SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

November 30, 2011

Christopher A. Amalfitano, Esquire
Ramunno & Ramunno, P.A.
903 N. French Street
Wilmington, DE 19801

William R. Baker, Jr., Esquire
Tybout, Redfearn & Pell
750 Shipyard Drive, Suite 400
P.O. Box 2092
Wilmington, DE 19899

RE: Laura Cooper v. Capitol Nursing
C.A. No. S11A-01-005-ESB
Letter Opinion

Date Submitted: August 22, 2011

Dear Counsel:

This is my decision on Laura Cooper's appeal of the Industrial Accident Board's dismissal of her Petition to Determine Additional Compensation Due. Although characterized as a Petition to Determine Additional Compensation Due, the matter before the Board was its *de novo* review of a utilization review company's finding that certain chiropractic care provided to Cooper was not provided in compliance with the health care practice guidelines developed by the Health Care Advisory Panel and adopted and implemented by the Department of Labor.

Cooper suffered a compensable work-related injury while employed by Capitol Nursing. She was initially cared for by Dr. Ganesh Balu. He then referred Cooper to Dr. Jennifer Walder for chiropractic care.

Dr. Walder is a board certified chiropractic physician. She treated Cooper for chronic neck pain. Dr. Walder saw Cooper 32 times. Cooper's first visit was on December 17, 2008. Cooper's last visit was on September 29, 2009. Cooper suffered from cervical facet syndrome, cervical radiculopathy and a herniated disc in her cervical spine. Dr. Walder gave Cooper electrical muscular stimulation, hydro and regular massage therapy, chiropractic manipulations and acupuncture. Most of the treatment that Dr. Walder provided to Cooper consisted of passive therapy.

Capitol Nursing's insurance carrier, PMA Insurance, sought utilization review of Dr. Walder's treatment of Cooper pursuant to 19 *Del.C.* § 2322 F(j). The utilization review company found that Dr. Walder's treatment after June 1, 2009, did not meet the health care practice guidelines. Dr. Walder saw Cooper 12 times after June 1, 2009. Dr. Walder's bill for those visits was $3,185.00. Cooper asked the Board to review *de novo* the utilization review company's finding.

The Board held a hearing on March 8, 2010. Before the hearing could get started, Cooper asked the Board to reconsider a decision it had made previously on a discovery dispute. That dispute originally came before the Board on February 17, 2010. Cooper had asked the Board to compel Capital Nursing to produce (1) documentation regarding the date of PMA's original filing with the utilization review company, (2) the packet of medical records that accompanied PMA's utilization review filing, and (3) Cooper's unpaid medical bills. Cooper was particularly interested in the utilization review packet so that she could determine if it was complete. The Board had previously denied Cooper's request, stating

that there was no record available that would document the date the filing was made with the utilization review company, there was no need for Capital Nursing to produce the medical records because both parties had all of them, and there was no need for Capital Nursing to produce the unpaid medical bills because Capital Nursing's promise to produce a payment ledger was adequate.[1] The Board once again denied Cooper's discovery request, stating that the Department of Labor does release to anyone the documents submitted to the utilization review company and that Cooper would have to get her own medical records because she had the burden of proving that they should be paid.

The Board then held the hearing on Cooper's petition. Dr. Walder was the only witness to testify at the hearing. Cooper did not appear at the hearing. At the close of Cooper's case, Capitol Nursing moved to dismiss Cooper's petition, arguing that she did not prove that Dr. Walder's chiropractic care was performed in accordance with the health care practice guidelines. The Board agreed, stating:

> The Board has discussed this motion and given the testimony and the circumstances of the case the Board is going to grant the motion at this time because the Claimant is not here to testify. And in order to meet her burden of proof we need to hear from her. And without her testimony the burden can not be met. So Mr. Baker, can you write a form of order since it was your motion.[2]

Cooper then filed an appeal of the Board's decision with this Court. I remanded the matter back to the Board so that it could fully explain its decision. The Board did so, stating:

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[1] *Cooper v. Capital Nursing,* IAB Hearing No. 1307702 (Feb. 24, 2010).

[2] Transcript at 65 - 66.

> The Board finds that Claimant's testimony was necessary at the March 8, 2010 hearing, but she failed to attend the hearing. After hearing the testimony of Dr. Walder, the Board needed to hear Claimant's testimony regarding the effect of Dr. Walder's treatment and about Claimant's condition before and after that treatment in order to render a decision on the reasonableness and necessity of the treatment. The Board found that Dr. Walder's testimony alone was insufficient to meet the burden of proof to find compensability of the chiropractic treatment; therefore, the Board granted Capital Nursing's Motion to Dismiss Claimant's Petition.[3]

The parties then supplemented their briefs with updated letter memorandums.

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.[4] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[5] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[6] It merely determines if the evidence is legally adequate to support the agency's

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[3] *Cooper v. Capital Nursing,* IAB Hearing No. 1307702 (May 25, 2011).

