



IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMANDA WYATT, )  
 )  
Employee-below, Appellant ) No. 112, 2013  
 )  
v. ) Court Below – Superior Court  
 ) of the State of Delaware  
RESCARE HOME CARE, ) in and for Sussex County  
 ) C.A. No. S12A-06-004 ESB  
Employer-below, Appellee )

**Reply Brief of Employee-below, Appellant**

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<sup>1</sup> Attached to Employer’s Ans. Br. at Attachment 1.

## **SUMMARY OF ARGUMENT**

1. Claimant's credibility was an issue to be determined by the Board. Once the Board found Claimant to be credible, there was sufficient medical testimony provided by two medical experts to support the Board's finding as to causation.
2. The evidence before the Board was appropriate to find that Claimant's back surgery is compensable under 19 *Del. C.* § 2322B as an emergency procedure

## ARGUMENT

### **I. DR. VENKATARAMANA'S EXPERT MEDICAL OPINION HAD A SUFFICIENT BASIS SINCE IT WAS PROVIDED AFTER HE REVIEWED CLAIMANT'S RECORDS AND REPORTS AND WAS AWARE OF THE DECEMBER 15, 2010 LIFTING INCIDENT.**

The issue of credibility in a workers' compensation case can only be decided by the Board. The court does not sit as trier of fact and will not substitute its judgment for that rendered by the Board.<sup>1</sup> Despite the Board having found Claimant to be credible as to how her work accident occurred, when it occurred, the symptoms that she experienced, and when those symptoms were experienced, the Employer argues in its Answering Brief that Claimant's work injury did not occur in the manner testified to at the Board hearing. This issue of credibility is the Employer's sole basis for claiming that the Board lacked substantial evidence in rendering its decision.

The Employer's argument that Dr. Venkataramana's opinion on causation lacked foundation is baseless. The evidence before the Board was that Claimant's medical expert, Dr. Venkataramana, was aware at the time he rendered his opinion on causation of the different versions of Claimant's account of her symptoms. His opinion as to medical causation, which was submitted to and accepted by the Board, was provided at his deposition take on May 9, 2011. His deposition

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<sup>1</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965).

transcript, submitted to the Board, shows his knowledge that Claimant had two different versions regarding the onset of her symptoms; the one she told to Dr. Venkataramana on the day of her initial encounter with him, and the other which she told to Dr. Hanley and which formed the basis of her Petition for Compensation Due.

All of the opinions given by Dr. Venkataramana during his deposition were provided to the standard of reasonable medical probability.<sup>2</sup> In preparation of his testimony, Dr. Venkataramana had reviewed Claimant's chart, a copy of Dr. Hanley's report of March 7, 2011, and the Beebe Medical Center emergency room records of October 21, 2010.<sup>3</sup> During his first encounter with Claimant, Dr. Venkataramana testified that Claimant provided a history that included the October 21, 2010 experience of back pain and the symptoms she experienced on December 9th through the 13th.<sup>4</sup> The only difference in medical history that he received on his initial treatment encounter with Claimant is that she did not inform him that the numbness occurred when she lifted Isaac at work. Instead, Claimant told him that

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<sup>2</sup> See Appendix to Employer's Ans. Br. at B202-203

<sup>3</sup> See Appendix to Claimant's Op. Br. at A-56-57

<sup>4</sup> *Id.* at A-58-59

after December 13th she could not work due to the pain and she awoke the morning of December 15th with numbness.<sup>5</sup>

Dr. Venkataramana testified that he had an opportunity to review Dr. Hanley's March 7, 2011 report prior to this testimony.<sup>6</sup> Dr. Hanley's report of March 7, 2011 included Claimant's account of the incident on December 15th when she suddenly experienced numbness after lifting Isaac at work, and this lifting incident was discussed with Dr. Venkataramana during his deposition:

Q. She reported to Dr. Hanley that her leg pain increased over the weekend, and the sciatica was so intense that she didn't go to work on Monday. And she did go in the next evening to care for the child, and on the 15th while moving him, felt this numbness down her left extremity. Is that somewhat a little bit different than the history she gave you?

A. Yes, there is some difference in the history that I got.<sup>7</sup>

Despite the difference of when the symptoms were experienced, waking up in the morning with numbness versus suddenly experiencing numbness when lifting Isaac at work, Dr. Venkataramana stated that Claimant reported the same symptoms to both Dr. Venkataramana and Dr. Hanley. With knowledge of the different versions of Claimant's onset of symptoms, Dr. Venkataramana stated that in his opinion,

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<sup>5</sup> *Id.* at A-59.

