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

SHANE HOLBROOK,	)	
	)	
Claimant-Below, Appellant,	)	
	)	
v.	)	C.A. No. N10A-11-009 CLS
	)	
CASTLE CONSTRUCTION,	)	
	)	
Employer-Below, Appellee.	)	
	)	

Date Submitted: September 15, 2011
Date Decided: December 14, 2011

On Appeal from the Industrial Accident Board.
AFFIRMED.

ORDER

Joseph J. Rhoades, Esq., Stephen T. Morrow, Esq., Elissa A. Greenberg, Esq., Law Office of Joseph J. Rhoades, 1225 King Street, Suite 1200, P.O. Box 874, Wilmington, DE 19899. Attorneys for Appellant.

Christopher T. Logullo, Esq., Chrissinger & Baumberger, Three Mill Road, Suite 301, Wilmington, DE 19899. Attorney for Appellee.

Scott, J.

Introduction

Before this Court is the Appellant's appeal from the decision of the Industrial Accident Board ("Board"). Where there is substantial evidence and conflicting testimony, the Board is free to accept the testimony it finds credible. Therefore, the decision of the Board is **AFFIRMED**.

Background

On October 9, 2007, Shane Holbrook ("Appellant") suffered work related injuries to his neck and left shoulder working in the course and scope of employment with Castle Construction ("Appellee"), a demolition company. On the day of the incident, Appellee was in the process of demolishing a concrete and steel building. Appellant was removing water mains which are cast iron pipes, between approximately six and twelve feet in length. Appellant injured himself while throwing a pipe in the dumpster.

On November 9, 2007, Appellant initially filed a petition to determine compensation due. Within the petition, the only injuries noted were to his neck and his left shoulder. There was no indication in that petition that Appellant had low back injury. The injuries were recognized as compensable; Appellant received limited periods of compensation for total disability as well as an award for 33% permanent impairment to the neck. Appellant's compensation rate was $320.02 per week based on an average wage at the time of the injury of $480.00 per week.

Appellant agreed to a termination of his total disability benefits effective January 23, 2009.

On January 8, 2010, Appellant filed a Petition to determine additional compensation due. Appellant claimed that he suffered a recurrence of total disability and sought a finding of compensability of an alleged low back injury as a related to the injury on October 9, 2007. Appellee denied that Appellant's low back injury and any of his related medical treatment is causally related to the work injury. On February 16, 2010, Dr. Rudin performed surgery on Appellant's low back consisting of a nerve root compression and diskectomy. A hearing was held by the Board on June 29, 2010.

At the hearing, Appellant testified that he informed his boss on the day of the accident that he hurt his back. On October 10, 2007, Appellant went to the Emergency Room and only indicated left shoulder pain. He did not report any pain issues with respect to his lower back and denied tearing or ripping back pain. Appellant treated with Concentra Medical Center for about a month and did not mention low back pain. Appellant was referred to Dr. Rudin by the doctors at Concentra Medical Center.

Appellant first treated with Dr. Rudin on October 17, 2007, eight days after the accident. In his initial paperwork, Appellant indicated that he had pain in his neck and left shoulder area; there was no mention of low back pain. Appellant was

involved in a car accident on October 24, 2006, but did not inform Dr. Rudin when he inquired about Appellant's prior medical history. Appellant went to physical therapy in January 2007 because of his neck and back pain arising from the car accident on October 24, 2006. On Appellant's physical therapy pain diagram completed on January 8, 2007, he circled neck and low back with pins and needles sensation and stabbing pains in his neck, right side of his neck and right side of his low back. Appellant rated his pain complaints an eight out of ten. Appellant also treated with a chiropractor at Back in Action Chiropractic, for about a month as a result of the motor vehicle accident.

Appellant had surgical spine surgery with Dr. Rudin to correct his neck injury on October 18, 2007. On October 31, 2007, in an office visit, Appellant indicated that he had significant improvement as to his neck pain after the surgery. Appellant did not indicate in this office visit that he had low back pain. Appellant had another follow up appointment with Dr. Rudin on November 28, 2007, where Appellant indicated that he was significantly improved; there is no documented notation that Appellant told Dr. Rudin of his low back pain. On January 9, 2008, at Appellant's next appointment with Dr. Rudin, there is no documentation of Appellant's low back pain. The first complaint of Appellant's low back pain was documented by Dr. Rudin on October 6, 2008.

Dr. Rudin referred Appellant to Dr. Craig D. Sternberg ("Dr. Sternberg"). Dr. Sternberg recommended that Appellant undergo physical therapy and referred Appellant to Matthew J. McIlrath, ("Dr. McIlrath") for chiropractic treatment. Appellant received physical therapy with Dr. Sternberg and was released to return to work.

In June 2009, Appellant underwent an MRI with Dr. McIlrath which revealed a disk herniation at LS – S1. Appellant returned to Dr. Rudin on October 28, 2009, and received a series of nerve block injections, which provided Appellant with temporary relief. Appellant then went to Dr. Townsend on November 20, 2008. Dr. Townsend performed a medical examination and reviewed Appellant's medical records. Dr. Townsend did not diagnose Appellant's low back on November 20, 2008. Dr. Townsend examined Appellant on April 21, 2009, and on May 19, 2010. On February 16, 2010, Dr. Rudin performed surgery on Appellant's low back which consisted of a nerve root compression and diskectomy.

