

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
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GEORGETOWN, DE 19947

October 10, 2007

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RE: Finisha Mitchell-Hopkins v. Perdue Farms, Inc.
C.A. No. 07A-03-002-ESB
Letter Opinion

Date Submitted: July 27, 2007

Dear Counsel:

This is my decision on Finisha Mitchell-Hopkins' ("Hopkins") appeal of the Industrial Accident Board's ("Board") denial of her claim for worker's compensation benefits. Hopkins slipped and fell at work. She filed a claim with the Board seeking compensation for her injuries. The Board denied Hopkins' claim for compensation, reasoning that she failed to establish that her injuries were related to her fall. I have affirmed in part and reversed in part the Board's decision.

STATEMENT OF THE CASE

Hopkins was a 37-year-old quality control inspector for Perdue Farms, Inc. ("Perdue"). She inspected finished chicken products to make sure that they were prepared and packaged properly. On June 9, 2005, as Hopkins was leaving work, she slipped on a wet floor and fell on her right side, allegedly injuring her neck, back and right shoulder. Hopkins reported the incident to Perdue that night and then went home. The next day she saw Susan Timmons, a nurse at Perdue's wellness

center. Hopkins did not initially report any injuries or pain. She first reported pain in her neck and back on June 15, 2005. Hopkins saw Dr. Black, a Perdue doctor, on that day. He examined Hopkins and ordered her not to bend or lift anything heavier than five pounds for two weeks. Perdue complied with Dr. Black's order and gave Hopkins clerical work. Dr. Black treated Hopkins over the next two weeks. Perdue's wellness center's records indicate that someone, most likely Dr. Black, diagnosed Hopkins with a cervical strain.

Unhappy with Dr. Black, Hopkins saw her family doctor, Fabricio Alarcon, M.D. ("Dr. Alarcon"), on July 5, 2005. He diagnosed her with a cervical strain and prescribed an anti-inflammatory medication and physical therapy for her. Hopkins first complained about her right shoulder on July 12, 2005. After treating Hopkins for nearly a month, Dr. Alarcon referred her to Eric B. Bontempo, D.O. ("Dr. Bontempo"), an orthopedic surgeon. Hopkins saw Dr. Bontempo on September 7, 2005. He examined her right shoulder and ordered an MRI. The MRI disclosed that Hopkins had a partial tear of the rotator cuff in her right shoulder. Dr. Bontempo continued Hopkins on anti-inflammatory medicine and physical therapy. He also gave her a cortisone shot in the right shoulder. When her shoulder did not improve after five months of treatment, Dr. Bontempo recommended that she undergo arthroscopic surgery to repair her rotator cuff.

Hopkins last worked for Perdue on July 1, 2005. Perdue terminated Hopkins on July 15, 2005, because she failed to bring in a note from Dr. Alarcon indicating the specific diagnosis for her being unable to return to work.

Hopkins filed a Petition to Determine Compensation Due with the Board, seeking total disability benefits for the period from July 5, 2005 to July 30, 2005, and payment of Dr. Bontempo's medical bills of \$883 and his proposed surgical fee of \$1500. The Board held a hearing on October

5, 2006. Hopkins, Michelle Hastings (“Hastings”), David Jones (“Jones”), Caryn Gloyd (“Gloyd”), David Cook (“Cook”), Dr. Bontempo, and Walter J. Roche, M.D. (“Dr. Roche”) testified at the hearing. Hopkins testified about her fall, injuries and treatment. Hastings is a supervisor at Perdue’s wellness center. Although she never treated Hopkins, she did testify about Perdue’s wellness center’s records. Jones is the complex human resource manager for Perdue. He testified about why Hopkins was terminated. Gloyd and Cook are private investigators. They conducted surveillance on Hopkins and testified about what they saw and also showed videos of Hopkins. Dr. Roche, a specialist in pain management and rehabilitation, examined Hopkins three times for Perdue. He testified that Hopkins’ fall caused injuries to her neck and back and that these injuries would not have totally disabled her for any period of time. Drs. Roche and Bontempo disagreed about whether Hopkins’ torn rotator cuff was related to her fall at work. Dr. Roche testified that it was degenerative in nature and was caused by overuse. Dr. Bontempo testified that it was caused by her fall at work.