<sup>6</sup> *Id.* at A-69.

<sup>7</sup> *See* Appendix to Employer's Ans. Br. at B-258.

Claimant's condition was caused by her work activities.<sup>8</sup> Since he testified that he had reviewed all of Claimant's records and reports prior to being deposed, the deposition testimony clearly establishes that Dr. Venkataramana was apprised of Claimant's lifting incident with Isaac on December 15th and her past medical history of back symptoms before giving his opinion as to causation.

Employer cites *Perry v. Berkley*<sup>9</sup> in support of its argument that Dr. Venkataramana's opinion lacked foundation. The *Perry* case does not provide support for Employer's position. First, the *Perry* case is a civil case based upon a traffic incident and brought in the Superior Court of Delaware. As such the rules of procedure and evidence are different and stricter than the rules of procedure and evidence for an administrative hearing before the Board.<sup>10</sup> Second, *Perry* is factually distinguishable because the medical expert was not aware of the plaintiff's pre-existing conditions and treatment when he provided his opinion. That was not the situation when Dr. Venkataramana rendered his opinion in this case. Although when Dr. Venkataramana first met with Claimant he received a different medical history from her, the focus must be on what he knew when he rendered his opinion, and not on what he knew when he first met with Claimant.

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<sup>8</sup> *Id.* at B-223.5

<sup>9</sup> 996 A.2d 1262 (Del. 2010).

<sup>10</sup> *General Chem. Div., Allied Chem. & Dye Corp. v. Fasano*, 94 A.2d 600, 601 (Del. Super. 1953).

As shown above through excerpts of his deposition transcript, Dr. Venkataramana knew of Claimant's prior medical history and of the lifting incident when he rendered his opinion on causation.

Employer also argues that *General Motors Corp. v. Freeman*<sup>11</sup> is distinguishable from this case. In *Freeman*, the claimant suffered from an eye condition that could result in a detached retina from a "relatively innocuous traumatic incident."<sup>12</sup> In deciding the sufficiency of expert testimony to establish a causal relationship between the workplace incident and the detached retina, this Court stated:

If the testimony of the[] experts should show that the injury was possibly the result of the trauma and such testimony is supplemented by other credible evidence tending to show that the injury occurred directly after the trauma without interruption, we think that such evidence would be sufficient to sustain an award.<sup>13</sup>

In this case, both Dr. Venkataramana and Dr. Hanley testified that if Claimant experienced the onset of numbness and urinary urgency immediately after lifting Isaac at work, then her injury was caused by an industrial accident. Claimant's testimony of the lifting incident was supported by the testimony of her co-worker, who saw Claimant immediately after the incident occurred, and Claimant's mother,

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<sup>11</sup> 164 A.2d 686 (Del. 1960).

<sup>12</sup> *Freeman*, 164 A.2d at 687-88.

<sup>13</sup> *Id.* at 688.

who received a phone call from Claimant only minutes after the incident occurred. Considering the Court's decision in *Freeman*, the medical testimony and the lay witness testimony provided a sufficient basis upon which the Board found that an industrial accident had caused Claimant's condition.

Employer seeks to distinguish *Freeman* by claiming that the claimant in *Freeman* "did not have a detached retina prior to the alleged work accident, and then he did" but Claimant in this case had back pain prior to the lifting incident with Isaac.<sup>14</sup> However, prior back pain is not the determinative symptom focused on by the medical experts in this case. Rather, the experts' focus was on the onset of numbness and urinary urgency. That is the point when the experts considered the disc to have ruptured. Dr. Hanley's testimony on the issue is as follows:

A. [] On the basis of the history that she gave me, that she had a sudden episode of lifting, it was my belief that episode, that lifting episode, had completed the rupture of the disc.

\* \* \*

A. [] Then December 15th, which she said he told – she told him that she awoke with no pain, but with numbness. In other words, this is where the history that I got from Ms. Wyatt tends to diverge. She told me that she lifted the child at work, the pain went away and then she had numbness.<sup>15</sup>

Dr. Venkatarmana's testimony similarly agrees with Dr. Hanley's original opinion that the symptoms she reported on December 15th after the lifting incident, was the

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<sup>14</sup> Employer's Ans. Br. at 15.

