

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

Andrew J. Carmine, Esquire
Elzufon Austin Tarlov & Mondell
300 Delaware Avenue, Suite 1700
P.O. Box 1630
Wilmington, Delaware 19899
Attorney for Appellant J & J Staffing

Brian E. Lutness, Esquire
Silverman McDaniel & Friedman
1010 North Bancroft Parkway, Suite 22
Wilmington, Delaware 19805
Attorney for Appellee Brian Swafford

Re: J & J Staffing v. Bryan Swafford
C.A. No. 12A-01-001 RRC

Submitted: July 11, 2012
Decided: September 18, 2012

On Appeal from a Decision of the Industrial Accident Board
AFFIRMED.

Dear Counsel:

Appellant, J & J Staffing (“Appellant”), appeals a determination of the Industrial Accident Board (“Board”) that Appellee, Bryan Swafford’s (“Appellee”), surgery was within the Delaware Health Care Practice Guidelines (“Guidelines”) promulgated by the Health Care Advisory Panel.¹ In so finding, the Board accepted

¹ 19 *Del. C.* § 2322A (The General Assembly recognizes that issues related to health care in workers' compensation require the expertise of . . . [a] Health Care Advisory Panel.”).

Appellee's expert's testimony over Appellant's expert's testimony and over surveillance video evidence showing Appellee supposedly performing everyday activities. This Court finds that the Board's finding that Appellee's surgery was within the Guidelines is supported by substantial evidence and is free from legal error. Therefore, the Board's determination is **AFFIRMED**.

I. FACTUAL AND PROCEDURAL HISTORY

On February 11, 2011, Appellee injured his lower back working as a machine operator. Appellee was lifting heavy boxes when he felt a "pop," developing pain in his lower back and right leg. Appellee was referred to Concentra for physical therapy, and had three unsuccessful sessions. But, after these sessions did not prove successful, Appellee was referred to Dr. Bruce Rudin, an orthopedic surgeon with fellowship training in adult spinal surgery.

In March 2011, Dr. Rudin evaluated Appellee. Appellee complained of constant low back pain that worsened with bending and changing positions. Dr. Rudin determined Appellee "looked horrible, stuck bent over and crooked on the left, with terrible posture [and was] highly impaired and barely able to function."² Dr. Rudin recommended Appellee receive two nerve blocks, undergo a CAT scan, and to report back in three weeks.³

Meanwhile, Appellant's insurance company hired a private investigator to observe Appellee on two different occasions: April 3, 2011 and April 12, 2011.⁴ The investigator monitored Appellee running errands and doing other daily activities. Appellant argues that this surveillance indicated that Appellee was a "mobile and functional individual,"⁵ who was seen driving his vehicle, entering and exiting his vehicle with little pain, bending at the waist to pick items up off the ground, and lifting his legs.⁶ In other words, the surveillance video potentially contradicted Appellee's claimed condition.

In April 2011, Appellee returned to Dr. Rudin, who reported "[o]verall, [Appellee] is . . . very limited functionally."⁷ Dr. Rudin described the Appellee as

² Rudin Dep. 5:16; 6:18-22 (Oct. 27, 2011).

³ *Id.* 7:3-15.

⁴ Appellant was only able to obtain surveillance video evidence on April 12, 2011.

⁵ Appellant's Op. Br. at 2.

⁶ *See* Hr.'g Tr. 12:11-15:5 (Oct. 31, 2011).

⁷ Rudin Dep. 7:22-23.

having a “high level of disability,” and concluded Appellee had “intractable low back pain and lower extremity radiculopathy unresponsive to conservative care and interfering with [Appellee’s] activities of daily life.”⁸ Dr. Rudin recommended lumbar spinal surgery, eschewing more conservative care in favor of surgery⁹ because “physical therapy was making him worse.”¹⁰ As mentioned below, this decision formed the basis of Appellant’s argument that Dr. Rudin admitted his decision fell outside the Guidelines.¹¹

After visiting Dr. Rudin a second time, Appellee saw Dr. William Sommers, a neurologist, at the Appellant’s request. As discussed below, Dr. Sommers is not a surgeon. Appellee reported severe and constant low back pain that traveled down his right lower extremity. Dr. Sommers concluded that Appellee exaggerated his symptoms and that the surveillance video contradicted Dr. Rudin’s findings. Additionally, Dr. Sommers found no objective evidence of radiculopathy. Dr. Sommers concluded that Appellee had not undergone sufficient conservative efforts to alleviate his pain before opting to have surgery.