The Board issued written decisions on November 14, 2006, and February 12, 2007. In its first decision, the Board ruled that Hopkins’ right shoulder injury was not related to her fall, reasoning that because she did not complain of pain in her right shoulder for over a month, that her right shoulder injury was caused by something else. In its second decision, the Board ruled that Hopkins’ neck and back injuries were also not related to her fall, reasoning that any medical opinion that they were was not reliable because Hopkins was not a credible witness.

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the Superior Court on appeal from a decision of the Industrial Accident Board is to determine whether the agency’s decision is

supported by substantial evidence and whether the agency made any errors of law.¹ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.² The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.³ It merely determines if the evidence is legally adequate to support the agency's factual findings.⁴ Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.⁵

DISCUSSION

Hopkins argues that the Board's finding that her neck, back and right shoulder injuries were not related to her fall is not supported by substantial evidence in the record. In its first decision, the Board ruled that Hopkins' right shoulder injury was not related to her fall. The Board's reasoning is straightforward and supported by expert medical testimony. Hopkins did not complain of pain in her right shoulder when she fell, or the next day when she went to Perdue's wellness center. Indeed, the first time that Hopkins complained of pain in her right shoulder was on July 12, 2005, five weeks after her fall. Dr. Bontempo testified that the symptoms for a torn rotator cuff should appear in a week or two and that four weeks would be the outer limit. Dr. Roche testified that the symptoms for a torn rotator cuff should appear immediately. While Drs. Bontempo and Roche disagreed about

¹*General Motors v. McNemar*, 202 A.2d 803, 805 (Del. 1964); *General Motors v. Freeman*, 164 A.2d 686 (Del. 1960).

² *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del.Super. 1986), *app. disp.*, 515 A.2d 397 (Del. 1986).

³ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

⁴ 29 *Del.C.* § 10142(d).

⁵ *Dellachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

whether Hopkins' torn rotator cuff was related to her fall, they both agreed that the symptoms for such an injury usually appear much earlier than Hopkins' did. The Board accepted Dr. Roche's opinion instead of Dr. Bontempo's as to causation, which is well within the Board's discretion, particularly since both doctors agreed that Hopkins' symptoms should have appeared sooner than they did. Thus, the Board's first decision is supported by substantial evidence in the record.

In its second decision, the Board ruled that Hopkins' neck and back injuries were not related to her fall. The Board's reasoning, unlike in its first decision, is at odds with all of the expert medical testimony. Hopkins was seen by four doctors, Black, Alarcon, Bontempo and Roche. Dr. Roche examined Hopkins for Perdue in preparation for the hearing. The other three doctors treated Hopkins. Two of the doctors were paid by Perdue and two were paid by Hopkins. Regardless of who paid them and their reason for examining Hopkins, all four doctors agreed that Hopkins' neck and back injuries were related to her fall. Notwithstanding the opinions of these four medical doctors, the Board ruled that Hopkins' neck and back injuries were not related to her fall. The Board identified three reasons for its decision. One, the Board stated that Hopkins did not complain about her neck and back until four days after she fell at work. Thus, I presume that the Board felt that since she did not complain immediately, that her neck and back complaints were either fabricated or related to something else. However, unlike the Board's finding about Hopkins' right shoulder, there is no expert medical testimony supporting this finding. Indeed, every doctor that examined Hopkins knew that she did not report pain in her neck and back immediately, but they still concluded that her neck and back injuries were related to her fall.

Two, the Board stated that Hopkins had other medical problems at the same time she fell that were unrelated to her fall, "which raises serious questions about whether the neck and back

complaints are related to that fall.” I must confess that the logic of this argument escapes me. The Board, in reaching this conclusion, relied on medical records from Perdue’s wellness center and Atlantic General Hospital. A Perdue wellness center medical record indicates that Hopkins complained about pain in her left shoulder on June 20, 2005. Hopkins testified that the record was wrong and that at the time she was complaining about pain in her right shoulder. An Atlantic General Hospital medical record indicates that Hopkins went there on July 6, 2006, complaining of chest pain. Hopkins, who is overweight, has high blood pressure and thought at the time that she was having a heart attack. As I said before, the fact that Hopkins may have had pain in her left shoulder and did have high blood pressure does not mean that she could not have also had neck and back pain from her fall at work.