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

[5] *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. dism.*, 515 A.2d 397 (Del. 1986)(TABLE).

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

factual findings.[7] Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.[8]

DISCUSSION

Cooper argues that (1) the Board's decision is not supported by substantial evidence in the record, (2) the Board erred as a matter of law by requiring her to testify, (3) the Board's dismissal of her petition was too harsh and inappropriate, and (4) the Board abused its discretion when it failed to compel Capital Nursing to produce the documents she wanted.

1. The Board's Decision

The Board found that Cooper did not prove that Dr. Walder's treatment of her from June 1, 2009, to September 29, 2009, was reasonable and necessary. I have concluded that the Board's decision is supported by substantial evidence in the record. Cooper had the burden of proof in this case.[9] She relied entirely on Dr. Walder's testimony and records to meet that burden. Dr. Walder's testimony and medical records were very unpersuasive. Indeed, I had an extremely difficult time understanding exactly what Dr. Walder did for Cooper during the period of time at issue.

Dr. Walder was not even sure how many times she saw Cooper after June 1, 2009, stating that she thought it was anywhere from 9 to 12 times.

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[7] 29 *Del.C.* § 10142(d).

[8] *Dallachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

[9] *Meir v. Tunnell Companies, LP.,* IAB Hearing No. 1326876, at n. 2(Nov. 24, 2009); *Winterthur Museum, Inc. v. Mowbray*, 2006 WL 1454813, at * 2 (Del. Super. May 12, 2006).

Mr. Amalfitano: But on how many occasions after June 1, 2009 when a guideline was in affect did you actually see her?

Dr. Walder: Nine, I think nine.

Mr. Amalfitano: Nine visits.

Dr. Walder: Maybe 10, 12 I think.

Mr. Amalfitano: 12 through September?

Dr. Walder: Yeah, from June to September till the end.[10]

Dr. Walder was also initially uncertain how many times she saw Cooper in June, eventually stating it was six times.

Mr. Amalfitano: And so far as you know this UR decision only could address in terms of the guideline your visits on June, how many times did you see her in June?

Dr. Walder: I don't remember I'd have to count again the number of times in June your saying?

Mr. Amalfitano: Mm hmm.

Dr. Walder: Six.[11]

Dr. Walder did know that she saw Cooper three times in July.

Mr. Amalfitano: Now the document that Mr. Baker supplied indicates the filing for UR occurred in July. How many times did you see her in early July?

Dr. Walder: Three times in July.[12]

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[10] Tr. at 46.

[11] Tr. at 46 - 47.

[12] Tr. at 47.

After having fleshed out the number of times that Dr. Walder saw Cooper in June and July, it would stand to reason that she saw Cooper three times in September.

However, the treatment that Dr. Walder provided to Cooper during those 12 visits was never set forth during the hearing with any degree of specificity. It appears that Dr. Walder performed some type of manipulation for two of the visits and provided some unspecified type of chronic pain treatment for the other seven visits for June and July.

Mr. Amalfitano: Were any of those nine visits were they the visits with regard to manipulation you indicated?

Dr. Walder: I don't think we did manipulation on those visits. There was one on July 7th and June 9th.

Mr. Amalfitano: So there were two for manipulation?

Dr. Walder: That's what it looks like.

Mr. Amalfitano: Any for therapeutic exercise?

Dr. Walder: I don't think so. I think those were in towards the end and in the beginning.

Mr. Amalfitano: Okay.

Dr. Walder: I don't see it in July.

Mr. Amalfitano: So that leaves seven visits for chronic pain treatment, correct?

Dr. Walder: Sounds right.[13]

This testimony accounts for, in a very vague way, what Dr. Walder did for nine of the visits. Later on, after extensive questioning by a Board member, Dr. Walder described

[13] Tr. at 47 - 48.

what she did for Cooper on June 21 and July 9.

> Dr. Walder: Well on June 21st she came in and she said that she had increased pain in her right shoulder. Its worse then it's been in a couple months she said. I palpated her. There was increased tenderness and pain of the right lower cervical spine, the levator scapulae splenius cervicis and the right trapezius so we did a little acupuncture that day because she was at a six that day. So we did do a little acupuncture that day. July 9th she says she stated she felt an increase in upper back pain again. Much more relief following today's treatment. We decided we would schedule her twice the next week and we would incorporate massage times three the next week as well. (**Emphasis added**).[14]
>
> Board Member: And do you adjust at all, do you do any adjustments at all on this particular patient?
>
> Dr. Walder: I didn't do that many on her.[15]

This testimony adds a little more detail, but not very much. Again, after more questioning by a Board member, Dr. Walder described what she did for Cooper on September 22.

