. The Board chose Dr. Townsend over Dr. Sugarman; such a choice implies that the Board found Dr. Townsend's testimony more credible than Dr. Sugarman's. The Board's decision also implies that it did not find Breeding's own testimony credible; this is indicated by the Board's

¹² *DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1982) (citing *Gen. Motors v. Veasey*, 371 A.2d 1074, 1076 (Del. 1977)).

¹³ *Gen. Motors Corp. v. McNemar*, 202 A.2d 803, 807 (Del. 1964) (citing *Gen. Motors Corp. v. Freeman*, 164 A.2d 686, 689 (Del. 1960)), *overruled in part on other grounds*, *Reynolds v. Cont'l Can Co.*, 240 A.2d 135, 136 (Del. 1968).

¹⁴ *DiSabatino Bros.*, 453 A.2d at 106.

conclusion that Breeding's pain was not persistent following the 2007 surgery, despite Breeding's assertions to the contrary. Given the Board's credibility determination below, the Court cannot consider the countervailing testimony of Dr. Sugarman on appeal.

It follows that Breeding's two primary arguments on appeal are without merit. First, Breeding argues that the Board's statement regarding Dr. Townsend not seeing any records indicative of persistent pain throughout 2008 lacks substantial evidence. Breeding misconstrues this statement: the Board is not saying that no records existed of Breeding's complaints of pain in 2008. Rather, the Board is simply noting that Dr. Townsend did not see any records that changed his conclusion that Breeding's pain was not persistent throughout 2008. This statement is corroborated by Dr. Townsend's testimony that Breeding's later pain symptoms was indicative of a L5-S1 injury rather than a L3-4 injury, Breeding's return to work in 2007, and the separate conclusions of two other doctors that Breeding had made a complete recovery following the 2007 surgery.

Second, Breeding argues that the Board's decision fails to address the significance of Dr. Sugarman's conclusions regarding the 2007 MRI films and reports. The Board's decision clearly indicates that it found Dr. Townsend's testimony more persuasive than Dr. Sugarman's. Thus, the Board does not need to further clarify why it rejected Dr. Sugarman's theory. The Board's decision represents a credibility determination. The Board does not need to address every aspect and facet of that determination in order to satisfy the substantial evidence

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standard. Further, it is not the Court's role under the limited standard review of agency decisions to make its own credibility determinations.

Thus, the Court finds substantial evidence to support the Board's decision. Breeding has also failed to point to any legal error or abuse of discretion on the part of the Board.

CONCLUSION

In light of the substantial evidence in support of the IAB's decision, as well as the absence of any error of law or abuse of discretion, the decision of the IAB must be, and is, hereby **AFFIRMED**.

IT IS SO ORDERED.

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

WLW/dmh