In May 2011, Appellee returned to Dr. Rudin for a pre-surgical appointment. Dr. Rudin planned on performing surgery, but after checking with the Guidelines, postponed the surgery.¹² Dr. Rudin believed surgery was “justifiable based on [his] experience, and while it [would not have been] in compliance with the practice guidelines, it would have been approved.”¹³ Dr. Rudin testified that “[surgery] was postponed because [Appellee] was uncomfortable with the uncertainty whether or not it was approved [by the Guidelines]. And since it was only, roughly six weeks away, we elected to wait the additional six weeks so that the surgery . . . was in full compliance with the [Guidelines].”¹⁴

⁸ Hr’g Tr. 19:25-20:1.

⁹ Rudin Dep. 25:6-10 (“Q: In the [Guidelines], is it accurate they recommend some non-operative treatment prior to surgery being performed in the majority of cases? A: Yes.”).

¹⁰ *Id.* 15:3-4.

¹¹ *But see* 19 *Del. Admin. C.* 1342D-1.0 (“Services rendered outside the Guidelines and/or variation in treatment recommendations from the Guidelines may represent acceptable medical care, be considered reasonable and necessary treatment and, therefore, determined to be compensable, absent evidence to the contrary. [A]cceptable medical care may include deviations from these Guidelines, as individual cases dictate.”).

¹² *See* 19 *Del. C.* § 2322C. *See also* 19 *Del. Admin. C.* 1342D-1.0-7.0 (discussing health care guidelines for low back injuries).

¹³ Rudin Dep. 9:12-15.

¹⁴ *Id.* 9:17-10:3.

On June 23, 2011, Dr. Rudin operated on Appellee's low back, performing an L5 laminectomy, bilateral nerve root decompression, posterior spinal fusion, and a translumbar interbody fusion with an implant and posterior pedicle screw.¹⁵ In response to the surgery, Appellants filed a utilization review.¹⁶ The utilization review's purpose is to resolve issues related to treatment and/or compliance with the Guidelines.¹⁷ An employer or insurance carrier may file for a utilization review to evaluate the proposed or provided services' quality, reasonableness, and/or necessity.¹⁸ On July 12, 2011, the utilization review determined Appellee's surgery was reasonable and within the Guidelines.

On June 16, 2011, one week before Appellee's surgery, Appellant had petitioned to terminate Appellee's benefits,¹⁹ arguing Appellee was able to return to work and had refused a reasonable employment offer.²⁰ On July 21, 2011, Appellant also petitioned the Board to review the utilization review decision.²¹ On October 31, 2011, the Board heard Appellant's two petitions. By this time, four months post-surgery, Appellee's condition allegedly had worsened. Appellee and Drs. Rudin and Sommers testified. On December 6, 2011, the Board issued a decision, concluding that Appellee was permanently disabled and that his surgery was reasonable and necessary. This appeal followed.²²

II. THE PARTIES' CONTENTIONS

A. Appellant's Contentions

Appellant contends the Board erroneously relied on Dr. Rudin's testimony. Specifically, Appellant argues Dr. Rudin contradicted himself by stating Appellee's surgery was reasonable and necessary, yet admitted it fell outside the Guidelines. Appellant also argues that Dr. Rudin's evidence supporting the surgery's reasonableness was inadequate, in that Dr. Rudin based his opinion on Appellee's "intractable low back pain that interfer[ed] with his activities of daily life."²³

¹⁵ *Id.* 10:6-10.

¹⁶ 19 *Del. C.* § 2322F(j)

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* § 2347.

²⁰ *Id.* § 2353.

²¹ *Id.* § 2322F(j).

²² Appellants are only appealing the Board's utilization review decision. Appellants are not appealing the Board's decision upholding Appellee's permanent disability.

²³ Hr'g Tr. 20:1.

Appellant contends, however, that its surveillance video evidence refutes Dr. Rudin's testimony. Thus, Appellant contends the Board had inadequate evidence to substantiate Dr. Rudin's testimony, requiring this Court to reverse the Board's decision.

B. Appellee's Contentions

Appellee contends that the Board correctly utilized its broad discretion in favoring Dr. Rudin's testimony over Dr. Sommers's. Specifically, Appellee contends the Board noted Dr. Sommers was not a surgeon and had acknowledged that he would send a patient similar to Appellee to a surgeon and go along with the surgeon's recommendation. Therefore, Appellee asserts the Board afforded appropriate weight to Dr. Rudin, and that its decision requires affirmance. Appellee says the Board's decision is supported by substantial evidence and the Board made no errors of law.

