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

BRANDYWINE SUITES HOTEL, Employer/Appellant,	)	
v.	)	C.A. No.: 11A-01-011 FSS
ANGELICA CASTILLO, Claimant/Appellee	)	

Submitted: June 17, 2011
Decided: September 30, 2011

MEMORANDUM OPINION AND ORDER

Upon Appeal from the Industrial Accident Board – *AFFIRMED*

Brandywine Suites Hotel appeals the Industrial Accident Board's denying Brandywine Suites' Petition to Terminate Disability Benefits. Brandywine Suites contends the Board's decision was based on the incorrect legal standard, and its rationale for denying the petition was not supported by substantial evidence. Specifically, Brandywine Suites contends first that the Board used the now-discarded "change in condition" standard. Brandywine Suites further contends that the Board discounted Brandywine Suites' medical expert in favor of Angelica Castillo's medical expert. Actually, the Board decided that Brandywine Suites failed to meet its burden of proving that Castillo was fit to work.

I.

On December 7, 2005, Angelica Castillo hurt her lower back at work. In 2006, she began treating with Dr. Bikash Bose. On March 25, 2008, Dr. Bose performed a lumbar laminectomy and fusion of Castillo's L5-S1 vertebrae. Due to persistent pain, Dr. Bose performed a second surgery on July 28, 2009, decompressing nerves and removing hardware and scar tissue from the 2008 surgery.

Castillo saw Dr. Bose regularly after the second surgery. He prescribed painkillers and anti-anxiety drugs for Castillo's pain and stress. Dr. Bose ordered objective tests, including a discogram, an MRI, and a CAT scan. The CAT scan showed an annular tear at L1-L2.

Castillo also saw Dr. John Townsend, III, a board certified neurologist, several times. During a March 2010 visit, Dr. Townsend noted there was no objective evidence of ongoing physical injury and he believed Castillo could return to limited work. Although he opined that she had recovered, Dr. Townsend agreed that the annular tear was a bad injury.

II.

On July 29, 2010, Brandywine Suites filed its petition to terminate benefits, alleging Castillo had recovered enough from her 2005 injury and could

return to work. On December 16, 2010, the Board held a hearing on the merits. On January 4, 2011, the Board denied the petition. Brandywine Suites filed a timely appeal on January 11, 2011, and filed its Opening Brief on Appeal on May 2, 2011. Castillo answered on May 24, 2011. Brandywine Suites replied on June 2, 2011.

III.

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.[1] Substantial evidence is enough evidence to support a conclusion.[2] It is more than a scintilla but less than a preponderance.[3]

When considering the facts, the court defers to the Board's expertise and competence.[4] It is the Board's role to determine credibility.[5] Appellate review "[r]equires the reviewing court to search the entire record to determine whether, on

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[1] *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66 (Del. 1965); *General Motors Corp. v. Jarrell.* 493 A.2d 978, 980 (Del. Super. 1985)

[2] *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.,* 636 A.2d 892, 899 (Del. 1994).

[3] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

[4] *Histed v. E.I. DuPont de Nemours & Co.,* 621 A.2d 340, 342 (Del. 1993).

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

the basis of all the testimony and exhibits before the agency, it could fairly and reasonably reach the conclusion that it did."[6]

In a petition to terminate disability benefits, the employer must show "the employee is no longer totally incapacitated for the purpose of working."[7] If the employer meets this burden, the burden shifts to the employee to show the employee is "so handicapped by a compensable injury that [s]he will no longer be employed regularly."[8] Here, significantly, the Board decided that the burden did not shift from Brandywine Suites to Castillo.

IV.

Brandywine Suites claims the Board applied the incorrect legal standard. The Board concluded, "It does not appear Claimant's condition has improved. In this situation, Employer has fallen shy of meeting its burden."[9] Brandywine Suites now emphasizes the words "condition" and "improvement" and erroneously concludes the

[6] *National Cash Register v. Riner*, 424 A.2d 669, 674-675 (Del. Super. 1980).

[7] *Torres v. Allen Family Foods,* 672 A.2d 26, 30 (Del. 1995).

[8] *Hamlet v. Chrysler Corp.*, 231 A.2d 258, 261 (Del. 1967).

[9] *Castillo v. Brandywine Suites Hotel,* IAB Hearing No. 1279137, at 10.

Board adopted a "change in condition" as its review standard, a discredited standard.[10]

The Board, however, used the correct standard: whether or not Castillo is totally incapacitated for work purposes. The statement that Castillo's condition had not improved was merely descriptive. It did not use an improper review standard. It clarified that Castillo was still incapacitated for work purposes.

V.

Brandywine Suites also argues the Board wrongly discounted its medical expert's testimony in favor of Castillo's. Brandywine Suites claims "[t]he Board's decision goes to great lengths and with great detail in its analysis and rejection of both Dr. Bose's testimony and opinions. Conversely, the decision offers little more than two vague sentences of criticism of Dr. Townsend."

Thus, Brandywine Suites tacitly recognizes that the Board faced a battle of the experts. In a battle of the experts, the Board may choose between the opinions and the court's role on appeal is limited to determining whether the evidence was legally adequate to support the Board's findings.[11] The wrinkle in this case is that

[10] See *Brokenbrough v. Chrysler Corp.,* 460 A.2d 551, 553 (Del. Super. 1983) ("In petitions alleging cessation of disability, the 'change of condition' standard is not an appropriate burden.").

[11] *Reese v. Home Budget Center,* 619 A.2d 907, 910 (Del. 1992).

the Board was unimpressed by both side's experts. As discussed below, the Board simply decided that Brandywine Suites failed to meet its burden of proof. Thus, its analysis of Dr. Bose's opinion was largely beside the point.

The Board accurately observed "this is not Claimant's petition. It is the Employer's burden to prove Claimant is no longer totally disabled." The Board concluded, "ultimately, the decision rests on Dr. Townsend's credibility." The Board was not satisfied with his dismissal of Castillo's annular tear. Dr. Townsend agreed with Castillo's CT results and admitted "a Grade V tear is like the worst there is." He also testified "given that you can have tears without pain, I'm not sure that it would or wouldn't [cause pain]." The Board also held that Dr. Townsend contradicted himself. He testified there were no objective findings of an ongoing injury, yet he acknowledged objective findings from diagnostic tests.

As mentioned, the Board was not completely satisfied with Castillo's expert, Dr. Bose. It questioned his credibility, was not entirely persuaded by him, and greatly discounted his testimony. But, as the Board recognized, and as discussed above, the burden was on Brandywine Suites to demonstrate that Castillo was fit to work. The Board found that Brandywine Suites failed to meet its burden. So, the Board's dissatisfaction with Dr. Bose is of no consequence.

VI.

For the foregoing reasons, the Industrial Accident Board's January 4, 2011 decision denying Brandywine Suites' petition to terminate disability benefits is **AFFIRMED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary
Danielle K. Yearick, Esquire
Nicholas M. Krayer, Esquire
Gary S. Nitsche, Esquire
David A. Arndt, Esquire