Three, the Board stated that Hopkins was not a credible witness because, according to the Board, Hopkins misled Dr. Bontempo about when she first felt pain in her right shoulder and that she magnified her subjective complaints of pain in her right shoulder when examined by Dr. Roche. Hopkins told Dr. Bontempo that she felt pain in her right shoulder after her fall at work. A Perdue wellness center record indicates that Hopkins complained about pain in her left shoulder on June 20, 2005. An Atlantic General Hospital record, according to the Board, indicates that Hopkins mentioned a “left arm complaint” on July 6, 2005. Thus, there is an apparent conflict between Hopkins’ statement to Dr. Bontempo and her medical records. However, the conflict is easily explained. Hopkins, when asked about Perdue’s wellness center record for June 20, 2005, testified that it was a mistake. She was not asked about Atlantic General Hospital’s record for July 6, 2005. The Board concluded that it was unlikely that the Perdue and Atlantic General Hospital health care providers could be wrong twice about whether the pain was in Hopkins’ right or left side. Thus,

according to the Board, Hopkins must have misled Dr. Bontempo about when she first experienced pain in her right shoulder. I agree with the Board that two health care providers at two different places and at two different times probably wouldn't make the same mistake. Even though Hopkins offered an explanation for the apparent conflict between what she told Dr. Bontempo and Perdue's wellness center record, the Board was still free to reject her explanation. However, the flaw with the Board's rationale is that it is based on an unfounded factual assumption. When Hopkins went to Atlantic General Hospital, she complained of "tingling in her left arm," which together with her chest pain and shortness of breath, made her think she was having a heart attack. She did not complain of pain in her left shoulder caused by her fall. Thus, the Board's rationale fails.

Dr. Roche did testify that Hopkins was very guarded about her right arm and that she would not let him move it around very much. Based on this Dr. Roche concluded that Hopkins was magnifying her complaints of pain. This may well be the case. However, it is worth noting that it is beyond dispute that Hopkins had a partially torn rotator cuff and that both Drs. Roche and Bontempo agreed that such a condition is painful. Hopkins may simply have been protecting her injured shoulder.

It is also worth noting that all of the reasons that the Board relied on for concluding that Hopkins' back and neck injuries were not related to her fall dealt with medical records and testimony regarding her right shoulder injury and not her back and neck injuries. Of the Board's three reasons for concluding that Hopkins' neck and back injuries were not related to her fall at work, the first is essentially a medical opinion that is not supported by any expert medical testimony in the record, the second is simply illogical, and the third is based, in part, on a factual assumption that is not supported by the record. At best, the Board is left with Dr. Roche's belief that Hopkins exaggerated

the pain in her right shoulder. This alone is not substantial evidence in the record to support the Board's finding that Hopkins's neck and back injuries were not related to her fall.

Even though I have concluded that there is not substantial evidence in the record to support the Board's findings that Hopkins' neck and back injuries were not related to her fall, Hopkins' claim for total disability benefits still fails. The Board did go on and rule that Hopkins was not totally disabled at any time. This decision is supported by substantial evidence in the record. Drs. Bontempo and Roche were the only medical doctors to testify at the hearing. Dr. Bontempo only treated Hopkins for her right shoulder injury. He never testified that she was totally disabled by her neck and back injuries. Dr. Roche testified that none of Hopkins' injuries left her totally disabled for any period of time. Thus, the Board's decision is supported by Dr. Roche's testimony. The Board also ruled that Hopkins was not entitled to recover Dr. Bontempo's medical bills and proposed surgical fee because they were related to Hopkins' right shoulder injury, which the Board found was not related to her fall at work. This ruling is similarly supported by substantial evidence in the record.

CONCLUSION

The Board's decision is affirmed in part and reversed in part as set forth herein. Even though the Board's decision was reversed in part, it does not appear that the reversal revives any of Hopkins' claims. Therefore, I will not remand the case to the Board for any further proceedings.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

cc: Industrial Accident Board