III. STANDARD OF REVIEW

On appeal from the Industrial Accident Board, the court's role is limited to determining whether there was substantial evidence supporting the Board's findings, and whether the decision was legally correct.²⁴ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.²⁵ Questions of law are reviewed *de novo*.²⁶ When considering the facts, the court defers to the Board's expertise and competence.²⁷ The Board determines credibility, not the court.²⁸ An administrative appeal record must be viewed in the light most favorable to the prevailing party below.²⁹ The Court must uphold a Board's decision that is supported by substantial evidence even if, in the first instance, the reviewing judge might have decided the case differently.³⁰ If the medical evidence is in conflict, the Board is the finder of fact and must resolve the conflict.³¹ In a battle of the experts, such as this one, the

²⁴ *Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136 (Del. 2006).

²⁵ *Histed v. E.I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

²⁶ *Munyan*, 909 A.2d at 136.

²⁷ *Histed*, 621 A.2d at 342. *See also* 29 Del. C. § 10142(d) ("The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted.").

²⁸ *Simmons v. Delaware State Hosp.*, 660 A.2d 384, 388 (Del. 1995).

²⁹ *Sewell v. Delaware River and Bay Authority*, 796 A.2d 655, 660 (Del. Super. 2000).

³⁰ *Kreshtool v. Delmarva Power and Light Co.*, 310 A.2d 649, 653 (Del. 1973).

³¹ *Munyan*, 909 A.2d at 136.

Board is ordinarily free to favor one expert's testimony.³² Where the Board adopts one medical opinion over another, the opinion adopted by the Board constitutes substantial evidence for purposes of appellate review.³³

IV. DISCUSSION

A. Substantial Evidence Supports the Board's Determination that Appellee's Surgery was Reasonable, Necessary and Causally Related to His Work Accident.

The Board concluded that Appellee's surgery was reasonable, necessary and within the Guidelines. There is substantial evidence supporting the Board's decision. The Board is free to choose which expert to believe.³⁴ Here, the Board favored Dr. Rudin's testimony over Dr. Sommers's.

Dr. Rudin testified that physical therapy and other conservative care worsened Appellee's condition, and his best chance of recovery was through surgery. Additionally, Dr. Rudin examined Appellee twice before recommending surgery.

On the other hand, Dr. Sommers testified that he did not oppose the surgery, just its timeliness. According to Dr. Sommers, he would have preferred Appellee to continue his conservative treatment for a longer period before opting for surgery. Dr. Sommers, however, testified that he would defer to a surgeon's expertise regarding a surgery's reasonableness.

Lastly, the Board was not swayed by Appellant's surveillance. Appellee was videotaped for one day, and the tape was edited down to show Appellee performing daily activities. The Board put little weight into Appellant's surveillance evidence, noting in a lone footnote that "[Appellee's] actions [were] captured on one day of surveillance."³⁵

The Board reasonably concluded that Dr. Rudin's opinion was more reliable than Dr. Sommers, and the evidence presented reasonably supported Dr. Rudin's conclusion that Appellee required surgery to correct his back.

³² See *Standard Distrib. Co. v. Nally*, 630 A.2d 640, 646 (Del. 1993) (“[T]he Board [is] entitled to accept the testimony of one medical expert over the views of another.”).

³³ *Munyan*, 909 A.2d at 136.

³⁴ *Standard Distrib. Co.*, 630 A.2d at 646.

³⁵ *Swafford v. J & J Staffing*, No. 1370012, at *13, n. 5 (Del. I.A.B. Dec. 6, 2011).

V. CONCLUSION

As noted, the Court must defer to the Board's expertise.³⁶ This Court does not weigh evidence, resolve credibility questions, or make its own factual findings.³⁷ An administrative appeal record must be viewed in the light most favorable to the prevailing party below.³⁸ The Board was free to favor one expert's testimony.³⁹ Here, the Board favored Dr. Rudin over Dr. Sommers. Additionally, the Board was well within its discretion to put little weight into the surveillance video evidence. The Board's order stating Appellee's surgery was reasonable is supported by substantial evidence and is otherwise free from legal error.

For all the reasons stated in this Opinion, the December 6, 2011 decision of the Industrial Accident Board is **AFFIRMED**.

IT IS SO ORDERED.

Richard R. Cooch, R.J.

cc: Prothonotary
Industrial Accident Board

³⁶ *Histed*, 621 A.2d at 342. See also 29 Del. C. § 10142(d).

³⁷ *Johnson*, 213 A.2d at 66.

³⁸ *Sewell*, 796 A.2d at 660.

³⁹ *Standard Distrib. Co.*, 630 A.2d at 646.