Dr. Rudin testified by deposition on behalf of Appellant. Dr. Rudin relates Appellant's lower back problems to the work injury at Castle because of Appellant's representations to both Dr. Rudin and Dr. Sternberg. Dr. Townsend, a neurologist, testified by deposition on behalf of Appellee. In November 2008, Appellant reported that was experiencing low back pain, along with pain radiating

into his right leg. Appellant indicated this pain started two months prior when he helped his mother take a box out of her car. It was Dr. Townsend's opinion that this is significant because it suggests that Appellant's lumbar radiculopathy likely started two months prior, and not as a result of the work accident on October 9, 2007. He testified that there can be a relationship between right leg pain and low back pain, especially if the patient had a disc herniation and pressure on the nerve root.

On October 25, 2010, the Board found for Appellee and held that: (1) Appellant did not meet his burden of proof to show that his low back condition is related to the original work injury; and (2) Appellant did not suffer a recurrence of total disability because of his low back symptomotology and related surgery in early 2010. The Board found Dr. Townsend's testimony as more persuasive than Dr. Rudin's because Dr. Rudin's opinion relied solely on Appellant's representations to the doctor. Thus, the Board found that Appellant did not supply the doctor with important information necessary to form an informed opinion.

Standard of Review

The scope of review of an appeal from the Board filed within thirty days[1], is limited to errors of law and whether the decision is supported by substantial

[1] 29 *Del. C.* § 10142.

evidence.[2] The Court will not weigh the evidence, determine the credibility of the witnesses, or make its own factual findings and conclusions.[3] Evidence is substantial when a reasonable person would think the evidence presented was adequate to support the conclusion.[4] When the decision is not supported by substantial evidence it must be reversed.[5] When critical issues are overlooked or ignored, remand for further consideration is appropriate.[6] Deference is given to the decision of the Board.[7] The record is viewed in the light most favorable to the party prevailing below.[8]

Discussion

The Board Did Not Commit Legal Error in Concluding that Appellant's Low Back Injury was Unrelated to the Work Accident on October 9, 2007.

The Board did not commit legal error in concluding that Appellant did not meet his burden of proof of showing that his low back condition was related to the work injury on October 9, 2007. Thus, the Board appropriately concluded that Claimant did not suffer a recurrence of total disability because of his low back symptomotology and related surgery on February 16, 2010.

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[2] *Varga v. Gen. Motors*, 996 A.2d 794 (Del. 2010) (TABLE) (citation omitted).
[3] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (1965).
[4] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (citation omitted).
[5] *Mladenovich v. Chrysler Group, LLC*, 2011 WL 379196 (Del. Super. Ct. Jan. 31, 2011)
[6] *Sharpe v. W.L. Gore & Associates*, 1998 WL 438796 (Del. Super. Ct. May 29, 1998).
[7] 29 *Del. C.* § 10142.
[8] *O'Brien v. Unemployment Ins. Appeals Bd.*, 1993 WL 603363 (Del. Super. Ct. Oct. 20, 1993).

Appellant had the burden of proving that he suffered that he suffered a recurrence after he voluntarily terminated his total disability benefits.[9] "The term recurrence is used in common parlance to describe the return of a physical impairment, regardless of whether its return is or is not the result of a new accident. As applied in most workmen's compensation cases, however, it is limited to the return of an impairment without the intervention of a new or independent accident."[10] The Board did not commit legal error in concluding that because Appellant's injury was unrelated to the accident and therefore, did not suffer a recurrence of totally disability.

There is Substantial Evidence in the Record Supporting the Board's Decision.

Appellant claims that the Board's decision is not supported by substantial evidence. However, here, there is substantial evidence to support the Board's decision that Appellant's work low back injury was unrelated to the initial injury on October 9, 2007.

Although Appellant contends otherwise, the first documentation of the low back pain was recorded by Dr. Rudin on October 6, 2008, almost a year after the initial injury. Additionally, Appellant informed Dr. Townsend that he injured himself two months prior while lifting a box from his mother's car. Appellant's right-sided leg complaints directly correlate to an MRI from June 2009 that

[9] *Chubb v. State*, 961 A.2d 530, 535 (Del. 2008).
[10] *DiSabatino & Sons, Inc. v. Facciolo*, 306 A.2d 716, 718 (Del. 1973).

showed a disk herniation at L5-S1. Also, Appellant was not forthcoming with his doctors about his prior medical history. Appellant was involved in a car accident in 2006 resulting in physical therapy and chiropractic care, yet failed to bring forth these facts.

The Board did not find Appellant's testimony to be credible and found Dr. Townsend's testimony to be more persuasive than Dr. Rubin's. When there is conflicting testimony the Board is entitled to reject the testimony of one of the witnesses.[11] Here, there was conflicting testimony presented at the hearing of Dr. Rudin and Dr. Townsend. The Board found, based on Dr. Townsend's testimony, the low back injury is more likely attributable to Appellant moving a box from his mother's car, rather than his injury at Castle on October 9, 2007.

Based on the proper standard of review on appeal, this Court does not determine credibility. The Board was permitted to determine credibility of witnesses and make their own findings of fact based on the evidence presented at the hearing. There was substantial evidence presented to conclude that Dr. Townsend did not have correct information to make an informed decision about the cause of Appellant's low back injury. Therefore, the Board was within its purview in discounting the testimony of Appellant and finding the Appellant did

[11] *Kaschalk*, 1999 WL 458792, at *3.

not meet his threshold of proving by a preponderance of the evidence that his low back injury arose out of and in the scope of his employment.

Conclusion

Based on the forgoing, the decision of the Board is **AFFIRMED.**

IT IS SO ORDERED.

/S/ CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.