<sup>15</sup> See Appendix to Employer's Ans. Br at B-245, 249.

point of the final disc herniation.<sup>16</sup> Employer's argument to distinguish *Freeman* is thus without support as there is nothing in the record to suggest that Claimant had prior numbness and urinary urgency.

It is well established in the law that the Board decides issues of credibility.<sup>17</sup> Nevertheless, Employer argues that Claimant's testimony regarding the lifting incident with Isaac was wrongfully accepted by the Board. The Employer's remarks as to Claimant's veracity are improper at this stage of the case as the Board is the sole decider of credibility. On the issue of Claimant's credibility, the Board stated:

The Board finds Claimant to be credible and accepts her testimony regarding [the] industrial accident. The Board accepts Claimant's testimony that the back pain that she felt prior to December 15, 2010 went away suddenly when she lifted Isaac and the numbness replaced the pain in the back. She also developed a left foot drop and urinary urgency immediately later that evening.

The Board also accepts Claimant's testimony that she was scared to tell Dr. Venkataramana about the lifting incident as to the onset of the numbness and urinary symptoms because his staff had just told her that he does not treat workers compensation patients. The Board does not condone lying to the physician or withholding pertinent information from the physician, but the

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<sup>16</sup> *Id.* at B-223.5-224.

<sup>17</sup> *General Motors Corp. v. Guy*, 1991 WL 190491, \*2 (Del. Super. Aug. 16, 1991) (citing *Johnson*, 312 A.2d at 66-67) ("In reviewing a decision of the Board it is not the function of this Court to sit as trier-of-fact and to rehear the case or to substitute its judgment for that of the Board.").

Board understands how and why it happened in this case. It is understandable that Claimant was scared and did not know if she could find another surgeon or how long it would take to find another one and she was scared about her condition.<sup>18</sup>

The Board properly determined Claimant's credibility and had a sufficient basis for doing so since her testimony was corroborated by the testimony of her co-worker and mother.

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<sup>18</sup> See Claimant's Appendix to Opening Brief at A-91-92 (*Wyatt v. Rescare Home Care*, I.A.B. Hearing No. 1369716, Decision on Petition to Determine Compensation Due, Feb. 3, 2012).

## **II. SUFFICIENT EVIDENCE SUPPORTS A FINDING THAT CLAIMANT’S BACK SURGERY IS COMPENSABLE AS AN EMERGENCY PROCEDURE.**

The testimony presented to the Board sufficiently established that Claimant presented herself to Dr. Venkataramana with a condition that required emergency treatment. After examining Claimant, Dr. Venkataramana ordered an MRI. Dr. Venkataramana stated that he took Claimant into the operating room the next day “even before [the MRI report] arrived”.<sup>19</sup> His testimony shows the urgency of Claimant’s condition. Claimant was admitted on the day of her surgery, December 19th, and was told by Dr. Venkataramana that surgery had to be performed on an urgent basis.<sup>20</sup> Dr. Venkataramana explained the reason why surgery had to be performed on an urgent basis:

Because of the ongoing compression of the nerves, we don’t know when the point of no return happens, whether the nerve roots are already damaged or if you don’t decompress those elements which are damaged can get damaged (*sic*) so we had to proceed as an urgent basis.<sup>21</sup>

Similarly, Dr. Hanley agreed that Claimant’s condition when she was first seen by Dr. Venkataramana was an emergency situation.<sup>22</sup>

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<sup>19</sup> *Id.* at A-62.

<sup>20</sup> *Id.* at A-65.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at A-51

Employer argues that “urgent care” does not meet the statutory requirement of “emergency.” However, the words are synonymous. The ordinary definition of “emergency” is “a condition of urgent need for action or assistance.”<sup>23</sup> Claimant agrees with Employer that the rules of statutory interpretation require that words be given their ordinary and common meanings unless specifically defined in the statute. Since the ordinary definition of “emergency” is an urgent condition, it is appropriate in this case to find that Claimant’s back surgery is compensable under 19 *Del. C.* § 2322B as an emergency procedure.

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<sup>23</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 584 (4th ed. 2000).

## CONCLUSION

For the foregoing reasons, Claimant respectfully requests this Court reverse the decision of the Superior Court and hold that there was sufficient evidence to support the Board's finding that Claimant suffered a compensable back injury. Furthermore, Claimant requests this Court reverse the Board's finding that Claimant's medical expenses incurred for her neurosurgery are not compensable because of the failure to obtain preauthorization.

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