> Dr. Walder: Well actually on September 22nd, she didn't want surgery. I think that was one of the things we were trying to help her with it. She didn't want the surgery so she was trying to maintain you know her job and her functional capacity to where it was so it wouldn't deteriorate. And then I guess on September 22nd I did note here I started her with some strengthening of the upper extremity like some shoulder shrugs and some flies to keep this strong so that way she wouldn't be as prone to exacerbating that area if it was weak. So we did do that and I told her about those things and how

[14] Tr. at 55.

[15] Tr. at 55 - 56.

important they are. (**Emphasis added**)[16]

Dr. Walder did not tell the Board what she did for Cooper on her other two visits in September.

Dr. Walder also never told the Board why either her treatment of Cooper from June 1, 2009, to September 29, 2009, was consistent with the health care practice guidelines or reasonable and necessary. Very early on in Dr. Walder's testimony, she stated that the care that she provided for Cooper was reasonable, necessary, and related to Cooper's work-related injuries.[17] This, without more, was similarly unpersuasive.

The only thing that I could glean from Dr. Walder's testimony was that she treated Cooper for chronic neck pain by doing electrical muscle stimulation, hydro and regular massage therapy, chiropractic manipulations and acupuncture, and that the treatment afforded Cooper some measure of pain relief while she was in Dr. Walder's office. The Board did not find this to be adequate and I do not either.

The focus of the hearing should have been on Dr. Walder's care of Cooper for a very specific period of time. I would have thought, as the Board obviously did, that Dr. Walder's testimony would have focused on what she actually did for Cooper during each of those visits over that period of time and why the treatment was either in accordance with the health care practice guidelines or reasonable and necessary. It did not. I am not surprised that Dr. Walder was unable to do this. The attorneys' references to Dr. Walder's

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[16] Tr. at 58.

[17] Tr. at 25.

medical records only showed how incomplete and vague they were, which explains why Dr. Walder could not describe what she had done for Cooper. In any event, Dr. Walder's testimony was deficient. Cooper clearly did not meet her burden of proof. The Board's finding that she did not is supported by substantial evidence in the record, which in this case is evidenced by the incomplete and unpersuasive testimony of Dr. Walder and her incomplete and unpersuasive medical records.

2. Collaborative Testimony

Cooper argues that the Board committed an error of law when it ruled that she had to testify in order to prove that Dr. Walder's chiropractic care was reasonable and necessary. I disagree. The Board did not rule that Cooper had to testify. Instead, it ruled that without her testimony, it could not determine if Dr. Walder's chiropractic care was reasonable and necessary. This is a meaningful distinction. If Dr. Walder's testimony had been adequate, then it alone would have been enough to carry Cooper's burden of proof. Since it was not, the Board correctly noted that without any testimony from Cooper about how Dr. Walder's treatment had helped her, it had no choice but to dismiss Cooper's petition.

3. Dismissal With Prejudice

Cooper argues that the Board should not have dismissed her Petition to Determine Additional Compensation Due with prejudice. I disagree. Cooper's petition was in a posture for consideration. Her attorney had rested, stating that "we're done." The Board then considered the evidence that had been presented to it and concluded that it was

insufficient to sustain Cooper's burden of proof. Once the Board reached this decision, it was appropriate for it to dismiss Cooper's petition.[18]

4. Discovery

Cooper argues that the Board abused its discretion when it did not order Capital Nursing to produce (1) documentation regarding the date of PMA's original filing with the utilization review company, (2) the packet of medical records that accompanied PMA's utilization review filing, and (3) Cooper's unpaid medical bills. I disagree. The Board decided that Capital Nursing did not have to produce the documentation regarding the date of PMA's original filing with the utilization review company because it did not exist. I agree with this. You can not produce a document you do not have. The Board decided that Capital Nursing did not have to produce the medical records that were submitted to the utilization review company because (1) the Department of Labor would not release them, and (2) the parties already had them. I agree with this. It would not have made sense for Capital Nursing to produce documents that Cooper already had. The Board decided that Capital Nursing did not have to produce Cooper's unpaid medical bills because it concluded that she, as the patient, was in just as good a position as Capital Nursing to get them. I agree. They were her medical records and she had the burden of proving that they should be paid. Thus, it seems appropriate that she should be tasked with producing them. Given all of this, I conclude that the Board did not abuse its discretion when it

[18] *Samson Management Co. v. Simpler,* 1993 WL 138990 (Del. Super. April 16, 1993); *Brasaure v. Markelly Group, Inc.,* 1996 WL 527226 (Del. Super. Aug. 23, 1996).

denied Cooper's request to have Capital Nursing produce these documents.

CONCLUSION

The Industrial Accident Board's decision granting Capitol Nursing's Motion to Dismiss Laura Cooper's Petition to Determine Additional Compensation Due is **AFFIRMED.**

IT IS SO ORDERED.

Very truly yours,

/S/ E. Scott Bradley

E. Scott Bradley

cc: Industrial Accident Board